NORTH CAROLINA COURT OF APPEALS REPORTS

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RALEIGH
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CITE THIS VOLUME
52 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

NAOMI E. MORRIS

Judges

R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD
JOHN WEBB
HARRY C. MARTIN
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD
CHARLES L. BECTON

Retired Judges

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FRANK M. PARKER

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CHRISTIE SPEIR PRICE[1]

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1. Appointed effective 14 September 1981.

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	Franklin R. Brown	Tarboro
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CHARLES WINBERRY	Rocky Mount
JAMES ARTHUR BEATY, JR.	Winston-Salem

EMERGENCY JUDGES

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HENRY A. MCKINNON, JR.	Lumberton

1. Appointed Resident Judge, Twenty-First District, 22 January 1982.

2. Retired 1 February 1982.

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1. Appointed Chief Judge 1 February 1982 to succeed Derb S. Carter who retired 30 January 1982.

2. Appointed 1 February 1982.

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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(j)(5)(c)	Long v. Board of Education, 625
6(b), (d)	Shopping Center v. Life Insurance Corp., 633
12(b)(6)	Dorn v. Dorn, 370
17(b)(1)	Gaskins v. McCotter, 322
38(b), (d)	N. C. State Bar v. DuMont, 1
39(b)	N. C. State Bar v. DuMont, 1
50(a)	Jones v. Allred, 38
54(b)	Harris v. DePencier, 161
	Bacon v. Leatherwood, 587
56(b)	Dorn v. Dorn, 370

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 23	State v. Moses, 412

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

VI Amendment	State v. Moses, 412

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
12(a)	In re Farmer, 97
28	Brewer v. Hatcher, 601

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

Case	*Reported*	*Disposition in Supreme Court*
Abbott v. Town of Highlands	52 N.C. App. 69	Denied, 303 N.C. 710 Appeal Dismissed
Adcock v. Perry	52 N.C. App. 724	Allowed, 304 N.C. 192
Anderson v. Greene	52 N.C. App. 585	Denied, 304 N.C. 192
Bell v. Bell	52 N.C. App. 585	Denied, 303 N.C. 543
Boyce v. Boyce	52 N.C. App. 734	Denied, 304 N.C. 192
Butler v. Nationwide Mutual	52 N.C. App. 734	Denied, 304 N.C. 193
Butler v. Peters, Comr. of Motor Vehicles	52 N.C. App. 357	Appeal Dismissed, 303 N.C. 543
Carter v. Insurance Co.	52 N.C. App. 520	Denied, 304 N.C. 193
Church v. Parsons Trucking	52 N.C. App. 164	Allowed, 304 N.C. 193
Crowell v. Chapman	52 N.C. App. 164	Allowed, 304 N.C. 193
Dills v. Sumner	52 N.C. App. 585	Denied, 303 N.C. 710
Employment Security Commission v. Lachman	52 N.C. App. 368	Allowed, 304 N.C. 389
Falls v. Falls	52 N.C. App. 203	Denied, 304 N.C. 390
Gaymon v. Barbee	52 N.C. App. 627	Denied, 304 N.C. 194
Gore v. Hill	52 N.C. App. 620	Denied, 303 N.C. 710
Housing, Inc. v. Weaver	52 N.C. App. 662	Denied, 304 N.C. 390
Housing, Inc. v. Weaver	52 N.C. App. 662	Allowed, 304 N.C. 588 Appeal Dismissal Rescinded
Humphries v. Cone Mills Corp.	52 N.C. App. 612	Denied, 304 N.C. 390
In re Altman	52 N.C. App. 291	Denied, 303 N.C. 544
In re Cook	52 N.C. App. 164	Denied, 303 N.C. 544
In re Farmer	52 N.C. App. 97	Denied, 304 N.C. 195
In re N.C.N.B.	52 N.C. App. 353	Denied, 303 N.C. 544
Jones v. Stone	52 N.C. App. 502	Denied, 304 N.C. 195
Lowery v. Newton	52 N.C. App. 234	Denied, 303 N.C. 711

Case	*Reported*	*Disposition in Supreme Court*
Lowery v. Newton	52 N.C. App. 234	Denied, 304 N.C. 195
Mangum v. Nationwide Mutual	52 N.C. App. 734	Denied, 304 N.C. 196
Morris v. Morris	52 N.C. App. 734	Denied, 304 N.C. 391 Appeal Dismissed
Morrison v. Kiwanis Club	52 N.C. App. 454	Denied, 304 N.C. 196
O'Neal v. Watkins	52 N.C. App. 164	Denied, 303 N.C. 545 Appeal Dismissed
Pardue v. Pardue	52 N.C. App. 164	Allowed, 303 N.C. 545
Shepard, Inc. v. Kim, Inc.	52 N.C. App. 700	Denied, 304 N.C. 392
Shopping Center v. Life Insurance Corp.	52 N.C. App. 633	Denied, 304 N.C. 196
Smithers v. Collins	52 N.C. App. 225	Denied, 303 N.C. 546
Southland Associates, Inc. v. Peach	52 N.C. App. 340	Denied, 303 N.C. 546
State v. Alston	44 N.C. App. 72	Denied, 304 N.C. 589
State v. Christmas	52 N.C. App. 186	Allowed, 304 N.C. 198
State v. Cooper	52 N.C. App. 349	Allowed, 304 N.C. 198
State v. Cotten	52 N.C. App. 164	Denied, 303 N.C. 547
State v. Curry	52 N.C. App. 585	Denied, 303 N.C. 547
State v. Davis	52 N.C. App. 165	Denied, 303 N.C. 182
State v. Dugan	52 N.C. App. 136	Denied, 303 N.C. 711 Appeal Dismissed
State v. Elkins	52 N.C. App. 378	Denied, 303 N.C. 547
State v. Ellerbee	51 N.C. App. 249	Denied, 304 N.C.
State v. Furr	52 N.C. App. 735	Denied, 304 N.C. 198
State v. Gaten	28 N.C. App. 273	Denied, 304 N.C. 392
State v. Gollett	52 N.C. App. 585	Denied, 304 N.C. 198
State v. Gore & Gause	52 N.C. App. 165	Denied, 303 N.C. 548
State v. Gosnell	52 N.C. App. 586	Denied, 303 N.C. 548
State v. Hall	52 N.C. App. 492	Denied, 304 N.C. 198 Appeal Dismissed
State v. Harris	52 N.C. App. 165	Denied, 303 N.C. 316
State v. Harris	52 N.C. App. 735	Denied, 304 N.C. 199
State v. Isom	52 N.C. App. 331	Denied, 303 N.C. 548

Case	*Reported*	*Disposition in Supreme Court*
State v. Johnson	52 N.C. App. 592	Denied, 303 N.C. 549 Appeal Dismissed
State v. Linder	25 N.C. App. 474	Denied, 304 N.C.
State v. Locklear	52 N.C. App. 378	Denied, 303 N.C. 549
State v. Lombardo	52 N.C. App. 316	Allowed, 304 N.C. 199 Appeal Dismissal Denied
State v. McBride	52 N.C. App. 378	Denied, 304 N.C. 199
State v. Martin	52 N.C. App. 326	Denied, 303 N.C. 317
State v. Martin	52 N.C. App. 373	Denied, 303 N.C. 549 Appeal Dismissed
State v. Moses	52 N.C. App. 412	Denied, 303 N.C. 318
State v. Oliver	52 N.C. App. 483	Denied, 304 N.C. 589 Appeal Dismissed
State v. Overton	52 N.C. App. 735	Denied, 305 N.C.
State v. Owen	51 N.C. App. 429	Denied, 305 N.C.
State v. Self	52 N.C. App. 586	Denied, 303 N.C. 549
State v. Sellars	52 N.C. App. 380	Denied, 304 N.C. 200 Appeal Dismissed
State v. Simmons	52 N.C. App. 165	Denied, 304 N.C.
State v. Thompson	52 N.C. App. 629	Denied, 303 N.C. 549
State v. Wright	52 N.C. App. 166	Denied, 303 N.C. 319
State Bar v. DuMont	52 N.C. App. 1	Allowed, 303 N.C. 319
Sunset Investments, Ltd. v. Sargent	52 N.C. App. 284	Denied, 303 N.C. 550
Trotter v. Trotter	52 N.C. App. 586	Denied, 304 N.C. 200

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE NORTH CAROLINA STATE BAR v. HARRY DuMONT, ATTORNEY

No. 8010NCSB920

(Filed 19 May 1981)

1. Attorneys at Law § 11— disciplinary proceeding—applicable statutes

In a disciplinary proceeding before the N. C. State Bar where respondent alleged that the proceeding was governed by the amendments to G.S. Ch. 84 which became effective 1 July 1975, respondent could not thereafter challenge the applicability of the 1975 statute to his proceeding; moreover, since the amendments provided that they were to become effective on July 1, 1975 and would "apply to all cases, actions and proceedings arising on and after said date," it was evident that the statutes should apply to all such proceedings begun or instituted after 1 July 1975, even though such proceedings might involve infractions by attorneys of the disciplinary standards of the profession which occurred before 1 July 1975.

2. Attorneys at Law § 11; Constitutional Law § 33— discipline of attorneys—amendment of statutes—no ex post facto law

In a disciplinary proceeding before the N. C. State Bar there was no merit to respondent's argument that application of the procedures contained in the 1975 amendment to G.S. Ch. 84 to his hearing constituted an *ex post facto* application of the law since constitutional prohibitions of *ex post facto* legislation apply only to criminal proceedings, and disciplinary proceedings against attorneys in N. C. are civil and not criminal proceedings.

3. Attorneys at Law § 11; Constitutional Law § 23.4— procedure for disciplining attorneys—no interference with right to practice law

In a disciplinary proceeding before the N. C. State Bar there was no merit to respondent's argument that use of the 1975 amendments to G.S. Ch. 84 unlawfully interfered with his vested right to practice law in N. C., though the practice of law is a property right requiring due process of law before it may be impaired, since the amendments objected to in no way interfered with

respondent's right to practice law but only established procedures by which he could be disciplined in the event that he violated standards of professional conduct, and the legislature could properly enact valid retroactive legislation affecting procedure.

4. Attorneys at Law § 11; Rules of Civil Procedure § 38— disciplinary proceeding—no deprivation of jury trial

In a disciplinary proceeding before the N. C. State Bar respondent was not unconstitutionally deprived of a trial by jury, since the statutes applicable at the time of respondent's hearing did not provide him with a right to jury trial; moreover, had respondent been entitled to a jury trial, he waived it by failing to make a demand therefor within the time required by the Rules of Civil Procedure. G.S. 1A-1, Rules 38(b), (d) and 39(b).

5. Attorneys at Law § 11— disciplinary proceeding—fair and impartial hearing

In a disciplinary proceeding before the N. C. State Bar there was no merit to respondent's contention that he did not receive a fair and impartial hearing because (1) the chairman of the Disciplinary Hearing Commission had knowledge about the actions of respondent, the Commission was charged with whatever knowledge the chairman had about actions of respondent, and with that knowledge the Commission unnecessarily delayed the commencement of these proceedings, since the chairman, of necessity, had to divorce his personal knowledge concerning this proceeding from his position as chairman, which was evidenced by his recusal from participating in the hearing, and there was no imputation of his knowledge to the Commission and no laches on part of the Commission in commencing the proceeding; (2) the Commission consolidated for the purpose of hearing this proceeding with three other proceedings involving respondent, since the record on appeal did not contain any description as to the nature of the other three proceedings and no abuse of discretion was shown; (3) the Commission refused to allow into evidence for non-hearsay purposes only statements made by one of the participants in the proceedings in question, since testimony to the same effect was allowed into evidence without objection; (4) the Commission limited the number of character witnesses respondent could present, since the Commission could properly limit the number of character witnesses and no abuse of discretion was shown; and (5) the Commission permitted respondent to be cross-examined concerning incidents of which he had been acquitted in criminal trials, concerning his marital status and concerning his mental and emotional condition.

6. Attorneys at Law § 11— disciplinary hearing—standard of proof

The Disciplinary Hearing Commission of the N. C. State Bar did not err in using the "greater weight of the evidence" rule as the standard of proof in respondent's disciplinary hearing.

7. Attorneys at Law § 12— disciplinary hearing—procuring of false testimony—sufficiency of evidence

Evidence was sufficient to support the findings and conclusion of the Disciplinary Hearing Commission of the N. C. State Bar that respondent procured false testimony by a witness during a deposition.

N. C. State Bar v. DuMont

APPEAL by respondent from the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar (hereinafter Commission). Order entered 9 April 1980. Heard in the Court of Appeals 6 April 1981.

The Commission suspended respondent's law license for a period of six months, after a hearing based upon his procuring false testimony by a witness during a deposition.

The events arose in connection with a civil action pending in Burke County Superior Court, entitled *Jerry Dean Beck, Guardian ad litem of Sharon Sue Beck v. John H. Giles, M.D., Margaret Annis Nygren and Grace Hospital, Incorporated,* together with a companion suit by Beck against the same defendants. The gist of the action was a suit for damages resulting from negligence by defendants in the care and treatment of Sharon Beck while she was a patient in defendant hospital. Plaintiff contended that during a tonsil operation there were problems with the administration of anesthesia to Sharon Beck, causing brain damage to her. The operation was during 1971, and the lawsuit was instituted in 1973.

Evidence presented at the disciplinary hearing tends to show the following:

During the times involved, Michael Kaufman was the chief anesthetist for the hospital and was generally responsible for the anesthesia department. The nub of Beck's claim was negligence by the hospital and the anesthetist, Margaret Nygren, with respect to the anesthesia department itself, the administering of the anesthesia to the patient Beck, and the events occurring thereafter.

Following the incident involving Sharon Beck and another similar occurrence, the hospital requested that Dr. James of Winston-Salem visit the hospital, make a general study of the anesthesia department and standard of anesthesia care at the hospital, and prepare a report of his findings. Dr. James did so, and filed a report dated 7 December 1971 with the hospital. A copy of this report was provided plaintiff's counsel by DuMont prior to the deposition of Kaufman. During October 1972, Kaufman went to Winston-Salem to consult with Dr. James about the specific incidents involving the anesthesia in Grace Hospital. Kaufman provided Dr. James with all the hospital documents and

records in the cases. He wanted Dr. James to provide the hospital with recommendations that would help prevent the reoccurrence of such incidents. In response to this visit, Dr. James sent a letter to Mr. Brothers, the administrator of Grace Hospital at the time, and Kaufman received a copy of the letter from James. This letter, dated 23 October 1972, contained an evaluation of how the cases were handled, including some potential criticism with reference to better monitoring devices on patients and better record keeping.[1] This letter was not produced by DuMont, although request for it had been made. The request erroneously referred to Dr. Dennis James, rather than Dr. Francis James.

1. The letter, set out in full, follows:

October 23, 1972

Mr. Grayson Brothers
Administrator
Grace Memorial Hospital
Morganton, North Carolina

Dear Mr. Brothers,

I met with Mr. Michael Kaufman of your anesthesia department for about an hour and fifteen minutes the other day. We discussed two anesthetic deaths with which I am sure you are familiar: Sharon Beck, who had a cardiac arrest during a tonsillectomy in January of 1971 and Dr. Gerald E. Biso, who had a cardiac arrest on September 2nd 1972 at the completion of an operation for hemorroids. In going over the anesthesia records and charts with Mr. Kaufman, I was unable to come up with a specific cause as to why these two patients had suffered cardiac arrests, however, I find it hard to believe that this would have occurred as an act of God and without some kind of mismanagement in the conduction of the anesthetic itself. This is particularly true in the second case where the post-mortum [*sic*] examination failed to demonstrate any specific changes other than damage secondary to hypoxia. In looking over the records, I would like to make a few comments. The first record from January of 1971 had a number of gaps of information in it consisting of such items as effective pre-medication, pre-operative blood pressure and pulse, the patient's general physical condition, particularly in regards to the cardiac and respiratory systems, medications which the patient may be taking, allergies, and so on. Furthermore, during the course of the anesthetic there is no recording of the flows of nitrous-oxide and oxygen which were used, nor of the percent of halothane which is administered to the patient. At one point, the anesthetist stated that intermittent cyanosis occurred early in the operation but then does not carry through with what was done in order to further assess the patient at this point of time. Anesthetic records, as I am sure you are aware, are essentially legal documents which can be presented in court as evidence. This first record leaves the anesthetist and the hospital with very little to stand on in the way of documenting that the best of patient care was being carried out at the time of this operation, when it comes to techniques in anesthesia and anesthetic management. I cannot

As a part of plaintiff's discovery, a deposition of Michael J. Kaufman was scheduled for Monday, 30 December 1974. Appearing for plaintiff was Harold K. Bennett; Wayne Martin and J.

really criticize the record of the case which occurred this past September and must comment that the form of the record itself is quite superior to that used in the earlier case.

There are a number of things which could have occurred in both of the cases which might explain their sad endings. Certainly poor ventilation with resultant hypoxia and hyper-carbia as a result of laryngospasm or respiratory obstruction which was unrecognized at the end of the second case or a kinked or misplaced endotracheal tube or some similar problem in the first case may have occurred. Although this could be picked up quite easily by an astute anesthetist observing the patient from a clinical standpoint, certainly one must emphasize that early warning of patient difficulty can often be achieved through the use of proper monitoring equipment. In neither case was a pre-cordial stethoscope or an esophageal stethoscope or an electrocardiogram used. At the present time, our hospital monitors virtually every patient during the course of even the simplest anesthetic with an electrocardiogram which is run continuously by means of an oscilloscope and with either a pre-cordial stethoscope or an esophageal stethoscope. These are not terribly expensive items and are well worth the investment for the improvement of patient safety which they provide. Furthermore, I think in this day and age, each operating room should be equipped with a means of continuously monitoring the temperature of patients. Although there was no evidence of malignant hyperpyrexia having occurred in either of these patients, this is a well known phenomenon which can rapidly lead to cardiac arrest and death. The safest and quickest way to diagnose this problem is by monitoring the temperature continuously to detect the rapid rises as they occur. Once again, I feel any modern operating room ought to be equipped with temperature measuring devices and the use of these devices should be routine.

Although in both cases, successful cardiac resuscitation occurred, I feel if the arrests had been diagnosed sooner, it is likely that the brain may have been spared as well. By using the stethoscopes I mentioned above, and the electrocardiogram, the diagnosis might have been made quite a bit earlier. Secondly, after the diagnosis was made, there was some delay in carrying out resuscitation due to the lack of adequate numbers of people in the operating room at the time. A problem which is occurring in many hospitals at the present time is one of having the anesthetist literally deserted at the end of the operation by surgeons and other nursing personnel. If a disaster does occur at this point, the anesthetist is able to perform much less efficiently in resuscitating the patient if help is not available. Therefore, I would urge you to vigorously encourage your surgeons to remain in the operating room until the patient is off the operating table and ready to go to the recovery room. Furthermore, it would be a very useful thing to have a defibrillator in the operating suite itself. Although one can produce effective cardiac output by external massage, this does lead to trauma of the myocardium and can result in a punctured lung or a lacerated liver or spleen from broken ribs. If defibrillation can be carried out earlier and less external massage is necessary, it is to the patient's benefit. Our own operating room suite is equipped with three difibrillators and there is also a defibrillator in our labor and delivery suite, in our X-ray area, and in the emergency room of the hospital. Mr. Kaufman mentioned

Robert Elster represented Dr. Giles; O. E. Starnes, Jr. represented Margaret Nygren; and the respondent, DuMont, represented Grace Hospital.

In late November or early December 1974, Kaufman met with Brothers and DuMont in the hospital. There was a discussion about whether Kaufman recalled the original letter from Dr. James and whether Brothers had sent it back to Dr. James. At the time Brothers received the letter, he was not entirely satisfied with it and said he might return it to Dr. James.

Prior to the taking of Kaufman's deposition, DuMont scheduled a conference with Brothers and Kaufman for the purpose of discussing the deposition. The meeting was held at the hospital on 27 December 1974, and Brothers, Kaufman, Mr. Roye, Miss Houston, and DuMont were present. The conversation was about how they should act as witnesses. DuMont told them to answer

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that he would also like to have some kind of ventilator in the operating room which could be used during the course of an anesthetic in order to provide the anesthetist with "an extra pair of hands" during some of the more major operations in which he would have to be busy pumping blood, hanging up new bottles of blood, monitoring the patient, writing on the record, measuring central venous pressure, and doing a number of other things which would be difficult to carry out properly if he had to have one hand continuously on the anesthesia bag. Although a ventilator would be most useful and I think you should include it in your plans for anesthesia equipment in the not too distant future, it would rate a poor second in priority, in comparison to the above mentioned items of the stethoscopes, electrocardiogram monitoring equipment, temperature probes and defibrillator.

I enjoyed speaking with Mr. Kaufman and think you have a man who is seriously interested in providing the best of patient care at Grace Memorial Hospital. I commend him on his efforts to try to trace down why these patients arrested and what might have been done to prevent the ultimate outcome of both cases. Finally, I question the wisdom of employing a person to administer anesthesia in this day and age other than a certified, registered nurse anesthetist or Anesthesiologist. I realize that it is not always easy to obtain well trained anesthesia personnel, however, the fact that one of these cardiac arrests occurred when a nurse who was not specifically trained in anesthesia was administering the anesthetic raised rather perplexing questions.

I hope my comments will be of some use to you. I will be happy to discuss any of them with you if you should so desire. Please do not hesitate to call me at Bowman Gray any time you wish to speak with me.

Sincerely yours,

[/s/] FMJ
Francis M. James, III, M.D.

FMJ:vgs

questions briefly and not get harassed, and instructed them as to the general discipline at the deposition. During the course of the meeting, the subject of Dr. James's letter of 23 October 1972 entered the discussion. First, Kaufman was asked to go home and get the letter, which he did not do. Kaufman gave a synopsis of the letter to the others. DuMont explained that Kaufman did not really receive a letter, that it was a copy of a letter, and he could answer "no" if asked whether he received a letter from Dr. James. DuMont said that it was not addressed to him; that the letter requested was from Dr. Dennis James and he had a letter from Dr. Francis James.

Kaufman further testified at respondent's hearing:

> Dr. [*sic*] DuMont gave me various reasons why I did not have to answer questions during the deposition concerning the letter from Dr. James to Mr. Brothers. Well, those reasons were that I had not in actuality received the letter. It was a letter to Mr. Brothers. It was not to me. It was not from Dr. Dennis James, who, I believe, was the way the statement read; that the letter was being asked from, from whomever, and then if all of those weren't satisfactory because I—I had to argue the point that that would be difficult; that I didn't have to remember anything; that it's a perfectly legitimate answer to say you don't remember. Once again, I told him that Dr. Giles definitely knew about the letter; that he had read it when I received the copy; that we had discussed it in just the days previous to this meeting; and that he was aware of it; and that he would ask the question—or have the questions asked, to my knowledge of it. And I was concerned about that, even if I could answer those other things, if they asked for a copy, there would be no way that I could deny that I had a copy.
>
> Mr. DuMont advised me that if I were asked during the deposition whether I received a letter from Dr. James that I should say that I did not have the letter because it was not a letter to me and that anything else would be giving information, offering information. Mr. DuMont advised me to answer a question that may be posed "whether I received a copy of a letter from Dr. James?" that once again, I was not required to remember anything with that. I was specifically concerned about the fact that we were talking about it right then. But

now that we had discussed it, answering that I could not remember would be almost an impossibility.

That is correct, Mr. DuMont requested that I go get my copy of the letter. And, yes, that is correct, I refused. I refused because these two incidents were serious things to me and it was the only thing to show that I had taken action to solve that problem because I felt that it would be important to me at a later date to show my action as far as doing something about these two cases. After I refused to get the letter Mr. DuMont requested that I call him at his office. He gave me a phone number and then asked if I would read him the letter and requested that Saturday morning at an early time that I dial this number and read him the letter. Yes, I did do that. I talked with Mr. DuMont for a few moments and he said that he would put me on a tape recorder, that I should read it slowly and precisely and when I was through just hang up the phone. It would automatically disconnect. Yes, sir, I followed those instructions. I read the complete letter.

Directing my attention to Monday morning, December 30, 1974, that was the date that my deposition was to be made. Prior to the taking of my deposition, yes, we met again, the five of us: Mr. Brothers, Mr. Roye, Miss Houston, Mr. DuMont, and myself in the attorney's private office. Again, we made mention that the letter was not that important. He wasn't that concerned about it, but we were to go on with our testimony as decided or talked about on Friday.

In reference to what I said to Mr. DuMont concerning the existence of the letter, I was again very distraught about the fact that I had read him the letter and that he knew the contents and that to be able to say anything other than that I had a letter would not be totally honest, and that Mr. Brothers told him that he didn't tell me how to do anesthesia and that I shouldn't tell Mr. DuMont how to be a lawyer and that I should listen to what he was saying. Again, Mr. DuMont stated that I needed to remember that it was not a letter to me; that it was a copy of a letter; it was a letter from a Francis James, not a Dennis James and that if all of those weren't satisfactory, that I needn't remember; that I did not have to recall anything. That was not a requirement.

I argued with Mr. DuMont about my testimony. The deposition then proceeded. Recesses were taken during the taking of the deposition. There were at least two recesses taken during the taking of the deposition during the morning session. During these recesses, what transpired between me and Mr. DuMont or anyone else during these recesses is that we went back to the same office and once again I was told I was either doing well or that they were getting close to focusing on this letter and that I was to remember that it was not necessary that I divulge that this letter was known, or known to exist.

On 2 January 1975, Brothers wrote a letter to DuMont, advising him that he and Kaufman could not sign the deposition because of errors in their answers to questions about the letter from Dr. James. Over the holiday, Brothers had located the original letter.

On 7 May 1975, Kaufman corrected his testimony in the deposition. The original questions, answers, and corrected answers are:

Q. Who is Dr. Francis M. James.

A. He's a—chief of the O.B. anesthesia at the Bowman Gray Hospital.

Q. On what occasion did you discuss the report with him?

A. It was sometime later, a year or better, after another occurrence. I got approval to go down there and show him the charts.

Q. On the Beck case and on the other case?

A. Uh-huh.

Q. As a result of that conference did Dr. James write a letter to the Grace Hospital or to Mr. Brothers or to you?

A. He didn't write any to me.

[CORRECTED ANSWER: I received a copy of a letter written to Mr. Brothers.]

Q. Did you see a letter?

A. Not that I recall.

[CORRECTED ANSWER: Yes.]

Q. Did you hear of him writing a letter?

A. I would have supposed he must have answered, but—

[CORRECTED ANSWER: Yes, I read the letter that Mr. Brothers received.]

. . . .

Q. Was he critical of the resuscitation equipment available at the hospital?

A. I can't say that he was.

[CORRECTED ANSWER: This was in the letter.]

Q. Can you say that he wasn't?

A. Well, no, I can't say that he wasn't, either.

[CORRECTED ANSWER: This was in the letter.]

. . . .

Q. Do you know if he expressed his opinions in the form of a written letter or report?

A. I can't say that.

[CORRECTED ANSWER: Yes, the letter to Mr. Brothers.]

. . . .

Q. And you said you did not receive a response yourself?

A. No, sir.

[CORRECTED ANSWER: I received a copy of the letter to Mr. Brothers.]

. . . .

Q. All right, sir. Now, Mr. Kaufman, I believe you were also questioned about a report that was made by Dr. James to the Grace Hospital. I hand you that document and ask you if that is identically the same document about which you were questioned.

A. (Witness reads document.) I believe so.

[CORRECTED ANSWER: No.]

At the disciplinary hearing respondent testified, and produced other witnesses, including twenty witnesses as to the character and reputation of respondent. Numerous letters to the same effect were received in evidence by the Commission. After giving an extensive review of his outstanding background, DuMont testified concerning the events in question. He denied any meeting between himself, Brothers, and Kaufman in late November or early December 1974. He stated he did set up the predeposition conference on 27 December 1974. It was for the purpose of explaining the fundamentals of taking a deposition. He advised them to listen carefully and to be sure they understood the question. The answer should be brief and to the point. There was some discussion about a consultation report dated 7 December 1971. Near the close of the conference, Kaufman took him aside and said he had some information that apparently had not been given to him (DuMont). He asked Kaufman about it and wanted to see it, and Kaufman said he would try to get it to him. The next morning Kaufman called him and said he had a copy of the document he had referred to and began reading it to him. DuMont could not understand it and asked Kaufman to bring it to him before the deposition on Monday. Kaufman promised to do so. On Monday, before the deposition, Kaufman handed him a document which was an unsigned carbon copy, and DuMont said, "Mr. Kaufman, I don't want to see it. Hand it to Mr. Brothers." DuMont glanced at the paper, did not read it, and handed it to Brothers. Brothers said he had never seen the paper before, that James was only employed to make the consultation report. Because of this statement, DuMont did not read the letter. He did not give any instructions with respect to the letter, but repeated his usual instructions concerning depositions. He did not suggest or imply that Kaufman or Brothers should tell a falsehood or otherwise conceal anything or mislead the questioner. He told them to tell the truth, not to guess if they did not know the answer, and not to volunteer any information other than that asked.

Thomas M. Starnes, general counsel for the hospital, was called by respondent as a witness. He testified as follows concerning the letter of Dr. James dated 23 October 1972:

Yes, it is my testimony that when I learned of this letter from Dr. James I reiterated my previously made demands upon Mr. DuMont, as counsel for the carrier, to enter into settlement negotiations. As to whether it is my opinion that this letter was very critical as relates to the Beck case, I suppose the way to characterize my sentiment with respect to it is to refer to my letter to Mr. DuMont dated January 15, 1975.

A. The second paragraph, "It now appears that the liability exposure is even greater than we had originally perceived. By letter of January 2, 1975, Mr. J. Grayson Brothers, Administrator of Grace Hospital, Inc., provided you with the report letter of Dr. Francis M. James, III, concerning his evaluation of the records and conditions relating to the Beck incident.

"Upon the basis of the information set forth in that report letter, a further copy of which is attached hereto, we are now of the very firm opinion that every effort must be made to settle this claim within the limits of the liability coverage and to formally demand on behalf of Grace Hospital, Inc., that appropriate and immediate action be taken to accomplish that purpose."

Yes, there's no doubt in my mind that the letter was damaging to Grace Hospital, particularly as it related to and through Mrs. Nygren who was a named party.

By letter dated 27 March 1975, DuMont wrote Starnes the following:

In addition, as you have doubtless been advised, I did not receive a copy of Dr. James' letter of October 23, 1972, until when the same was attached to a letter from Mr. Brothers, although I have specifically made inquiry regarding the same prior thereto, and was advised by Mr. Brothers that he did not recall any such letter having been received.

After further negotiations, the two Beck lawsuits were settled by consent judgment on 26 January 1976.

At the completion of the hearing, the Commission filed a written order on 9 April 1980, finding facts, making conclusions of law, and ordering that the respondent, DuMont, be suspended from the practice of law in the state of North Carolina for a peri-

od of six months. Upon the announcement of the decision of the Commission, respondent immediately gave notice of appeal in the open hearing. Upon the filing of the written order by the Commission on 9 April 1980, written appeal entries were entered, being dated and filed on 9 April 1980. Thereafter, respondent entered another notice of appeal and objections and exceptions on 14 May 1980. By virtue of N.C.G.S. 84-28(h), the suspension ordered by the Commission was stayed pending determination of this appeal.

Harold D. Coley, Jr., General Counsel, and A. R. Edmonson for appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Charles T. Hagan, Jr. and John P. Daniel, for appellant.

MARTIN, (Harry C.), Judge.

At the outset, we note that the order appealed in this case was dated and filed by the Commission on 9 April 1980. Respondent gave immediate notice of appeal, both in the open hearing and in writing. Appeal entries were dated and filed 9 April 1980. On 14 May 1980, he again purported to give written notice of appeal. After having given notice of appeal in open hearing and appeal entries having been entered, respondent cannot thereafter extend the time for filing the record on appeal by giving another notice of appeal, albeit in compliance with Rule 18(d) of the North Carolina Rules of Appellate Procedure. *See* Rule 3, N.C.R. App. Proc., and Drafting Committee Note thereto; N.C. Gen. Stat. 1A-1, Rule 58. This appeal was filed with this Court on 29 September 1980, twenty-three days beyond the maximum of 150 days for filing appeals. *See* Rule 12(a), N.C.R. App. Proc. No order by this Court extending time for filing beyond 150 days is contained in the record on appeal. It thus appears from the record on appeal, stipulated to and agreed upon as the record on appeal by respondent's counsel, that this appeal should be dismissed. Rule 12(a), N.C.R. App. Proc.; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930); *State v. Brown*, 42 N.C. App. 724, 257 S.E. 2d 668 (1979), *disc. rev. denied*, 299 N.C. 123 (1980). Nevertheless, an examination of the records of the clerk of this Court, of which we take judicial notice, discloses an order entered 31 July 1980, extending time to file record on appeal beyond 150 days. Appellant failed to include this order in the record on appeal. This is a violation of

App. R. 9(b) (1) (ix). We, nevertheless, dispose of this appeal upon its merits.

I.

[1] Respondent first urges that the Commission never obtained jurisdiction over the person of DuMont or over the subject matter of the proceeding. We recognize respondent's argument that as the events in question occurred prior to 1 July 1975, the effective date of the 1975 amendments to Chapter 84 of the General Statutes of North Carolina, his proceeding should be controlled and governed by N.C.G.S. 84-28 as it existed prior to the passage of Chapter 582 of the 1975 Session Laws. Respondent, however, has judicially alleged that this proceeding is governed by the amendments effective 1 July 1975. In his reply to the Commission's motion to consolidate, he alleged "case number 78 DHC 17 is governed by the provisions of Chapter 84 of the General Statutes of North Carolina in effect after 1 July 1975." A party is bound by an allegation contained in his own pleading and may not thereafter take a position contrary thereto. *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964). Respondent cannot now challenge the applicability of the 1975 statute to this proceeding.

Regardless of the foregoing, we hold that the 1975 amendments were appropriately applied to this proceeding. Respondent relies upon the language of Section 13 of the Act: "This act shall become effective on July 1, 1975, and shall apply to all cases, actions and proceedings arising on and after said date." This reliance is misplaced. Had the legislature intended that the 1975 act be limited to *causes* that arose after 1 July 1975, it would have used such words as "claims," "causes" or "causes of action." Rather, it employed the words "cases, actions and proceedings," evidencing the intent that the act apply to all such lawsuits begun or instituted after 1 July 1975. "Arising," as respondent notes, means beginning, originating or commencing. Thus, it appears that the legislature intended that the act apply to disciplinary hearings commenced after 1 July 1975. It can be assumed that the General Assembly realized that proceedings regarding infractions by attorneys of the disciplinary standards of the profession are not barred by any statute of limitations, and intended that such violations occurring before 1 July 1975 would be addressed in ac-

tions, cases or proceedings instituted under the amendments.

This reasoning is supported by the amendments to the Rules and Regulations of The North Carolina State Bar adopted and approved as reported in 288 N.C. 743. There, at page 772, we find:

> BE IT FURTHER RESOLVED that these amendments shall become effective upon their approval by the Supreme Court in accordance with Section 84-21 of the General Statutes of North Carolina and shall apply to any grievance pertaining to cases, actions or proceedings received in the office of the Secretary-Treasurer on or after that date.

The Chief Justice stated: "[I]t is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes." *Id.* at 773.

[2] Respondent's argument that application of the procedures contained in the 1975 amendment to his hearing constitutes an *ex post facto* application of the law is without merit. Constitutional prohibitions of *ex post facto* legislation apply only to criminal proceedings. *Mazda Motors v. Southwestern Motors,* 36 N.C. App. 1, 243 S.E. 2d 793 (1978), *rev'd in part on other grounds,* 296 N.C. 357, 250 S.E. 2d 250 (1979). *See generally* 3 Strong's N.C. Index 3d Constitutional Law § 33 (1976); 16A C.J.S. Constitutional Law § 437 (1956). Disciplinary proceedings against attorneys in North Carolina are civil proceedings, not criminal. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962); *In re Bonding Co.,* 16 N.C. App. 272, 192 S.E. 2d 33, *cert. denied,* 282 N.C. 426 (1972). The doctrine of *ex post facto* laws does not apply to attorney disciplinary proceedings. *In re Brown,* 157 W.Va. 1, 197 S.E. 2d 814 (1973); *Braverman v. Bar Association of Baltimore City,* 209 Md. 328, 121 A. 2d 473, *cert. denied,* 352 U.S. 830, 1 L.Ed. 2d 51 (1956); 16A C.J.S. Constitutional Law § 437 at 146 n. 14 (1956).

[3] DuMont further argues that use of the 1975 amendments unlawfully interferes with his vested right to practice law in North Carolina. It is granted that the practice of law is a property right requiring due process of law before it may be impaired. *In re Burton, supra; In re Bonding Co., supra.* Here, however, the amendments in no way interfere with DuMont's right to practice law. They only establish procedures by which he may be disciplined in the event that he violates the standards of professional conduct. Without some wrongful action on the part of an attorney, the

amendments (or the old statute) in no way interfere with an attorney's right to practice law. While the legislature may not destroy or interfere with vested rights, it may enact valid retroactive legislation affecting procedure. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952); *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843 (1941). There is no vested right in procedure. We find no merit in respondent's contentions that the Commission lacked personal jurisdiction over DuMont, or that there was a lack of subject matter jurisdiction.

II.

[4] Respondent further contends that by the use of the 1975 amendments he was deprived of a jury trial. Under former N.C. G.S. 84-28 the Council of The North Carolina State Bar was to make provision by rules for an attorney to demand trial by jury in the superior court. N.C. Gen. Stat. 84-28(3) (d) (1) (amended 1975). Our Court has held that under this statute an attorney had a right to a jury trial in disciplinary proceedings. *In re Bonding Co., supra.* If this proceeding had been held prior to 1 July 1975, respondent would have been entitled to demand a jury trial. "It is almost universally held that in the absence of a statute so providing, procedural due process does not require that an attorney have a jury trial in a disciplinary or disbarment proceeding." *Id.* at 277, 192 S.E. 2d at 36. Very few states provide a jury trial in disbarment proceedings. 14 N.C.L. Rev. 374 (1936). As found in Ex Parte Wall, 107 U.S. 265, 289, 27 L.Ed. 552, 562 (1883), "it is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved." At the time of respondent's hearing, he had no right to jury trial. Due process of law was provided him by the procedure established by the 1975 amendments.

> The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in the case of *Davidson v. New Orleans*, 96 U.S., 97 [XXIV., 616]; and *Mr. Justice* Miller, speaking for the court, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

107 U.S. at 289-90, 27 L.Ed. at 562.

Had attorney DuMont been entitled to a jury trial, the record indicates that he waived it. His answer was filed 2 October 1978, without a demand for jury trial. Thereafter, notice of hearing before the Commission, dated 29 September 1978, was filed. On 2 November 1978, respondent filed motion for trial by jury. He did not request that the cause be transferred to the superior court for trial at regular term. Rule 38(b) of the North Carolina Rules of Civil Procedure requires that request for jury trial be made within ten days after the service of the last pleading directed to issues triable of right by jury. N.C. Gen. Stat. 1A-1, Rule 38(b). The last such pleading was respondent's answer, filed 2 October 1978. Ten days from that date respondent was precluded from demanding a jury trial. *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). Failure of a party to serve demand for trial by jury as required by the Rules of Civil Procedure constitutes a waiver of trial by jury. *Id.;* N.C. Gen. Stat. 1A-1, Rule 38(d). DuMont did not request that a jury trial be ordered in the discretion of the Commission pursuant to N.C.G.S. 1A-1, Rule 39(b). Respondent's request for jury trial was made far beyond the required ten days. Article IX, Section 14(12), The Rules, Regulations, and Organization of The North Carolina State Bar (hereinafter State Bar Rules) expressly provides that the Rules of Civil Procedure shall apply to proceedings before the Commission, and respondent has acceded to that regulation by his extensive use of the Rules of Civil Procedure during this proceeding. N.C. Gen. Stat. app. VI, art. IX, § 14(12), 1979 Supp. *See also* Council of The North Carolina State Bar, *The Red Book.* Respondent was not unconstitutionally deprived of a trial by jury.

III.

[5] Respondent contends he did not receive a fair and impartial hearing. A fair trial is an essential of due process. *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942 (1955). He states that the Commission delayed an unreasonable length of time from the happening of the events in question until the proceedings were commenced. The events are alleged to have occurred on 27 December 1974, and these proceedings were instituted on 18 September 1978. Mr. Harold K. Bennett, an attorney of Asheville, was counsel for plaintiff in the case in Burke County in which the depositions of Kaufman and others were taken. The record is silent as to when he became aware of the alleged acts in question, but, in the

winter of 1977-78, he did notify the State Bar officials of the possible misconduct of respondent with respect to the depositions. The Bar immediately commenced an extensive investigation into the matter, resulting in the filing of the complaint on 18 September 1978. Mr. Bennett was the first chairman of the Commission, serving until shortly after the resolution of this proceeding.

DuMont appears to contend that because Mr. Bennett was chairman of the Commission, the Commission was charged with whatever knowledge he had about the actions of DuMont, and, with that knowledge, unnecessarily delayed the commencement of these proceedings. He further argues that because of this he was deprived of the testimony of Brothers, who died 28 March 1976. Mr. Bennett's knowledge can only be imputed to the Commission if it were acquired within the scope of his authority for the Commission. *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279 (1964). As chairman of the Commission, Mr. Bennett's authority related only to quasi-judicial matters; the Commission is a body judicial in nature. *See* State Bar Rules, art. IX, § 8. The investigative and prosecutorial functions of the State Bar are separate from those of the Commission. *See* State Bar Rules, art. IX, §§ 9, 12, 13. Mr. Bennett, of necessity, had to divorce his personal knowledge concerning this proceeding from his position as chairman. This is further evidenced by his recusal from participating in the hearing. There was no imputation of his knowledge to the Commission, and no laches on the part of the Commission in commencing the proceeding. *See* State Bar Rules, art. IX, § 1. We later address the matter of Brothers as a witness.

Respondent further argues the Commission erred in consolidating, for the purpose of hearing, this proceeding with three other proceedings involving respondent. One of the proceedings was dismissed at the close of the Bar's case, and the other two were dismissed at the close of all the evidence. The record on appeal does not contain any description as to the nature of the three other proceedings, and no testimony concerning them is in the record. Ordinarily, the consolidation of cases for trial is a matter in the sound discretion of the court. The State Bar Rules provide that the Commission may in its discretion consolidate for hearing two or more proceedings. State Bar Rules, art. IX, § 8(6). On the record before this Court, without any of the testimony or other matters in the other proceedings, we do not find any abuse of that discretion.

Respondent objects to the refusal of the Commission to allow into evidence for non-hearsay purposes only, statements made by Grayson Brothers, who died before the proceeding was commenced. The statements, through the witnesses DuMont and Tom Starnes, were to the effect that Brothers, the hospital administrator, stated prior to the depositions that he had no knowledge of the James letter of 23 October 1972. The statements were not offered for the truth of what they contained, but only to show that the statements had been made. The record shows, however, that testimony to this same effect is in the evidence without objection. DuMont testified:

> Yes, sir, at or near the close of the conference on December 27, 1974, I was taken aside by Mr. Kaufman, who, as I recall I had met for the first time, and Mr. Kaufman said, "I have some information which has not—which apparently has not been revealed to you." And I said, "Well, what is it? Please let me know." He said, "Well, I don't have it here." And I said, "Well, I would like to see it—a copy of it, or I would like to have it to show to Mr. Brothers." He said, "Well, I don't have it here. I will try and get it to you." And I said, "Well, I'd like to see it as quickly as possible."
>
> As to whether at that conference and at other times I had talked to Mr. Brothers regarding whether or not he had provided me with all the documents relating to this case, we had requested—the Company had requested documents. I had requested all documents. He had been furnished with copies of all Motions to Produce. I had requested every single thing from the files of the hospital. He represented and told me that the only reports that he had were those—in reference to the Advisory Committee—were those that had been furnished to me. He repeatedly told me and the carrier that. I was surprised at the comment made by Mr. Kaufman, and I said, "I would like to see what you're talking about." He said he did not have it, and I said, "Well, I will stay here. Will you go home and get it?" He said, "No, I will not." As to whether that was brought to Mr. Brothers' attention at that time, he was present at all times. Mr. Brothers commented, "I can't imagine what it is because I have furnished you with copies of everything we have." . . .
>
> In reference to anything further from Mr. Kaufman, I received a telephone call from him on Saturday morning, the

day after the meeting, around noontime. He said, "I have a copy of the document that I was referring to you—that I referred to you which I wanted to read to you." . . . I said, "Well, can you see me before the deposition on Monday in Morganton so that I can see what you're referring to and so Mr. Brothers can see what you're referring to?" He said, "I will try to bring it to you on Monday."

. . . Before the depositions began and upon the arrival of Mr. Brothers, Mr. Kaufman, Ms. Houston and Mr. Roye, Mr. Kaufman handed me a document which was a carbon, unsigned copy, and I said, "Mr. Kaufman, I don't want to see it. Hand it to Mr. Brothers." I glanced at the document but did not read it and handed it to Mr. Brothers. Mr. Brothers appeared to read it in my presence. Mr. Kaufman, Mr. Roye, Mrs. Houston as well as myself were present there. Mr. Brothers said, "I have never seen this document. I do not know the contents. I have never seen the original of any such document such as this. Mr. James was never employed by Grace Hospital to do anything other than make a consultation for us." . . . My only recollection of any other discussion by Mr. Brothers and Kaufman is that Mr. Brothers told Mr. Kaufman that he had never received that letter. Mr. Brothers continued to insist that he had not received any letter from Dr. James other than the consultation report, that being the only thing that Mr. James had been employed to do and that they had paid him for that consultation report.

. . . .

. . . I received a letter from Mr. Grayson Brothers on or about January 3, with a copy of the letter from Dr. James attached to it. That is right, he refers in that letter to his looking through archives on the preceding day. That is right, sir, he refers in that letter that it was put away prior to June 23, 1973, when the hospital moved. Definitely this is the first time that Mr. Brothers had in any way indicated to me that he had it in his possession or had ever received a letter from Dr. James, dated October 23, 1972. According to Dr. [*sic*] Brothers' letter, this was two years after the date of Dr. James' letter. No, sir, I did not at any time have any occasion to doubt the integrity of Mr. Grayson Brothers.

. . . .

> . . . No, sir, Mr. Brothers did not provide any document to me in response to said Motion. Yes, sir, I discussed with Mr. Grayson Brothers whether or not there was in his possession or in the possession of the hospital any such document as is described in the Supplemental Motion.

Respondent's Exhibit No. 20, a letter from DuMont to Tom Starnes, 27 March 1975, contained the following:

> In addition, as you have doubtless been advised, I did not receive a copy of Dr. James' letter of October 23, 1972, until when the same was attached to a letter from Mr. Brothers, although I have specifically made inquiry regarding the same prior thereto, and was advised by Mr. Brothers that he did not recall any such letter having been received.

The witness Sheline testified:

> MR. JARVIS: What policy violation did you think gave rise to that possible defense?
>
> WITNESS: The existence of a letter which they said didn't exist.
>
> MR. JARVIS: Which who had said didn't exist?
>
> WITNESS: I beg your pardon?
>
> MR. JARVIS: Which who said did not exist?
>
> WITNESS: Grace Hospital representatives.
>
> MR. JARVIS: Specifically.
>
> WITNESS: Mr. Brothers.

Kaufman testified: "Yes, Mr. Brothers denied receiving the letter." The affidavit of DuMont (a part of the record) contains:

> I was assured by Mr. Brothers that I would be furnished with all such records and related documents. . ..
>
> . . . I received a number of documents, following which I was repeatedly advised that such constituted all of the hospital records and all other documents relative to said action.
>
> . . . .
>
> . . . [I]n my contacts with Mr. Brothers he repeatedly advised me that this was the only report which had been received by him or by Grace Hospital from Dr. James.
>
> . . . .

. . . I was assured by Mr. Brothers that I had been furnished copies of all documents, including all letters from Dr. James, which had been received by the hospital.

. . . .

. . . On Monday, December 30, 1974, at the time of the taking of the deposition, Mr. Kaufman brought to me a document which he advised was a copy of a letter from Dr. Dennis James. I advised Mr. Kaufman in the presence of Mr. Brothers to deliver this letter to Mr. Brothers so that he might thoroughly examine the same. After so doing, Mr. Kaufman handed this document to Mr. Brothers. Mr. Brothers explicitly stated to me and to Mr. Kaufman that the hospital had never received such a letter and that he could not recall receiving any information regarding the contents thereof. . . .

. . . Subsequent to the taking of the depositions, I received notification for the first time from Mr. Brothers that a second letter from Dr. James, dated October 23, 1972, had been received by the hospital but that he had been unable to locate the same prior to the taking of the deposition, despite repeated efforts to do so in response to the request of both myself and my client. . . .

. . . Mr. Brothers would testify that this was the first time that I had ever been furnished with a copy of the letter attached to his letter of January 2, 1975, and that I had been repeatedly advised that no such letter had been received by the hospital.

It thus appears that the testimony respondent complains was excluded was received in evidence without objection at several places throughout the record. Error in exclusion of evidence is harmless when other evidence of the same import is admitted. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Edmondson*, 283 N.C. 533, 196 S.E. 2d 505 (1973); *Terrell v. Insurance Co.*, 269 N.C. 259, 152 S.E. 2d 196 (1967); *State v. Anderson*, 26 N.C. App. 422, 216 S.E. 2d 166, *cert. denied*, 288 N.C. 243 (1975). We hold the exclusion of the testimony complained of was harmless beyond a reasonable doubt.

Next, respondent contends the Commission erred in limiting the number of character witnesses he could present. Respondent

cites no authority in support of his argument. He was allowed to present twenty witnesses and numerous letters as to character. The law is clear in North Carolina that the number of character witnesses may be limited by the court in the exercise of its discretion. *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968); *Wells v. Bissette*, 266 N.C. 774, 147 S.E. 2d 210 (1966). The order of the presentation of witnesses is controlled by the sound discretion of the court. The assignment of error is meritless.

Respondent complains he was prejudiced by questions on cross-examination concerning incidents of which he had been acquitted in criminal trials. He was asked if he had been charged with the offense of attempting to tamper with a juror. This question was, of course, objectionable. 1 Stansbury's N.C. Evidence § 112 (Brandis rev. 1973). Later, however, respondent testified at length about his criminal trial, without objection. Any prejudice arising from the one question objected to was rendered harmless beyond a reasonable doubt by respondent's subsequent testimony of the same import without objection. *State v. Wills*, 293 N.C. 546, 240 S.E. 2d 328 (1977); *State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976). Other questions relating to respondent's marital status were fair cross-examination in light of DuMont's testimony that he was married and had been so since 1946. Nor do we find any prejudicial error in allowing respondent to be questioned concerning his mental and emotional condition. We find no merit in this assignment of error.

IV.

[6] Respondent argues that the Commission erred in using the "greater weight of the evidence" rule as the standard of proof. He urges that the proper standard is the "clear, cogent and convincing" test, contending that the requirements of due process require a higher standard of proof when vested interests are to be affected.

Respondent recognizes that Article IX, Section 14(18), of the State Bar Rules, as in effect at the time of his hearing, adopts the standard of proof "by the greater weight of the evidence" in attorney disciplinary hearings. He urges us, nevertheless, to adopt the "clear, cogent and convincing" rule. Our Supreme Court, in *In re Palmer*, 296 N.C. 638, 252 S.E. 2d 784 (1979), approved the

standard of "clear and convincing" proof in *judicial* disbarment proceedings. In so doing, the Court stated: "We understand that the State Bar had adopted the 'preponderance of the evidence' rule for proceedings under the statutory method. Be that as it may, we feel that the 'clear and convincing' rule is more appropriate when the judicial method is followed." *Id.* at 648, 252 S.E. 2d at 790.

We are not convinced that we should impose our conception as to the appropriate standard of proof to these proceedings, when the General Assembly has empowered the State Bar to make such determination, and it has exercised that authority. We are aware that on 16 October 1980 the Council of The North Carolina State Bar adopted an amendment to section 14(18), changing the standard of proof to the "clear, cogent, and convincing" standard. However, the question before this Court is whether the rule in effect at the time of respondent's hearing was violative of his constitutional rights. We hold that it was not. The Council acted within its authority in amending the rule, but such amendment does not invalidate proceedings conducted under the former rule. Moreover, we find the evidence in this proceeding ample to sustain a burden of proof beyond a reasonable doubt. The assignment of error is overruled.

V.

[7] Last, respondent contends the findings of fact are not supported by substantial evidence and that those findings do not support the conclusions of the Commission and its decision. Without repeating our extensive review of the evidence, we hold there is substantial, competent evidence to support the findings of fact. This is true whether the "whole record" test is applied, or the "any competent evidence" standard of review is used. The whole record test

> requires the Board's judgment to be affirmed if upon consideration of the whole record as submitted, the facts found by the Board are supported by competent, material and substantial evidence, taking into account any contradictory evidence, or evidence from which conflicting inferences could be drawn. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). This test is distinguishable from both *de novo* review and the "any competent evidence" standard

> of review. Under the "whole record" test the reviewing court cannot replace the Board's judgment between two reasonably conflicting views, even though the court could have reached a different conclusion had the matter been before it *de novo*. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977).

Boehm v. Board of Podiatry Examiners, 41 N.C. App. 567, 568-69, 255 S.E. 2d 328, 330, *cert. denied*, 298 N.C. 294 (1979). As the findings of fact by the Commission are supported by competent, material and substantial evidence in view of the entire record, they are conclusive upon appeal. *In re Berman*, 245 N.C. 612, 97 S.E. 2d 232 (1957); Boehm, *supra*. A fortiori, there is ample competent evidence to support the findings of fact. With this holding, we do not deem it necessary to determine in this case whether the whole record test or the any competent evidence rule is the appropriate standard for other proceedings of this nature.

Further, we hold the findings of fact amply support the conclusions of law stated by the Commission. Respondent complains of the description of the testimony as "perjured," but the Commission did not use the word in its technical legal sense, as used in the criminal law. It was using the word as meaning "false swearing." *See* Webster's Third New International Dictionary 1682 (1971).

Respondent argues eloquently in his brief reasons why the Commission should have adopted his view of the facts from the evidence presented. Presumably, these arguments were made to the trier of the facts and rejected by it. At any rate, we cannot substitute our judgment for the Commission's under either standard of review. *Boehm, supra*. Likewise, although the Commission makes strong arguments that this Court has the authority on this appeal to replace the discipline imposed upon respondent by one of our own choosing, we do not find the law to be so. Under the statute, our review is limited to "matters of law or legal inference." N.C. Gen. Stat. 84-28(h). Under that statute, we do not find authority for this Court to modify or change the discipline ordered by the Commission. By this ruling, we do not express any intimation of the authority of this Court to modify or change the

discipline ordered by a court, upon appellate review of a *judicial* disciplinary proceeding.

We hold that respondent had a full and fair hearing, in full compliance with the constitutional safeguards of due process. Upon the certification of this opinion to the Commission, the automatic stay imposed by the statute, N.C.G.S. 84-28(h), will be vacated.

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. MERRILL LANE ANDREWS

No. 8010SC1107

(Filed 19 May 1981)

1. **Searches and Seizures §§ 7, 11, 34— search of car—lawful arrest—probable cause—plain view rule**

A gym bag containing stolen property was properly seized pursuant to a search of defendant's car incident to defendant's lawful arrest and based on probable cause where officers had a tip from a reliable informant that defendant and a companion were on their way to commit a burglary; officers followed and observed defendant and his companion in an area where many burglaries had occurred, watched defendant's car unattended on the street, and saw the companion enter the car carrying a gym bag; and officers followed the car to a stop light, stopped it, and apprehended defendant and his companion. Furthermore, the gym bag and its contents were properly seized under the plain view doctrine where stolen silver was inadvertently seen protruding from the bag when one officer reached into the car to keep it from rolling and again when another officer arrested and removed defendant's companion from the car.

2. **Burglary and Unlawful Breakings §§ 5, 10.3; Receiving Stolen Goods § 5.1— second degree burglary—larceny—possession of burglary tools—possession of stolen property—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for second degree burglary where it tended to show that defendant and a companion, acting in concert, broke into a dwelling house in the nighttime, entered with the intent to steal, and did steal items of silver belonging to the owner; no consent had been given to defendant; and defendant and his companion were soon arrested a short distance from the place of the burglary with the

stolen property. Likewise, there was ample evidence to submit the State's case to the jury on charges of felonious larceny, possession of burglary tools, and possession of stolen property.

3. Criminal Law § 26.5— double jeopardy—punishment for larceny and possession of stolen property

A defendant who committed larceny and thereafter continued to possess the stolen property was not placed in double jeopardy by his conviction and punishment for both larceny and felonious possession of the stolen property, since each offense contained an element not present in the other, and the crime of possession of stolen property was not a lesser included offense of larceny.

4. Indictment and Warrant § 17.2— possession of burglary tools—variance as to date of offense

There was no fatal variance between a bill of indictment charging possession of burglary tools on 14 March 1980 and evidence that the offense occurred on 19 March 1980 where defendant did not rely upon an alibi as a defense and time was not an essential ingredient of the offense charged. G.S. 15-155.

5. Criminal Law § 113.7— charge on acting in concert

The court's charge on acting in concert was supported by the evidence and did not constitute prejudicial error.

Judge CLARK dissenting.

APPEAL by defendant from *Brannon, Judge.* Judgments entered 19 June 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 13 March 1981.

Defendant was indicted and convicted of burglary in the second degree, felonious larceny, possession of burglary tools, and possession of stolen property. The state's evidence showed that the Raleigh Police Department, Wake County Sheriff's Department, and the SBI were jointly involved in a special investigation of residential burglaries. They had received reliable information from an informant about breakins in Wake, Johnston, Wilson, and New Hanover counties. The investigation focused upon defendant and his associates, one being defendant's sister who was hospitalized. Several burglaries had happened in the Hayes-Barton and Five Points area of Raleigh, involving homes of people who were also in the hospital on the same floor as defendant's sister. The officers had a list of the people on that floor of the hospital and noted those who had homes located in the suspect area. Their investigation showed that the thefts occurred around dusk, that the burglars left their car parked and walked to the house, using a pillowcase or small bag to carry the stolen articles, usually coins and silver, back to the car.

On 19 March 1980, an officer received a call from the informant telling him that defendant and Larry Rudd were leaving in defendant's car to commit a burglary. Several officers went to the Five Points area where defendant, with another man, was seen driving his car. For a time, the officers lost sight of defendant's car, but soon located it parked on the street unattended. The officers waited nearby and saw the taillights of the car come on. Rudd approached, carrying a gym bag, and entered the car. The officers followed the car as it drove away and stopped it at a red light. When the officers approached the car with drawn weapons, defendant put his hands on top of his head and his car rolled forward toward a police car. An officer reached into the car, turned off the ignition, and put the car in parking gear. In so doing, he saw the gym bag on the floor, with a shiny object on top. Another officer, in removing Rudd from the car, saw the same bag with silver protruding from the top. Defendant and Rudd were arrested and the bag was seized. Upon checking the neighborhood, the officers located a house which had been entered by breaking through a basement door. The silver in the bag was identified by a resident of the house and was offered into evidence.

Defendant did not offer evidence and appealed from the judgments imposed upon the verdicts of guilty.

Attorney General Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State.

Dean & Dean, by Joseph W. Dean and Christine Witcover Dean, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant urges prejudicial error was committed in four respects in his trial. We discuss them separately.

[1] First, defendant contends the court erred in denying his motion to surpress as evidence the bag and its contents. He insists there was no probable cause for his arrest or for the seizure of the evidence and that the court found facts unsupported by the evidence and considered incompetent evidence. We hold there is ample evidence in the record to support the court's findings that the officers had probable cause to arrest defendant and Rudd for the commission of a felony. Without repeating the evidence, it

shows the officers had a tip from a reliable informant that defendant and Rudd were on their way to commit a burglary. They followed and observed defendant and Rudd in the area where burglaries had occurred, watched defendant's car unattended on the street, and saw Rudd approach the car carrying the bag and enter the car. They followed the car to the stoplight, stopped it, and apprehended defendant and Rudd. Where an informant is reliable, probable cause may be based upon information given to police by such informant. *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970); *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977). The evidence would warrant a reasonably prudent person in believing that the felony of burglary had been committed by defendant and Rudd. *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974); N.C. Gen. Stat. 15A-401(b)(2)a. The arrest being lawful, a reasonable search incident thereto is lawful. *State v. Jackson*, 280 N.C. 122, 185 S.E. 2d 202 (1971).

Probable cause to search a vehicle means a reasonable ground or belief supported by circumstances sufficient to lead a person of prudence and caution to believe that defendant's car contained contraband or evidence of the commission of a crime. *State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979). It is not required to have proof beyond a reasonable doubt or even prima facie evidence of guilt; it is enough if the evidence would actuate a reasonable man acting in good faith. *Id.* The evidence here supports a conclusion that the officers had a reasonable basis for searching defendant's vehicle.

Additionally, the *stolen property* was first seen in the car within the meaning of the plain view doctrine. The officers had the right to be where they were in arresting defendant and Rudd. The discovery of the silver was inadvertent, as it was not seen until one officer reached into the car to prevent it from rolling and again when the other officer took Rudd out of the car in arresting him. Being recognized as silver, the property was immediately apparent as evidence of criminal activity under these circumstances, and it was in open, plain view. *State v. Wynn*, 45 N.C. App. 267, 262 S.E. 2d 689 (1980); *State v. Prevette*, 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *disc. rev. denied*, 299 N.C. 124, *cert. denied*, --- U.S. --- , 64 L.Ed. 2d 855 (1980). Although the

officers knew the bag was in the car, they did not know that it contained evidence of a crime until they saw some of its contents by chance, or fortuitously. *Id.*

The flashlights produced pursuant to an inventory search made in accordance with standard police procedures were competent as evidence and not prejudicial to defendant. *See State v. Phifer, supra; State v. Vernon,* 45 N.C. App. 486, 263 S.E. 2d 340 (1980).

We also find the findings of fact by the court in the order denying the motion to suppress are supported by substantial competent evidence. Defendant complains that the trial judge was biased because he asked questions of the witnesses on the voir dire hearing. We do not find the judge assuming the role of prosecutor here. The questions were of a clarifying nature. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied,* 393 U.S. 1087, 21 L.Ed. 2d 780 (1969). The evidence of defendant's modus operandi was admissible. *State vs. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972). The assignment of error to the denial of defendant's motion to suppress is overruled.

[2] The denial of his motion to dismiss constitutes defendant's next assignment of error. This assignment lacks merit. On such motion, the evidence must be considered in the light most favorable to the state, and all discrepancies or contradictions are resolved in favor of the state. The state is entitled to all reasonable inferences arising from the evidence. *State v. Witherspoon,* 293 N.C. 321, 237 S.E. 2d 822 (1977). There must be substantial evidence of every element of the offense charged. *See State v. Agnew,* 294 N.C. 382, 241 S.E. 2d 684, *cert. denied,* 439 U.S. 830, 58 L.Ed. 2d 124 (1978). On the burglary charge, the state was required to produce evidence that defendant, either alone or acting together in concert with Rudd, broke or entered a dwelling house in the nighttime without the owner's consent and did so with the intent to commit the felony of larceny therein. *State v. Jolly,* 297 N.C. 121, 254 S.E. 2d 1 (1979); N.C. Gen. Stat. 14-51. The evidence shows that defendant and Rudd, acting in concert, broke into the dwelling house of John Braman, entered with the intent to steal, and did steal items of silver belonging to Braman. No consent was given to defendant, and the events occurred in the nighttime, about 8:00 p.m., on 19 March 1980. Defendant and Rudd were soon arrested a short distance from the place of the burglary with the purloined property.

Likewise, there is ample evidence to submit the state's case to the jury on the charges of felonious larceny, possession of burglary tools, and possession of stolen property. The assignment of error is overruled.

[3] Next, defendant asserts it was error to punish him on the separate charges of felonious larceny and felonious possession of stolen property where both offenses arose out of the same fact situation. This raises the question of double jeopardy (multiple punishment for the same offense) under the federal and state constitutions. Defendant's contention is that it is necessary to possess the property being stolen in order to commit larceny and that larceny of property and the subsequent possession of it constitute a single criminal offense and permit only a single punishment.

The law concerning double jeopardy and the principles to be applied in determining whether this constitutional safeguard has been violated are succinctly set forth in *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), and require no extensive repetition here. There, the Court held that the basic rule in North Carolina is:

> "The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained. . . ."

Id. at 198, 195 S.E. 2d at 486.

Analogous arguments to defendant's have been made in cases of distribution or sale of controlled substances and possession of the same substances. The argument is that possession is a lesser

included offense of sale or distribution because one must have possession, actual or constructive, in order to sell or distribute the substance. The Supreme Court rejected the argument in *State v. Cameron, supra*, holding that possession was a continuing offense, occurring not only at the time of sale but prior thereto, and thereafter, until defendant divests himself of the substance. *See also State v. Lewis*, 32 N.C. App. 298, 231 S.E. 2d 693 (1977). In so doing, the Court stated:

> "Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single *act* with two criminal labels but with *component transactions* violative of distinct statutory provisions denouncing them as crimes. Neither in fact nor law are they the same. *State v. Midgett*, 214 N.C. 107, 198 S.E. 613. They are not related as different degrees or major and minor parts of the same crime and the doctrine of merger does not apply. The incidental fact that possession goes with the transportation is not significant in law as defeating the legislative right to ban both or either. When the distinction between the offenses is considered in the light of their purpose, vastly different social implications are involved and the impact of the crime of greater magnitude on the attempted suppression of the liquor traffic is sufficient to preserve the legislative distinction and intent in denouncing each as a separate punishable offense."

283 N.C. at 199-200, 195 S.E. 2d at 486-87.

The unlawful sale of a narcotic drug is a specific act and a given sale occurs only at one specific time. Unlawful possession, however, is a continuing violation of the law. It begins as soon as an individual first unlawfully obtains possession of the drug, whatever the purpose of that possession might be, and does not end until he divests himself of it. In this case defendant was violating the law in that he was possessing the heroin not only when he was in his house on the evening of the sale but from the time that he originally came into possession of it. This could have been one hour, one day, one week, or one month prior to the sale. The length of time makes no difference. He had been violating the law from the time he first took possession and control of the heroin. This

was a continuing offense and was not a single act which occurred at the time of the sale. *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1969).

283 N.C. at 202, 195 S.E. 2d at 488. *Cameron* is in accord with the decisions of the United States Supreme Court. *See Gore v. United States*, 357 U.S. 386, 2 L.Ed. 2d 1405 (1958); *Albrecht v. United States*, 273 U.S. 1, 71 L.Ed. 505 (1927).

The essential elements of feloniously possessing stolen property are:

(1) possession of personal property,

(2) valued at more than $400.00.

(3) which has been stolen,

(4) the possessor knowing or having reasonable ground to believe the property to have been stolen, and

(5) the possessor acting with a dishonest purpose.

State v. Davis, 302 N.C. 370, 275 S.E. 2d 491 (1981). *See* N.C. Gen. Stat. 14-71.1, 1979 Supp.; N.C.P.I.—Crim. 216.47.

The essential elements of felonious larceny are:

(1) the defendant took property belonging to another;

(2) the defendant carried away the property (the slightest removal is sufficient);

(3) the victim did not consent to the taking and carrying away of the property;

(4) at the time of the taking, defendant intended to deprive the victim of its use permanently;

(5) defendant knew he was not entitled to take the property; and

(6) the property was valued at more than $400.00.

See State v. McCrary, 263 N.C. 490, 139 S.E. 2d 739 (1965); N.C. Gen. Stat. 14-72(a), 1979 Supp.; N.C.P.I.—Crim. 216.10.

An examination of the elements of both offenses reveals the presence of an element in each offense that is not present in the other. The element of possession is different from, and not includ-

ed in, the elements of taking or carrying away required for larceny. The incidental fact that possession goes with the taking and asportation is not significant in law as defeating the legislative right to ban both or either offense. *State v. Cameron, supra.* The elements of taking and carrying away of the property are not essential to the offense of possession of stolen property. Thus, the requirements of *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306 (1932), that each offense requires proof of a fact which the other does not, are satisfied.

We have become advertent to *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187 (1977), and do not find it controlling. *Brown* involved a defendant pleading guilty to a charge that he did "unlawfully and purposely take, drive or operate a . . . motor vehicle . . . without the consent of the owner," referred to as joyriding. *Id.* at 162, 53 L.Ed. 2d at 192. Upon his release from jail, he was charged that he "unlawfully did steal a . . . motor vehicle, and take, drive or operate such vehicle without the consent of the owner." *Id.* at 163, 53 L.Ed. 2d at 192. Both charges arose out of the same facts. The Supreme Court held this constituted a violation of the Double Jeopardy Clause of the Federal Constitution. Although the joyriding was alleged to have occurred on 8 December 1973 and the theft on 29 November 1973, the Court held that the Ohio statutes, as written, and construed in *Brown,* make the theft and operation of a single car a single offense. Three justices dissented. We do not find our holding and *Brown* to be inconsistent. The facts in *Brown* simply do not concern a possession case. *Brown* is analogous to an effort to try a defendant on a charge of felonious breaking or entering after he had pleaded guilty to a charge of misdemeanor breaking or entering arising on the same facts. The only difference between the charges, in both *Brown* and the breaking or entering example, is the presence or lack of felonious intent. In either case, double jeopardy principles would bar the second charge.

In the case at bar, we are concerned with two discrete offenses, larceny and the felonious possession of stolen property, the fruits of the larceny. Although we find no case directly in point, *State v. Davis, supra,* and *Cameron, supra,* impel us to the result we reach. In *Davis,* the question was whether possession of stolen property is a lesser included offense of receiving stolen property, a violation of N.C.G.S. 14-71. The Supreme Court held

that it is not. We find the Court's reasoning equally applicable here and quote:

> Although at first glance possession may seem to be a component of receiving, it is really a separate and distinct act. In analogous cases dealing with the contraband of non-taxpaid whiskey and controlled substances (rather than with the contraband of stolen property) this Court has consistently held that the crime of *possession* of such items is not a lesser included offense of the crime of *selling* or *transporting* them. *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973) and cases therein cited. [Footnote omitted.] The Court said in *Cameron*, *id.* at 202, 195 S.E. 2d at 488:
>
> > "By setting out both the possession and sale as separate offenses in the statute and by prescribing the same punishment for possession and for sale, it is apparent that the General Assembly intended possession and sale to be treated as distinct crimes of equal degree, to be separately punished rather than providing that one should be a lesser included offense in the other.
> >
> > . . . .
>
> Similarly the unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment. Under G.S. 14-71 the state seeks to punish the act of *receiving* stolen goods *from another;* under G.S. 14-71.1 the state seeks to punish the act of *possessing* stolen goods without regard to who might have stolen them. The punishment for both offenses is the same. We believe the legislature intended *possession* and *receiving* to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter.

Id. at 374, 275 S.E. 2d at 494.

Paraphrasing Justice Exum in *Davis*, under N.C.G.S. 14-72, larceny, the state seeks to punish the act of stealing the property of another; under N.C.G.S. 14-71.1 the state seeks to punish the act of *possessing* stolen property without regard to who might have stolen it. Larceny is a single, specific act occurring at a specific time. Possession of stolen property, however, is a continu-

ing offense, terminating when defendant divests himself of the property. The punishment for both offenses is the same. We believe the legislature created a separate crime of equal degree with larceny when it passed N.C.G.S. 14-71.1.

The legislature's intent that possession of stolen property be a distinct crime and not a lesser included offense of larceny is found in the language of the statute itself. N.C.G.S. 14-71.1 contains the following: "[A]ny person [who possesses stolen property] . . . may be indicted and convicted, whether the felon stealing [such property] . . . *shall* or shall not have been previously convicted . . .." (Emphasis added.) It is clearly the intent of the legislature to allow the state to convict and punish a defendant for both larceny and the felonious possession of the property so stolen.

We find *Albernaz v. United States*, --- U.S. --- , 67 L.Ed. 2d 275 (decided 9 March 1981), persuasive. In *Albernaz*, defendants were convicted of conspiracy to import marijuana and conspiracy to distribute marijuana, arising from a single conspiracy. Consecutive sentences were entered. The Court held the cumulative punishment was not barred by the Double Jeopardy Clause of the Fifth Amendment. In so doing, the Court stated:

> . . . "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized." . . . In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional killing in the course of rape, the Court recognized that the "dispositive question" was whether Congress intended to authorize separate punishments for the two crimes . . . . This is so because the "power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress." . . . As we previously noted in *Brown v. Ohio*, supra, "where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense." . . . Thus, the question of what punishments are constitutionally permissible is not different

> from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.

Id. at --- , 67 L.Ed. 2d at 285 (citations omitted).

The language of the felonious possession statute, discussed above, clearly places it within the rationale of *Albernaz.*

In this case, the felonious larceny ended at the latest when defendant and Rudd carried the stolen property off Braman's premises. Thereafter, defendant was committing the offense of felonious possession of stolen property. N.C. Gen. Stat. 14-71.1, 1979 Supp. It is constitutionally permissible for a defendant to be convicted and punished for both larceny and the possession of stolen property, where the defendant commits the larceny and thereafter continues to possess the stolen property. *See State v. Davis, supra; State v. Kelly,* 39 N.C. App. 246, 249 S.E. 2d 832 (1978). Defendant's assignment of error is without merit.

[4] Last, defendant attacks portions of the court's charge to the jury. He argues that because the bill of indictment charging possession of burglary tools alleged 14 March 1980, rather than 19 March 1980, as the date of the offense, a fatal variance was created and the court erred in charging the jury with respect to 19 March 1980. Defendant overlooks N.C.G.S. 15-155, which states that defects as to the time of an offense in a bill of indictment, where time is not of the essence of the offense, will not vitiate an indictment. Here, defendant does not rely upon alibi as a defense and time is not an essential ingredient of the offense. The state may and did prove that it was in fact committed on some other date. *See State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396 (1961).

[5] The evidence in this case sustained the court's instructions on the doctrine of acting in concert by defendant and Rudd in the commission of the offenses. While perhaps not a model charge, the court's instructions on acting in concert do not constitute prejudicial error. For an approved charge on acting in concert, see *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *death penalty vacated,* 408 U.S. 939, 33 L.Ed. 2d 761 (1972). We find no error in these instructions.

Finally, defendant argues the court erred in repeating its instructions as to larceny. In giving the final mandate with respect

to larceny, Judge Brannon mistakenly referred to "case one" as the larceny offense, whereas "case one" was actually the burglary charge. He immediately realized this mistake or *lapsus linguae*, and corrected it by telling the jury that he had completed "case one" and that he was now charging on "case two," larceny. Thereupon, the court repeated its final mandate as to larceny, properly referring to it as "case two." Rather than committing error, the court promptly removed any possible error by its immediate instructions. Such a corrected *lapsus linguae* cannot be held as error. *State v. Barnes*, 297 N.C. 442, 255 S.E. 2d 386 (1979); *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). We hold no error resulted from this challenged instruction.

In defendant's trial, we find no prejudicial error.

No error.

Judge ARNOLD concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

I believe that the law stated in the opinion of Whichard, J., in *State v. Ulysees Perry*, filed by this Court on 19 May 1981, governs the question of former jeopardy raised on this appeal.

BERNICE M. JONES, ADMINISTRATRIX OF THE ESTATE OF BEVERLY A. JONES, DECEASED v. THOMAS GLENN ALLRED, RICHARD ALLEN HUBBARD, AND TONI C. KINSEY

No. 8019SC880

(Filed 19 May 1981)

1. Automobiles § 66.2— identity of driver—sufficiency of circumstantial evidence

Plaintiff's evidence was sufficient to support a jury finding that one defendant, rather than plaintiff's intestate, was the driver of a vehicle involved in an accident where it tended to show that defendant was observed driving the car, with plaintiff's intestate in the right front passenger seat, approximately fifteen minutes before the collision and six to eight miles from the scene of the collision; the position of the body of plaintiff's intestate in the car following the collision indicated that she suffered an impact to her face and

head on the passenger side of the car; the hood of the car was protruding through the windshield on the passenger side; the steering wheel of the car was very badly bent but there was no evidence that plaintiff's intestate suffered a steering wheel type of injury; and plaintiff's intestate had never driven her family's car and was too young to acquire a driver's license.

2. **Automobiles § 51.2— negligence of driver—excessive speed—sufficiency of circumstantial evidence**

Plaintiff's evidence was sufficient to support a jury finding that an automobile driver was negligent in approaching a curve at an excessive speed and failing to reduce speed or control the automobile so as to negotiate the curve successfully where it tended to show that the automobile left the road at a curve near a bridge over a river; the road was paved and approximately nineteen feet wide with a three foot shoulder; tire marks indicated that the automobile ran off the left side of the road into a ditch as it came into the curve, traveled beside the ditch, struck a dirt embankment, then overturned and came to rest on the bottom of the river; the tire marks were 122 feet in length from the curve to the dirt embankment, and the automobile traveled 75 feet beyond the point at which it first struck the embankment; and when found at the bottom of the river, the windshield of the car was gone and the hood of the car had been broken from its anchor next to the windshield and was protruding through the windshield on the passenger side.

3. **Automobiles §§ 97, 108.1— stepdaughter using family purpose automobile—driver's negligence imputed to stepdaughter and owner**

Where an automobile provided by the owner for family purposes was being used by a stepdaughter who was a member of the owner's household, and the stepdaughter permitted another person to drive the automobile and remained in the automobile as a passenger, the negligence of the driver was imputable to both the stepdaughter and the owner. G.S. 20-71.1.

4. **Rules of Civil Procedure § 50.3— motion for directed verdict—failure to state contributory negligence as ground**

The question of whether defendants' motion for a directed verdict should have been allowed on the ground of contributory negligence was not before the appellate court where defendants failed to state contributory negligence as a ground for their motion in the trial court. G.S. 1A-1, Rule 50(a).

Judge CLARK dissenting.

APPEAL by plaintiff from *Lupton, Judge.* Judgment entered 17 April 1980 in Superior Court, Randolph County. Heard in the Court of Appeals 31 March 1981.

Plaintiff, administratrix of the estate of Beverly A. Jones, brought this action to recover damages for the wrongful death of Beverly Jones. Plaintiff alleged that at approximately 7:30 p.m. on 30 October 1975 Beverly, defendant Hubbard, and defendant Kinsey were the occupants of an automobile, owned by defendant Allred, which left the traveled portion of a public road and collided with a concrete bridge abutment. Beverly died at the scene as

a result of serious injuries sustained in the collision. Plaintiff alleged that defendant Allred was the registered owner of the vehicle, that he maintained the vehicle for the use of his family, that Allred's stepdaughter, defendant Kinsey, a member of Allred's household, was using the vehicle on 30 October with Allred's permission and knowledge, and that defendant Hubbard was operating the vehicle at the time of the collision with the permission of Kinsey. Plaintiff alleged that Hubbard's negligent operation of the vehicle caused the collision and the wrongful death of Beverly.

In their separate answers, defendants admitted that the registration of the car was in Allred's name and that defendant Kinsey was a member of Allred's household, but denied that the car was being operated with Allred's permission on the occasion of the collision, denied that defendant Hubbard was operating the car at the time of the collision, and alleged that Beverly Jones was operating the car at the time of the collision. Each defendant admitted that Beverly Jones died as a result of injuries received in the collision.

At trial, plaintiff offered the testimony of Harland Jones, Beverly's brother, who, earlier in the evening on the day of the collision, had been a passenger in the car carrying the group with which Beverly was riding; Rupert C. Fruitt, a rescue squad member who was one of the first to arrive at the scene of the collision and who removed Beverly's body from the automobile; C. R. Byrd, a Highway Patrolman who arrived later at the scene and investigated the collision; Dr. Gordon B. Arnold, the medical examiner who examined Beverly's body after the collision; and Bernice Jones, Beverly's mother. At the close of plaintiff's evidence, defendants moved for a directed verdict pursuant to G.S. 1A-1, Rule 50 of the Rules of Civil Procedure on the grounds that the evidence was insufficient to show any negligence on the part of any of the three defendants, and more specifically that the evidence was insufficient to show who was operating the vehicle at the time of the accident. The trial court deferred ruling on this motion until the close of all the evidence.

Defendants' evidence consisted of the testimony of each of the defendants. At the close of all the evidence, defendants renewed their previously stated motion for a directed verdict, the trial court granted the motion, and plaintiff has appealed.

Boyan & Loadholt, by Clarence C. Boyan, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Stephen A. Millikin and Jeri L. Whitfield, for defendant appellees.

WELLS, Judge.

Defendants' motions for a directed verdict raised three questions for consideration by the trial court and for review by this Court: was plaintiff's evidence sufficient to support a finding by the jury (1) that Hubbard was the driver of the automobile at the time of the collision in which Beverly Jones met her death; (2) if so, did Hubbard operate the vehicle negligently, thereby causing the death of Beverly; and (3) if Hubbard was negligent in the operation of the vehicle, was his negligence was imputable to defendants Allred and Kinsey.

On a motion by defendant for a directed verdict in a jury case, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. All the evidence which tends to support plaintiff's claim must be taken as true and viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which may be legitimately drawn therefrom. *Dickinson v. Pake,* 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974); *Kelly v. Harvester Co.,* 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971); *Home Products Corp. v. Motor Freight, Inc.,* 46 N.C. App. 276, 277, 264 S.E. 2d 774, 775 (1980); *disc. rev. denied,* 300 N.C. 556, 270 S.E. 2d 107 (1980). A trial court should deny a defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) when viewing the evidence in the light most favorable to the plaintiff and giving plaintiff the benefit of all reasonable inferences, the court finds any evidence more than a scintilla to support plaintiff's *prima facie* case in all its constituent elements. *Hunt v. Montgomery Ward and Co.,* 49 N.C. App. 638, 640, 272 S.E. 2d 357, 360 (1980).

Plaintiff's evidence as to the identity of the driver, all circumstantial in nature, was as follows. Harland Jones, Beverly's brother, age sixteen at the time of the collision, testified that on the night of 30 October 1975, Toni Kinsey drove to the Jones' residence to pick up Harland, Beverly, and Steve Hill. Kinsey then drove her car to Allen Hubbard's home. When Hubbard

entered the car, Kinsey moved toward the passenger side and Hubbard assumed the driver's seat; so that at about 7:00 p.m. on that evening, five people were riding in the automobile; Harland Jones and Steve Hill in the back seat, and Beverly in the front passenger seat, defendant Kinsey in between the two front seats, and defendant Hubbard in the driver's seat driving the automobile. At approximately 7:00 or 7:15 p.m., Hubbard stopped the car at a restaurant and let Harland and Steve out of the car. Hubbard then drove off with defendant Kinsey and Beverly each maintaining their positions in the front seat. Harland testified that the place where the collision occurred was approximately six to eight miles from the restaurant.

Fruitt, the rescue squad member who removed Beverly's body from the wrecked automobile, testified that when he arrived at the scene the vehicle was upside down resting on rocks in the Uwharrie River in the vicinity of Miller's Mill Bridge, headed north, the same direction as the path of travel of the automobile. Fruitt found Beverly's body in a "prone position" [*sic*] on the inside of the roof of the car, facing the floorboard of the car, with her head clamped between the top of the car and the hood. The hood had protruded through the windshield on the passenger side, about ten inches. Beverly's head was up toward the windshield and fastened "near the center or a little bit to the passenger side" of the car, while her feet were down towards the back of the car with possibly one of her feet propped up against the seat. Fruitt did not remember whether the windows of the car were up or down or whether the door on the driver's side opened freely or was forced open.

Byrd, the investigating Highway Patrolman, testified that the collision occurred at approximately 7:30 p.m., on 30 October 1975, on Miller's Mill Road near the bridge over the Uwharrie River. When he arrived at the scene, Beverly's body was in the process of being removed from the car, but he did not observe the position of her body in the car. Defendants Kinsey and Hubbard were present but they were not in the automobile. After the car was removed from the river, he observed its condition, and among other things, observed that the steering wheel was very badly bent.

Dr. Arnold, the medical examiner who examined Beverly's body after the collision, testified that Beverly died instantly as a result of a tremendous blow to her mouth area, a guillotine type

injury which penetrated to ear level on each side with near decapitation. Below the head, there were no injuries of any significance.

Bernice Jones, Beverly's mother, testified that prior to 30 October 1975 Beverly had attended one classroom session of driver's training, but had never been allowed to drive the Jones' family's car, and that Beverly would have reached her sixteenth birthday on 15 January 1976.

Our appellate courts have consistently approved of the use of circumstantial evidence to establish the identity of the driver of an automobile at the time of a collision. *See, Helms v. Rea*, 282 N.C. 610, 616-17, 194 S.E. 2d 1, 5-6 (1973); *Greene v. Nichols*, 274 N.C. 18, 22, 161 S.E. 2d 521, 523-24 (1968); *Drumwright v. Wood*, 266 N.C. 198, 203, 146 S.E. 2d 1, 5 (1966); *Rector v. Roberts*, 264 N.C. 324, 141 S.E. 2d 482 (1965); *Johnson v. Gladden*, 33 N.C. App. 191, 194, 234 S.E. 2d 459, 461 (1977); *accord, Talbert v. Choplin*, 40 N.C. App. 360, 365-66, 253 S.E. 2d 37, 41 (1979). As stated by Justice (later Chief Justice) Sharp in *Helms*, in many instances, facts can be proved only by circumstantial evidence. *See also, Johnson v. Gladden, supra.* For a thorough discussion of the pertinent rules and cases, *see*, 2 Strong's N.C. Index 3d, Automobiles, § 66, at 226-30.

In *Drumwright*, the circumstantial evidence which the Court found sufficient to support a jury verdict for plaintiff as to the identity of the driver was that plaintiff did not know how to drive an automobile; the deceased owner was observed driving his automobile with plaintiff as a passenger about fifteen minutes before the collision; plaintiff's body was found protruding through the windshield on the right side of the car; and the deceased owner's body was found sprawled across the front seat.

In *Johnson*, where this Court reversed an order granting defendant's motion for a directed verdict, holding that plaintiff's circumstantial evidence permitted a reasonable inference that defendant was driving the car at the time of the accident, plaintiff's evidence was that defendant was the owner of the car, and that fifteen minutes before and five miles away from the collision defendant was seen in the driver's seat of the car and plaintiff's intestate was seen as a passenger in the back seat, and after the collision the bodies of all three occupants of the vehicle were found outside of the vehicle, widely dispersed.

In *Greene*, the evidence which the Court held sufficient to establish the identity of the driver was that plaintiff's intestate

was a fifteen year old female who had no driver's license, and was seen shortly before the collision riding as a passenger in the front seat, that the deceased owner was observed driving the car prior to the collision, that at the scene, the deceased owner's body was found outside the car on the left side, and that plaintiff's intestate was found in the front seat of the car on the right side.

In *Helms*, the Court found the circumstantial evidence presented by defendant in support of his counterclaim, to be sufficient to allow an inference that plaintiff was the driver of the car at the time of the collision. The evidence supporting this inference was that: defendant's intestate disliked to drive and was not dressed to drive on the occasion; defendant's intestate's injuries were consistent with the injuries she would have received had she been sitting in the passenger's seat; and although both occupants of the car were discovered outside of the car after the collision, the position of the bodies made it unlikely that defendant's intestate was driving.

[1] In summary, in the case *sub judice*, plaintiff's evidence tended to show the following: (1) approximately fifteen minutes before and six to eight miles from the scene of the collision, defendant Hubbard was observed driving the car, with Beverly Jones in the front passenger seat on the right side; (2) the position of Beverly Jones' body in the car following the collision indicated that she suffered the impact to her face and head on the passenger's side of the car; (3) the steering wheel of the car was very badly bent, but Beverly had no significant injuries except for the head wound caused by the hood, there being no evidence of a steering wheel type of injury; and, (4) Beverly had never driven her family's car and was too young to acquire a driver's license. This evidence is sufficient to permit the jury to find as a logical and reasonable inference that defendant Hubbard was the driver of the car at the time of the collision. *Compare, Stegall v. Sledge*, 247 N.C. 718, 102 S.E. 2d 115 (1958); *Parker v. Wilson*, 247 N.C. 47, 100 S.E. 2d 258 (1957).

[2] Plaintiff's evidence as to the negligence of the driver of the car, also circumstantial in nature, was as follows. Byrd, the investigating Highway Patrolman, testified that the collision occurred at a curve in Miller's Mill Road near the bridge over the Uwharrie River. At that point there was a steep embankment or drop off from the bridge down to the water level. The road was a

paved road, approximately nineteen feet wide with a three foot shoulder. Patrolman Byrd observed tire marks (scuff marks, skid marks) on the paved portion of the left side of Miller's Mill Road from the direction in which the car was travelling, and tire marks on the shoulder indicating where the vehicle had left the road. As the car came into the curve, it ran off the left side of the road into a ditch, traveling along beside the ditch, striking a dirt embankment, then overturning and coming to rest on the bottom of the river. The tire impressions observed by him appeared to be in a continuous line from the dirt embankment back up into the curve of the road where they started. The tire impression marks were measured as 122 feet in length, and the car continued to travel seventy-five feet beyond the point at which it first impacted the dirt embankment.

Fruitt testified that when he reached the car, he found the car upside down in the river; the windshield of the car was "gone"; and the hood of the car had been broken from its anchor next to the windshield and was protruding through the windshield area of the car on the passenger's side. Fruitt and others used a crowbar to pry the hood away from the top of the car to free Beverly so that they could remove her.

The foregoing evidence strongly supports an inference of negligence on the part of the driver of the vehicle. In *Greene v. Nichols, supra*, at 26-27, 161 S.E. 2d at 527, our Supreme Court held that a *prima facie* case of actionable negligence is established when a motor vehicle suddenly leaves the traveled portion of a highway, even where there is no apparent reason for such departure.

> It is generally accepted that an automobile which has been traveling on the highway, following "the thread of the road" does not suddenly leave it if the driver uses proper care. . . . The inference of driver-negligence from such a departure is not based upon mere speculation or conjecture; it is based upon collective experience, which has shown it to be the "more reasonable probability."

274 N.C. at 26, 161 S.E. 2d at 526. In the case *sub judice*, plaintiff's evidence goes beyond a "more reasonable probability". Surpassing the *prima facie* case established by the sudden departure of the vehicle from the highway, plaintiff's evidence shows excessive speed approaching a curve in the road and failure to

reduce speed or control the vehicle so as to negotiate the curve without a collision. *See, Mann v. Transportation Co. and Tillett v. Transportation Co.*, 283 N.C. 734, 745, 198 S.E. 2d 558, 556 (1973).

[3] Having sufficiently established negligence on the part of the driver of the automobile, under the provisions of G.S. 20-71.1[1] plaintiff was entitled to go to the jury against the owner of the car, defendant Allred. *See, Bowen v. Gardner*, 275 N.C. 363, 369-70, 168 S.E. 2d 47, 52 (1969); *White v. Vananda*, 13 N.C. App. 19, 185 S.E. 2d 247 (1971); *Allen v. Schiller*, 6 N.C. App. 392, 169 S.E. 2d 924 (1969).

Plaintiff's evidence showing that defendant Allred's family purpose automobile initially embarked upon the tragic journey of 30 October 1975 with his stepdaughter, defendant Kinsey, as the driver and showing that defendant Kinsey allowed and permitted Hubbard to drive the car and remained in the car as a passenger at the time of the collision, the negligence of defendant Hubbard is imputable to defendant Kinsey. *See, Rector v. Roberts, supra*, at 326, 141 S.E. 2d at 484; *Goss v. Williams*, 196 N.C. 213, 217-19, 145 S.E. 169, 171-72 (1928).

[4] In their brief, defendants contend that we should affirm the trial court's order because plaintiff's evidence shows that Beverly Jones was contributorily negligent in riding in an automobile when the driver was consuming beer. Defendants did not state contributory negligence as a grounds for their motions for a directed verdict. The requirement set forth in G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure that "a motion for a directed verdict shall state the specific grounds therefore" is mandatory. *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974);

1. § 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.—(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

Love v. Pressley, 34 N.C. App. 503, 511, 239 S.E. 2d 574, 580 (1977), *disc. rev. denied,* 294 N.C. 441, 241 S.E. 2d 843-44 (1978); *accord, Feibus & Co. v. Construction Co.,* 301 N.C. 294, 271 S.E. 2d 385 (1980). Defendants not having stated contributory negligence as a ground for their motions, that question is not before us in this appeal. *Love v. Pressley, supra; see also, Lee v. Tire Co.,* 40 N.C. App. 150, 156-57, 252 S.E. 2d 252, 256-57, *disc. rev. denied,* 297 N.C. 454, 256 S.E. 2d 807 (1979).

We hold that plaintiff's evidence was sufficient to take the case to the jury on the actionable negligence of all three defendants.

Reversed.

Judge VAUGHN concurs.

Judge CLARK dissents.

CLARK, Judge, dissenting:

The plaintiff first had the burden of offering evidence sufficient to justify a finding by the jury that defendant Hubbard was the driver of the automobile at the time of the collision.

The majority, in summary, listed four facts which it concluded were sufficient to permit the jury to find that Hubbard was the driver. The first listed fact is that "(1) approximately fifteen minutes before and six to eight miles from the scene of the collision, defendant Hubbard was observed driving the car, with Beverly Jones in the front passenger seat on the right side . . . ." Trooper Byrd who investigated the accident, testified that it occurred about 7:30 p.m. Harland Jones testified that the car left the grill around 7:00 or a quarter after. This fact alone is not sufficient to support a jury finding, and in my opinion the other three listed facts are not sufficient to raise a logical inference that Hubbard was driving when considered with the other circumstances, including the facts that Beverly Jones was taking driver training; that the vehicle traveled off the pavement and into a ditch, went over an embankment, flipped over, and landed fifteen feet below in a rocky stream. These circumstances support the testimony of the other two occupants that Beverly Jones, an

inexperienced driver, lost control while operating the automobile, and the positions of the bodies in the vehicles after the collision do not support plaintiff's claim.

In my opinion the evidence was sufficient to raise only speculation or conjecture that Hubbard was operating the automobile.

I vote to affirm.

STATE OF NORTH CAROLINA v. ULYSEES PERRY

No. 808SC1038

(Filed 19 May 1981)

1. **Criminal Law § 101— witness threatened—no mistrial**

The trial court did not err in denying defendant's motion for a mistrial made on the ground that events at trial caused the jury to conclude that defendant was somehow responsible for an attempt to intimidate or tamper with a witness, since there was no indication before the jury of any impropriety on defendant's part; testimony which was the same as or similar to that objected to by defendant had already been admitted on cross-examination pursuant to questions by defendant's own counsel; and defendant declined the opportunity to request any instructions he desired regarding the matter.

2. **Larceny § 7— heaters taken from church—testimony of one trustee—sufficiency of evidence**

In a prosecution of defendant for larceny, there was no merit to his contention that the State failed to show that heaters were taken from a church without permission because the State presented only one of the three trustees who constituted the ruling body of the church and were in charge of church property, since the State's failure to call the other two trustees went to the weight and not to the sufficiency of the evidence.

3. **Criminal Law § 111— jury instruction—presumption of innocence—defendant's contentions—lack of evidence**

There was no merit to defendant's arguments that (1) the trial court erred by failing to instruct that the presumption of innocence remains with a defendant "until that moment that the twelve agree on the verdict of guilty and for not one moment less," since the court did instruct on the presumption of the defendant's innocence and if defendant desired elaboration, he should have requested it; (2) the trial court erred in stating defendant's contentions, since defendant did not object at trial to the statement of his contentions and there was no gross misstatement by the trial court; and (3) the court failed to explain that the lack of evidence could be just as important as the existence of evidence, since the court had instructed that the State must prove defendant

guilty beyond a reasonable doubt and that a reasonable doubt could arise "out of the evidence or the lack of evidence or some deficiency in it."

4. **Larceny § 9— acquittal on breaking and entering charge—absence of charge on value of stolen property—felonious larceny conviction improper**

Where the jury returned a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, the conviction of felonious larceny should be vacated and the case should be remanded for entry of a sentence consistent with a verdict of guilty of misdemeanor larceny, since the larceny count of the indictment stated the value of the stolen property as $750; the evidence, however, tended to show that the three stolen heaters were worth only $75 each; and the trial court did not instruct the jury to fix the value of the stolen property and did not submit an issue of misdemeanor larceny.

5. **Criminal Law § 26; Larceny § 1— conviction of larceny and possession of stolen property—double jeopardy**

Defendant could not be convicted both of the larceny of property and of the possession of the same stolen property which was the subject of the larceny. G.S. 14-71.1; G.S. 14-72(a).

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendant from *Small, Judge.* Judgment entered 3 July 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 March 1981.

Defendant was tried for breaking or entering with intent to commit larceny; larceny following a breaking or entering of goods valued at $750; and possession of stolen property.

Reverend Willard Carlton testified for the State that he was assistant pastor of Moye Memorial Free Will Baptist Church in Goldsboro; that he conducted services on the second and fourth Sundays of each month; and that Reverend J. H. Moore conducted services on the first and third Sundays of each month. He testified that he was the last person to leave the church on 11 May 1980, and that he locked the doors upon leaving. When he next returned to the church on 19 May 1980, a Monday, he noticed that the front door was open and the latches on it were "busted." Three gas heaters which had been in the church on 11 May were missing. Subsequently, on 26 May 1980, he saw two of the heaters at Williams Used Furniture Store. Woodrow Williams testified for the State that he operated this store and that he bought the two heaters from defendant for $35 on the morning of 16 May 1980. Williams testified that in his opinion the fair market value of the heaters was $75 each. Finally, Mildred Carlton, Reverend Carlton's wife, testified for the State that she was a

trustee of Moye Memorial Free Will Baptist Church in May 1980 and that she did not authorize defendant or anyone else to remove the heaters from the church.

Defendant was acquitted of the breaking or entering charge but was convicted of both felonious larceny and felonious possession of stolen property. From a judgment of imprisonment, he appeals.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

John W. Dees for defendant appellant.

WHICHARD, Judge.

[1] Defendant's first assignment of error relates to the denial of his motion for a mistrial. During cross-examination the witness Woodrow Williams testified, without objection: "As to whether anybody has ever threatened me with prosecution in this case, I have been threatened today. As to whether anybody ever threatened to bring charges against me for receiving stolen property, no they have not." The district attorney subsequently asked Williams on redirect: "Mr. Williams, you stated on cross examination you had been threatened?" The witness answered: "I have." Defense counsel's objection was then sustained. No motion to strike the answer was made, however. A voir dire hearing was conducted during which Williams stated that a woman in the courtroom had told him, about half an hour earlier, "You are going to die tonight." The woman was identified by Williams and was taken into custody. Defense counsel denied any involvement by the defendant and moved for a mistrial. The motion was denied. The trial court offered to instruct the jury to disregard any question (presumably including defendant's own questions on cross-examination) relative to whether the witness had been threatened in any way. The court stated: "I will give you the option of requesting instructions as to whether or not they should disregard those questions and any testimony relative to it." The defendant declined to request any instructions, however.

Defendant now argues that a mistrial should have been allowed, because the events at trial "inevitably caused the jury to conclude that the defendant was somehow responsible for an attempt to intimidate or tamper with a witness." We disagree. "A mistrial

is appropriate only for serious improprieties which render impossible a fair and impartial verdict under law." *State v. Chapman*, 294 N.C. 407, 417-418, 241 S.E. 2d 667, 674 (1978). "[A] motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion, and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye*, 281 N.C. 592, 596, 189 S.E. 2d 481, 483 (1972). In this case there was no indication before the jury of any impropriety on defendant's part. The same or similar testimony had already been admitted on cross-examination pursuant to questions by defendant's own counsel. Further, defendant declined the opportunity to request any instructions he desired regarding the matter; and it is thus difficult for him to show any prejudice deriving therefrom. Defendant's first assignment of error is overruled.

[2] Defendant next contends the evidence was insufficient to convict as a matter of law. He argues that the State failed to show that the heaters were taken without permission since it presented only one of the three trustees who constituted the ruling body of the church and were in charge of church property. The testimony of trustee Mildred Carlton was, however, sufficient evidence to permit the jury to find that the heaters were taken without consent. The State's failure to call the other trustees went to the weight, not the sufficiency, of the evidence. Defendant also argues that although the State's evidence tended to show that the church would normally have been used for services on 18 May 1980, following sale of the heaters to Williams on 16 May 1980, there was nonetheless no evidence of a break-in at the church until 19 May 1980. He contends that the evidence thus tended to show that the heaters were not taken pursuant to a breaking and entering. Since defendant was acquitted of breaking or entering and since the felonious larceny verdict must be vacated as hereinafter discussed, however, the absence of evidence that the break-in occurred prior to 19 May 1980 cannot have prejudiced defendant.

[3] Defendant has brought forward three assignments of error dealing with the court's instructions to the jury. First, he excepts to the following instruction:

> Now, under our system of justice when a defendant pleads not guilty he is not required to prove his innocence.

> The defendant is presumed to be innocent. This presumption goes with him throughout the trial and until the state proves to you that the defendant is guilty beyond a reasonable doubt.

Defendant argues that the court erred by failing to instruct that the presumption of innocence remains with a defendant "until that moment that the twelve agree on the verdict of guilty and for not one moment less." "[T]he court did clearly instruct the jury that defendant was presumed to be innocent and that the burden was on the State to prove him guilty beyond a reasonable doubt." *State v. Geer*, 23 N.C. App. 694, 695-696, 209 S.E. 2d 501, 502 (1974). If defendant desired elaboration, he should have requested it. *State v. Tipton*, 8 N.C. App. 53, 173 S.E. 2d 527 (1970). Second, defendant excepts to the court's statement of his contentions. "A misstatement of the contentions of the parties must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception thereto to be considered on appeal, unless the misstatement was so gross that no objection at the trial was necessary." *State v. Lankford*, 28 N.C. App. 521, 526, 221 S.E. 2d 913, 916 (1976). Defendant did not object below to the statement of his contentions, and we find no "gross" misstatement of his contentions in the instructions given. Third, defendant excepts to that portion of the instructions in which the court admonished the jury that all of the evidence was important, and that the jury should remember and consider all of the evidence. He contends the court failed to explain that "the lack of evidence . . . can be just as important as the existence of evidence." The court had instructed, however, that the State must prove defendant guilty beyond a reasonable doubt and that a reasonable doubt could arise "out of the evidence *or the lack of evidence or some deficiency in it.*" (Emphasis supplied.) In view of this instruction, we find no error prejudicial to defendant in the court's failure to refer further to the lack of evidence in the portion of the instructions complained of.

[4] Defendant correctly contends the felonious larceny conviction is inconsistent with the acquittal as to breaking or entering.

> Our courts have repeatedly held that where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for

> the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $200.00 for the larceny to be felonious.

State v. Keeter, 35 N.C. App. 574, 575, 241 S.E. 2d 708, 709 (1978), and cases cited. G.S. 14-72 was amended, effective 1 January 1980, to increase from $200 to $400 the value which stolen property must exceed in order to constitute a felony. 1979 Sess. Laws, ch. 408. The $400 figure is applicable here, since the larceny charged occurred in May 1980. The larceny count of the indictment stated the value of the stolen property as $750; however, the evidence tended to show that the heaters were worth only $75 each. The court did not instruct the jury to fix the value of the stolen property and did not submit an issue of misdemeanor larceny. The felonious larceny conviction must therefore be vacated, and the case must be remanded for entry of a sentence consistent with a verdict of guilty of misdemeanor larceny. *Keeter*, 35 N.C. App. 574, 241 S.E. 2d 708; *see also State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981).

[5] Absent our holding with regard to defendant's final contention, the failure to instruct the jury to fix the value of the stolen property and to submit an issue of misdemeanor *possession* would likewise require vacating the felony *possession* conviction and remanding for entry of a sentence consistent with a verdict of misdemeanor possession pursuant to G.S. 14-72(a). Our holding with regard to defendant's final contention, however, requires remand for entry of a judgment of dismissal. Defendant finally contends that "[p]ossession of stolen property is an element of larceny [and] [t]hus both convictions cannot be sustained." This contention presents the question of whether the defendant can be convicted both of the larceny of property and of the possession of the same stolen property which was the subject of the larceny. We hold that he cannot.

We so hold, first, because "[i]t is our authority and duty . . . to apply a valid statute so as to give it the meaning and effect intended by the Legislature at the time of its enactment," *State v. Williams* 286 N.C. 422, 430, 212 S.E. 2d 113, 119 (1975); and we do not ascribe to the General Assembly, in its creation of the possession offense, the intent to effect such exposure to dual

punishment for the same offense. The 1977 General Assembly amended G.S. 14-72(a) by inserting the words "or the possessing of stolen goods knowing them to be stolen," thereby creating the offense of misdemeanor possession of stolen goods. 1977 N.C. Sess. Laws ch. 978 § 2. It also enacted G.S. 14-71.1, creating the offense of felony possession of stolen goods. 1977 N.C. Sess. Laws ch. 978 § 1. We ascribe to both enactments the legislative purpose set forth with regard to G.S. 14-71.1 in *State v. Kelly*, 39 N.C. App. 246, 249 S.E. 2d 832 (1978), *viz.*, "to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving." 39 N.C. App. at 248, 249 S.E. 2d at 833. As the court there noted, "[t]his could occur where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of possession of recently stolen property." *Id.* The apparent intent was to provide for the State a position to which to recede when it cannot establish the elements of breaking and entering or larceny but can effect proof of possession of the stolen goods. It would constitute a purposeless parsing of the single act of theft to extract from the larceny violation a distinct offense of possession of the very stolen goods which were the subject of the larceny. The presumed purpose of such extraction, enhanced punishment for the offender, could be achieved by the far simpler expedient of merely augmenting the penalty for the larceny itself. Further, because the knowledgeable rogue would then have reason promptly to pass the fruits of his thievery to another for the purpose of attempting to avert at least one of two potential convictions deriving from his single larcenous act, the effect of a contrary interpretation could well be the involvement of multiple defendants in what might otherwise be the criminality of a single offender. We decline to impute to the General Assembly in the enactment of the possession offense the improbable intent which the foregoing considerations suggest.

We so hold, second, because as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, it is the duty of the court to adopt the interpretation which will save the act. *In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976). "Even to avoid a serious doubt the rule is the same." *Dairy Farms*, 289 N.C. at 465, 223 S.E. 2d

at 329 *quoting from National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1936). While "the decisional law in the area [of the double jeopardy clause of the fifth amendment of the United States Constitution] is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator," *Albernaz v. United States*, --- U.S. --- , --- , 67 L.Ed. 2d 275, 284, 101 S.Ct. 1137, 1144-1145 (1981), we have at minimum "serious doubt" that a contrary interpretation of the possession statute could survive the fifth amendment double jeopardy clause protection "against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L.Ed. 2d 656, 665, 89 S.Ct. 2072, 2076 (1969).

The double jeopardy clause of the fifth amendment is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969); *see also North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969). The Court in *Benton* stated: "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . it should apply to the States through the Fourteenth Amendment." 395 U.S. at 794, 23 L.Ed. 2d at 716, 89 S.Ct. at 2062. The validity of defendant's dual convictions thus "must be judged . . . under [the United States Supreme] Court's interpretations of the Fifth Amendment double jeopardy provision." *Benton*, 395 U.S. at 796, 23 L.Ed. 2d at 717, 89 S.Ct. at 2063.

The standard established by that Court for determining the validity of convictions under the double jeopardy clause is as follows:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, 55 L.Ed. 489, 490, 31 S.Ct. 421, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusettes in *Morey v. Com. 108 Mass. 433*: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction

> under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 309, 52 S.Ct. 180, 182 (1932). "If each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 43 L.Ed. 2d 616, 627, 95 S.Ct. 1284, 1294 (1975). We consider the offenses here in the light of this standard.

Larceny, the first offense of which defendant was convicted, is a common law crime which consists of

> the . . . taking and carrying away from any place at any time of the personal property of another, without the consent of the owner, with the . . . intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some other person than the owner.

State v. Booker, 250 N.C. 272, 273, 108 S.E. 2d 426, 427 (1959). Possession of stolen goods, the second offense of which defendant was convicted, is a statutory crime. G.S. 14-72(a) provides:

> Except as provided in subsections (b) and (c) below, . . . the possessing of stolen goods knowing them to be stolen, of the value of not more than four hundred dollars ($400.00) is a misdemeanor punishable under G.S. 14-3(a).[1]

To establish the offense of larceny, then, the State must show that defendant took and carried away the goods of another with the intent to deprive the owner thereof permanently. To establish the offense of possession of stolen property the State must show that defendant possessed the goods of another knowing them to have been stolen.[2] Evidence establishing commission

1. G.S. 14-72(a) is the applicable statute here because, as noted above, only a conviction of misdemeanor possession could be sustained under the facts of this case.

G.S. 14-72(c) and G.S. 14-71.1 relate to felony possession. The double jeopardy clause would appear equally applicable whether the possession was of the felony or misdemeanor variety.

2. G.S. 14-72(a). The felony possession section of this statute adds "or having reasonable grounds to believe them to be stolen." G.S. 14-72(c). The other felony possession statute contains a similar phrase: "or having reasonable grounds to believe the same to have been feloniously stolen or taken." G.S. 14-71.1.

of the offense of larceny necessarily also establishes commission of the offense of possession of the stolen property which was the subject of the larceny. It is impossible to take and carry away the goods of another without in the process possessing those goods with knowledge that they are stolen. There are no facts to be proven in establishing possession of stolen goods which are not also proven in establishing the larceny of those goods. The prosecutor who has made out a case of larceny *ipso facto* has also made out a case of possession of the stolen goods which were the subject of the larceny. "[I]t is clearly *not* the case that 'each [statute] requires proof of a fact which the other does not.'" *Brown v. Ohio*, 432 U.S. 161, 168, 53 L.Ed. 2d 187, 195, 97 S.Ct. 2221, 2226 (1977) (emphasis in original).

In *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed. 2d 1054, 97 S.Ct. 2912 (1977), defendant had been convicted of felony murder arising from an armed robbery. He was subsequently convicted on a separate information charging the underlying offense of robbery with firearms, the trial court having rejected his claim that the second prosecution violated the double jeopardy clause of the fifth amendment. The United States Supreme Court reversed, stating:

> When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. [Citations omitted.] ". . . [*A*] *person* [*who*] *has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.*" [Citations omitted.]

Harris, 433 U.S. at 682-683, 53 L.Ed. 2d at 1056, 97 S.Ct. at 2913 (emphasis supplied).[3]

It can be argued that a defendant is guilty of both larceny and possession of the stolen property which was the subject of

3. For other recent United States Supreme Court decisions in the double jeopardy area, see *Albernaz v. United States*, --- U.S. --- , 67 L.Ed. 2d 275, 101 S.Ct. 1137 (1981); *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S.Ct. 2260 (1980); and *Whalen v. United States*, 445 U.S. 684, 63 L.Ed. 2d 715, 100 S.Ct. 1432 (1980).

the larceny on the theory that the act of larceny terminates at the latest when defendant leaves the victim's premises, and that thereafter he is committing the distinct offense of possession of the stolen property.[4] Absent clearly expressed legislative intent to that effect, the decision of the United States Supreme Court in *Brown v. Ohio* deprives this argument of viability. The defendant in *Brown* had been convicted under Ohio law of the offenses of joyriding (taking or operating a vehicle without the owner's consent) and auto theft (joyriding with the intent permanently to deprive the owner of possession). The Ohio Court of Appeals held that the two offenses constituted the same statutory offense within the meaning of the double jeopardy clause. It further held, however, that the defendant could be convicted of both crimes because "[t]he two prosecutions [were] based on two separate acts . . . which occurred [nine days apart]." *Brown*, 432 U.S. at 164, 53 L.Ed. 2d at 193, 97 S.Ct. at 2224. The United States Supreme Court reversed, stating:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. [Citation omitted.] The applicable Ohio statutes . . . make the theft and operation of a single car a single offense. . . . Accordingly, the specification of different dates in the two charges on which [defendant] was convicted cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments.

Brown, 432 U.S. at 169-170, 53 L.Ed. 2d at 196-197, 97 S.Ct. at 2227.

The facts here would seem to invoke the *Brown* result, even more so than those in *Brown*. If the double jeopardy clause precludes conviction for both theft of a vehicle and joyriding nine days later in the stolen vehicle, by the same reasoning it precludes conviction for both larceny of property and the uninterrupted possession at some later time of the stolen property which was the subject of the larceny. There is no evidence in the record here tending in any way to establish that the possession

4. See *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981).

count resulted from a reacquisition by defendant of the stolen property subsequent to relinquishment of possession. The question of applicability of the double jeopardy clause where a defendant relinquishes possession of the stolen property which was the subject of the larceny, and thereafter reacquires it, is thus not before us.

"The proper remedy for convictions on both greater and lesser offenses is to vacate both the conviction and the sentence of the lesser-included offense." *United States v. Michel*, 588 F. 2d 986, 1001 (5th Cir.) *cert. denied* 444 U.S. 825 (1979); *see also Williams v. Indiana*, 383 N.E. 2d 416 (Ind. App. 1978). Accordingly, the possession of stolen property judgment must be vacated, and the case must be remanded for entry of a judgment of dismissal.

The result is

As to the felonious larceny conviction, the judgment is vacated, and the case is remanded to the trial court for entry of a judgment as upon a verdict of guilty of misdemeanor larceny.

As to the possession of stolen property conviction, the judgment is vacated, and the case is remanded to the trial court for entry of a judgment of dismissal.

Chief Judge MORRIS concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I believe that the law stated in the opinion of Martin (Harry C.), J., in *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981) governs the question of former jeopardy raised on this appeal.

THE FIDELITY BANK, A NORTH CAROLINA BANKING CORPORATION, PLAINTIFF v. ARNOLD GARNER, DEFENDANT AND THIRD PARTY PLAINTIFF v. DONALD MACK BLUE, VERNON G. BLUE, AND VERMAC CONSTRUCTION COMPANY, A NORTH CAROLINA CORPORATION OF MOORE COUNTY, THIRD PARTY DEFENDANT

No. 8020SC591

(Filed 19 May 1981)

1. **Evidence §§ 29.2, 32.2— business records—hearsay—parol evidence rule**

In a bank's action to recover on a note signed by defendant as an accommodation maker, a bank officer could properly identify and read from certain documents relating to the loan in question where he negotiated the loan and had personal knowledge of the facts reflected in the documents, and where the documents were issued and maintained under his direct supervision and control. Furthermore, the bank officer's testimony as to defendant's wish to have an equipment list added to the note as extra security did not relate to the contents of the list and was not hearsay, and his testimony did not violate the parol evidence rule since it did not vary, add to, or contradict the contents of the note.

2. **Bills and Notes § 19— action on note—uses of proceeds—hearsay—harmless error**

In a bank's action to recover on a note signed by defendant as an accommodation maker, a witness's speculation that a portion of the loan proceeds were used to pay insurance premiums owed to defendant's agency was inadmissible hearsay, but the admission of such testimony was not prejudicial to defendant since the only issue before the court was whether defendant should be held jointly and severally liable on the note with the third party defendants, and the uses to which the borrowed money was put by the borrowers were irrelevant to such issue.

3. **Trial § 11— improper jury argument—curative instructions**

The trial court did not abuse its discretion in denying defendant's motion for a mistrial made when plaintiff's counsel argued to the jury that defendant, who had been convicted and later pardoned for insurance fraud, "had been previously convicted of lying to a jury" where the trial court allowed defendant's motion to strike this statement and instructed the jury that the argument was improper and to disregard it.

Judge BECTON dissenting.

APPEAL by defendant from *Mills, Judge.* Judgment entered 30 Jaunary 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 27 January 1981.

Plaintiff brought this action to collect the balance due, interest, and attorney's fees on a note of Vermac Construction Company in the amount of $15,584.57 which was allegedly in default. The note was endorsed by Donald Mack Blue, Vernon G. Blue and defendant. Defendant signed the note as an accommodation en-

dorser. Defendant answered denying liability on the note on the grounds that at the time of the making of the note, plaintiff had agreed to require payment by defendant only after plaintiff had sold its security interest in certain pieces of equipment put up as collateral for the loan. Plaintiff had not foreclosed on the equipment before bringing this action against defendant. Defendant had signed the note only as an accommodation maker and had received no consideration for his endorsement. Defendant denied liability on the further ground that plaintiff had subrogated its liens on the equipment to another lending institution, thus, impairing its collateral without notifying defendant or obtaining his permission to do so.

Defendant filed a third party complaint against Vermac Construction Company, Donald Mack Blue, and Vernon G. Blue alleging that they refused to pay the sum due on the note to plaintiff or to make any effort to sell the pledged equipment to pay the debt. Therefore, defendant alleged, he should recover from the third party defendants all sums adjudged against him in plaintiff's action along with attorney's fees and costs of court. On 16 January 1980, Judge Mills ordered entry of default against the third party defendants for failing to plead or defend in answer to defendant's third party complaint.

Plaintiff's action was tried in superior court before a jury. The jury's verdict found defendant to be jointly and severally liable with the third party defendants on the indebtedness. The court also awarded plaintiff interest on the debt and attorney's fees. Defendant appealed from the judgment entered.

Thigpen and Evans, by John B. Evans, for plaintiff appellee.

Smith and Gibson, by Dock G. Smith, Jr. and Millicent Gibson, for defendant appellant.

MORRIS, Chief Judge.

[1] During the course of the trial of this matter plaintiff called Ernest Whitley, Jr. as a witness. Whitley was an employee of plaintiff at the time the loan was negotiated. Whitley, representing plaintiff, entered into negotiations in January of 1975 with defendant with regard to the loan to Vermac Construction Company, hereinafter Vermac. Whitley testified as to the origin and significance of plaintiff's Exhibit No. 13 which consisted of lists of

equipment owned by Vermac and against which plaintiff, at defendant's request, took a lien in 1975 to secure its loan to Vermac. Defendant had given Whitley the lists and appraisals of the equipment.

Whitley also testified as to plaintiff's demand on defendant for payment of the note. Whitley identified a copy of plaintiff's letter to defendant making demand for payment. The witness also identified and testified as to the contents of a subsequent letter of notice from plaintiff's attorney to defendant which stated that the note was in default and that if payment was not made within the specified time the attorney's fee provision of the note would be enforced.

Defendant's objections to the admission of witness Whitley's testimony were overruled by the court and defendant urges that this was error. Whitley was allowed to interpret and indicate the significance of the contents of the documents even though he was not the author of either. This, defendant maintains, constituted hearsay.

Defendant does not question the admissibility into evidence of either of these documents. Whitley as the officer of plaintiff, who negotiated this loan, had personal knowledge of the facts reflected in both writings. In his capacity as a bank officer these documents were issued and maintained under his direct supervision and control. Therefore, it was not error for him to identify or read from these documents before the court.

Whitley's testimony as to defendant's wish to have the equipment list added to the note as extra security did not relate to the contents of the list itself. Rather, it related to the negotiations between him and defendant prior to the closing of the loan. This was not hearsay.

Nor did Whitley's explanation vary, add to, or contradict the contents of the note. Therefore, there was not a violation of the parol evidence rule. *See Gas Co. v. Day,* 249 N.C. 482, 106 S.E. 2d 678 (1959).

[2] In his second assignment of error defendant asserts that the court erroneously allowed into evidence the following testimony of witness Whitley:

Q. You mentioned in your testimony that part of this money was to be for the payment of insurance premiums. Do you know who these payments were made to?

A. I don't know for a fact. I understood it was Mr. Garner.

Mr. Smith: I object.

Court: Overruled. Go ahead.

A. I understood it was to Mr. Garner's agency.

Mr. Smith: Object. Move to strike.

Court: Overruled. Motion denied. Go ahead.

A. They did business with him, and I assume that's why he wanted to help them get the loan.

Although we do think that this witness's speculation as to the payments of these insurance preimums was hearsay, we do not think that it was sufficiently prejudicial to defendant's case to warrant our granting a new trial. In this instance the issue before the court was whether defendant should be held jointly and severally liable on this note with the third party defendants. The uses to which the borrowed money was put by the borrowers are irrelevant to the issue of liability on the note. If a portion of the loan proceeds were used to pay insurance premiums owed defendant's agency this would demonstrate his reason for endorsing the note but it would not influence his liability on the debt. Therefore, we find the error was not prejudicial.

Similarly, defendant maintains that the allegedly speculative testimony of third party defendant Donald Mack Blue was inadmissible hearsay. Blue's testimony indicated that Garner knew in advance of the subordination by the plaintiff of its security interest in the equipment to that of the Bank of Montgomery. Defendant alleges that the following answer to plaintiff's question was hearsay:

Q. But to your knowledge, he had to know in advance, didn't he?

Mr. Smith: Objection.

Court: Overruled.

Exception No. 10

A. It was my understanding to the Bank that Mr. Garner—that he was buying the note from the John Deere people; and he bought the note from them; and therefore he had a first lien on it. Regardless of where the lien came from when he bought that note he picked up the first lien.

We find defendant's claim to be without merit. Exceptions to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection. *Gaddy v. Bank*, 25 N.C. App. 169, 212 S.E. 2d 561 (1975), *citing, Glace v. Pilot Mountain*, 265 N.C. 181, 143 S.E. 2d 78 (1965). Immediately prior to the answer under scrutiny the following exchange occurred between plaintiff's counsel and the witness without objection or exception:

Q. Now, to your knowledge, Mr. Garner knew in advance of that subordination—he knew that was being done, didn't he?

A. I would say he did. He was writing the insurance on it.

Q. He had the insurance to the Bank of Montgomery, didn't he?

A. It was wrote to the Bank of Montgomery, yes, sir.

Q. He had to deliver an insurance binder to the Bank prior to the loan being made, didn't he?

A. That I don't know.

These answers are of the same import as those to which defendant objected. Therefore, assuming arguendo, that the court erred in admitting the testimony to which objection was made, evidence of like import was admitted without objection, thereby rendering harmless any error the court might have made in admitting the evidence.

[3] During his closing argument to the jury, plaintiff's counsel went outside the record and made the statement, "that the defendant Garner had been previously convicted of lying to the jury." There was evidence that on a prior occasion defendant had been convicted and later pardoned for the offense of insurance

fraud. Defendant's motion to strike this statement was allowed, and the judge instructed the jury that the argument was improper and to disregard it. Defendant made a motion for mistrial based upon the inflammatory nature of this statement. This motion was denied. Defendant contends that the denial of his motion for mistrial was prejudicial error.

We disagree. Undoubtedly, plaintiff's counsel should not have made such a remark. However, the record indicates that upon hearing the remark the court took the necessary steps to correct the impropriety.

> When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony. Lacking other proof . . . a jury is presumed to be rational.

State v. McGraw, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980). *See Highway Commission v. Pearce*, 261 N.C. 760, 136 S.E. 2d 71 (1964); *Hamilton v. Henry*, 239 N.C. 664, 80 S.E. 2d 485 (1954). Nothing in this record indicates that the jury would have considered the stricken statement in making their determination.

> Ruling on a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966). However, this discretionary power is not unlimited; a motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law. *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954).

State v. McGraw, supra, at 620, 268 S.E. 2d at 179. In this case we do not think the court abused its discretion in denying defendant's motion for mistrial, it having stricken the objectionable statements and cautioned the jury. Therefore, we find that the court's denial of defendant's motion did not constitute reversible error.

Affirmed.

Judge VAUGHN concurs.

Judge BECTON dissents.

Judge BECTON, dissenting.

I concur in the majority's resolution of every issue except the "jury argument" issue. It is one thing to argue that a witness should not be believed; it is quite another thing to call a witness a liar; and it is yet another thing to tell the jury that a witness has been previously convicted of lying to a jury. Because of the qualitative difference between arguing credibility and placing before the jury, by argument, incompetent and prejudicial matters not supported by the evidence, I respectfully dissent.

I dissent in the face of an incomplete, but not inadequate, record—neither the argument of counsel nor the attempted curative instructions were recorded; the record on appeal simply reflects the following:

> During plaintiff's counsel's closing argument to the jury, a motion was made for the defendant Arnold Garner by and through his attorney to strike plaintiff's counsel's statement that the defendant Garner had been previously convicted of lying to a jury. The motion to strike was allowed and the judge instructed the jury the argument was improper and to disregard it. A motion for mistrial was made based on the said statement of plaintiff's counsel. Motion denied.

Consequently, I do not know the extent to which the trial judge sought to correct the transgression. I do know, however, that "in a clear case, an appellate court will reverse a judgment because of improper conduct and prejudicial statements of counsel, even though the trial court has sustained objections thereto, rebuked counsel, and directed the jury to disregard such statements." 75 Am. Jur. 2d *Trial* § 317 at 389 (1974). *See Belfield v. Coop.* 8 Ill. 2d 293, 134 N.E. 2d 249 (1956). *See also State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). I believe this to be one of those "clear" cases.

Although G.S. 84-14 permits counsel to argue the "whole case as well of law as of fact . . . to the jury," closing "argument is not without its limitations . . . ." 288 N.C. at 712, 220 S.E. 2d at 291. The right to argue is not a license to indulge in vilification or to inject into the trial counsel's beliefs and personal opinions which are not supported by the evidence. Our courts "have spelled out in meticulous detail what is permitted and what is prohibited by way of . . . argument in the trial of cases." (Citations omitted.)

State v. Locklear, 294 N.C. 210, 216, 241 S.E. 2d 2d 65, 69 (1977). It is improper for an attorney to express his personal opinion concerning the veracity of a witness; "[h]e can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Miller*, 271 N.C. 646, 659, 157 S.E. 2d 335, 345 (1967). *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954); *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953). *See also* Disciplinary Rule 7-106 (C), North Carolina State Bar Code of Professional Responsibility.

This is not a case in which counsel argued that the jury should not believe a witness (*compare State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974) in which the Supreme Court upheld such an argument), nor is this a case in which counsel suggested that a witness previously gave false testimony. In this case, counsel asserted not only that the defendant lied before, but also that he *lied to a jury*, and further, that he had been *convicted of lying to a jury*. It is hard to imagine a more damaging and damning statement. It is folly to believe that all twelve jurors were able completely and totally to erase the incompetent and prejudicial statement from their minds.

The remarks of counsel were grossly unfair and well-calculated to mislead and prejudice the jury. In *State v. Britt*, it was said that counsel "should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterizations may legitimately be inferred. *See State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 677 (1962); *State v. Wyatt*, [254 N.C. 220, 118 S.E. 2d 420 (1961)]; *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949)." 288 N.C. at 712, 220 S.E. 2d at 291. There was no evidence in the record on appeal suggesting that defendant had been convicted of lying to a jury. The record shows that defendant had been convicted of insurance fraud in 1975 but was, within a few months following his conviction, granted a full and complete pardon by the Governor based on further investigation and information.

In *State v. Britt*, the prosecutor argued that the defendant had been on death row as a result of his prior conviction of first degree murder in the case then being tried. The court's reasoning and holding bear repeating:

> The trial judge attempted to correct this transgression by sustaining defendant's objection and twice instructing the jury to disregard defendant's prior conviction and return a verdict based solely upon the evidence presented in the present trial. Ordinarily, counsel's improper conduct may be cured by such action by the trial court, *see State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Correll*, 229 N.C. 640, 50 S.E. 2d 717 (1948), since the presumption is that jurors will understand and comply with the instructions of the court. *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972); *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972). We have recognized, however, that some transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors. *See State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Roach*, 248 N.C. 63, 102 S.E. 2d 413 (1958); *State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954); *State v. Dockery, supra*, *State v. Eagle*, 233 N.C. 218, 63 S.E. 2d 170 (1951); *State v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35 (1948); *State v. Little*, supra. A fair consideration of the principles established and applied in these cases constrains us to hold that *no instruction by the court could have removed from the minds of the jurors the prejudicial* effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case. The probability that the jury's burden was unfairly eased by that knowledge is so great that *we cannot assume an absence of prejudice. State v. Hines*, supra. We hold the challenged questions by the district attorney were highly improper and incurably prejudicial. (Emphasis added.)

288 N.C. at 713, 220 S.E. 2d at 292.

Application of these principles to the present case impels me to conclude that the argument made by plaintiff's counsel transcends the bounds of propriety and fairness. This court should not sanction the type of argument in this case and should not "open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach." 271 N.C. at 660, 157 S.E. 2d at 346. Rather,

"[c]ourts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing."

Starr v. Oil Co., 165 N.C. 587, 81 S.E. 776 (1914). Counsel's argument in this case was highly improper and manifestly and incurably prejudicial. Therefore, I vote for a new trial.

MRS. O. A. ABBOTT, ET AL. v. THE TOWN OF HIGHLANDS, ET AL.

No. 8030SC796

(Filed 19 May 1981)

Municipal Corporations § 2— annexation by local act of General Assembly—no unlawful discrimination

A local act of the General Assembly whereby the property of plaintiffs was annexed to defendant town was reasonably related to a valid legislative purpose and did not unlawfully discriminate against property owners in the newly annexed area, though plaintiffs would not receive sewer services upon annexation, since their situation in that regard was no different from that of the many original residents of the town who did not receive sewer services; there were adequate mechanisms for eventally providing sewer services for plaintiffs under the local act and under G.S. 160A-216 et seq; and police, fire, rescue, ambulance, utilities, garbage, zoning, street maintenance and recreational services which plaintiffs received from defendant town would be provided them in the same manner in which these services were provided to all other persons in the town. Moreover, the exclusion of undeveloped land used as a golf course from the territories described in the local act did not violate the equal protection of law requirements of the state or federal constitutions.

APPEAL by plaintiffs from *Thornburg, Judge.* Judgment entered 4 June 1980 in Superior Court, MACON County. Heard in the Court of Appeals 5 March 1981.

Plaintiffs-landowners brought this action to have a local Act (S.L. 1979, C.756) annexing their land to the Town of Highlands declared unconstitutional and to have the enforcement of the Act permanently enjoined. From an adverse decision, plaintiffs appealed. Because the trial court stayed its order pending the appeal, the Town of Highlands (Town) cross-appealed alleging that the

stay denied it the power to tax the plaintiffs although it was required by the Act to provide services to the plaintiffs as of 1 July 1980.

Plaintiffs allege that the Act is unconstitutional in that it deprives them of equal protection of the law in violation of Article I, Section 19 of the Constitution of North Carolina and the fourteenth amendment to the Constitution of the United States (1) by its failure to furnish them sewer services on an equal basis with the present residents of the Town; and (2) by its failure to include in its annexation a 105-acre golf course which is totally surrounded by the newly annexed area. Plaintiffs also contend that the Act is unconstitutional because at Easter, 1979 the State Senate adjourned for a period of more than three days (while the House of Representatives did not) without the benefit of a joint resolution allowing such adjournment. This, according to plaintiffs, was a violation of Article 2, Section 20 of the Constitution of North Carolina and makes the Act void because it was not enacted by a regularly constituted General Assembly.

The facts are stipulated and are set forth in a Judicial Stipulation, relevant portions of which are set out below.

1. On 11 July 1977 the Town, pursuant to Chapter 160A of the General Statutes of North Carolina, enacted an ordinance annexing to the Town an area of land identical to the one in dispute in this case.

2. Some landowners in the area affected by the ordinance (including some of the plaintiffs herein) filed a petition for review of said Ordinance in the Macon County Superior Court (Civil Action Number 77CVS153).

3. On 22 September 1977, following a trial, a judgment was entered voiding the attempted annexation on the grounds, among other things, that said "Plan and Ordinance of Annexation fail to provide for services as required by G.S. 160A-35 with respect to water, sewer, ..."

4. No appeal was taken from the judgment in Civil Action Number 77CVS153.

5. Prior to 1977, the Town furnished sewer services to its business or commercial district and to *some* apartment houses and residences within the existing Town limits. The Town was

financially unable to extend the sewer services into the area it sought to annex because of the rocky terrain and the variations in elevation between the area sought to be annexed, which was in the southwest portion of Town, and the Town's sewer treatment plant, which was north of Town.

6. On 24 March 1980 the Town enacted its present sewer use ordinance which includes provisions explaining how a landowner can "connect to the available sewer line" and explaining "user fees."

7. For plaintiffs and other persons within the annexed area "willing to install lines and pay the total cost, not only for the hook-ups, but for the main line as well, the Town stands ready to provide sewer services under the present ordinance. There is no existing plan by the Town of Highlands [nor has any money been appropriated] to extend sewer service into the area added by the local Act or into those parts of the existing Town that are not already served except in accordance with the present ordinance."

8. Plaintiffs obtain water service from the golf course located near their properties, and the Town is presently negotiating with the golf course for acquisition of that water system. The Town's present water system serves Town residents and all of the property to be included in the Town under the Act.

9. The Town intends to collect taxes on plaintiffs' property and to enforce all Town regulations.

10. "On or about March 9, 1979, H.B. 728 was introduced in the House of Representatives of the General Assembly of North Carolina."

11. "The Senate of the General Assembly of North Carolina met on Good Friday, April 13, 1979, and adjourned on Friday, 13 April 1979 until the following Tuesday, two o'clock p.m., 17 April 1979, and did not meet at any time between said adjournment and the following Tuesday."

12. "The House of Representatives of the General Assembly of North Carolina met on Good Friday, April 13, 1979, and on the Monday following."

13. "There was no resolution of both Houses of the General

Assembly of North Carolina to adjourn for any period longer than three days, until adjournment in June, 1979."

The trial court made findings of fact in accordance with the Judicial Stipulation, and then set forth its Conclusions of Law. With regard to plaintiffs' equal services claim, the trial court *stated* that plaintiffs were denied equal protection *but concluded* that the legislature did not have to comply with equal protection requirements in creating new boundaries for the Town. Specifically, Conclusion of Law Number 4 reads:

> In the context of the factual background of this case, including the earlier effort by the Town of Highlands to annex property of plaintiffs and the litigation and judgment which followed, S.L. 1979, C. 756, and, as it provides, the addition of plaintiffs' property to the Town of Highlands (with the attendant taxation and enforcement of ordinances and regulations) without providing plaintiffs with equal, or substantially equal, sewer services as the Town of Highlands provides some of its other residents fails to comport with the equal protection of the laws requirements of Article I, Section 19 of the Constitution of North Carolina and Amendment XIV, Section I of the Constitution of the United States at the time the addition of such property to the Town of Highlands is effective; the court concludes, however, that comporting with such requirements is not a necessary prerequisite to the exercise of legislative authority by the General Assembly of North Carolina to create new or additional boundaries of a town.

With regard to the Town's failure to include the 105-acre golf course within its municipal boundaries, the court concluded that the exclusion of the golf course "does not so break contiguity as to make the legislative act illegal or unconstitutional." The court finally concluded that adjournment of the Senate for more than three days at Easter 1979 without a joint resolution was a constitutional violation but that this violation did not make the Act invalid nor affect the General Assembly's ability to enact valid legislation following the adjournment.

Herbert L. Hyde for plaintiff appellants.

Rodgers, Cabler & Henson, by Richard T. Rodgers and J. Edwin Henson, and Womble, Carlyle, Sandridge & Rice, by E. Lawrence Davis, Roddey M. Ligon, Jr. and Anthony H. Brett, and Assistant Attorney General Douglas A. Johnston, for defendant appellees.

BECTON, Judge.

The purpose of annexation is to provide urbanly-developed areas with governmental services needed therein for public health, safety, protection and welfare. North Carolina has five methods of annexing urbanly-developed areas:

1. By an Act of the General Assembly (before 1947 this was the only method available, and all annexations were by special legislative acts), G.S. 160A-21;

2. By referendum, G.S. 160A-24;

3. On petition of 100% of real property owners in the area sought to be annexed, G.S. 160A-31;

4. By city ordinance if the territory meets the statutory-standards of urban development and if the city demonstrates its ability to provide services to the area to be annexed[1], G.S. 160A-33, *et seq.*;

5. On petition of 100% of the real property owners in non-contiguous satellite areas, G.S. 160A-58.1.

Using method number four above—city ordinance—the Town sought in 1977 to annex plaintiffs' property. The Town was unsuccessful in its efforts however, because it was unable to demonstrate its ability to provide services to the area to be annexed in accordance with G.S. 160A-33, *et seq.* Defeated, but undaunted, the Town sought in 1979 to annex the same area by using method number one above—getting the General Assembly to pass a Local Act, S.L. 1979, C.756.

I

That the General Assembly is by law authorized to enlarge municipal boundaries by the annexation of new areas is clear beyond cavil. Our constitution empowers the General Assembly to determine the municipal limits of the political subdivisions of the State.

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions . . .

1. This procedure requires the annexing city to develop a report on services and financing and to hold a public hearing.

N.C. Const. art. VII, § 1. As indicated, even though the General Assembly gave municipalities the power, under certain circumstances, to extend their own boundaries, the General Assembly specifically recognized its own power to continue to extend boundaries by local act. G.S. 160A-21 states:

> The boundaries of each city shall be those specified in its charter with any alterations that are made from time to time in the manner provided by law *or by local act of the General Assembly.* (Emphasis added.)

Our Supreme Court has spoken with consistency and clarity on the General Assembly's power to determine municipal boundaries:

> We have held in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson,* 148 N.C. 423, and *Perry v. Comrs., ibid.,* 521; *Manly v. Raleigh,* 57 N.C. [370], 372.
>
> Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do.

Lutterloh v. Fayetteville, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908). *See also Plemmer v. Matthewson,* 281 N.C. 722, 190 S.E. 2d 204 (1972); *Chimney Rock Co. v. Lake Lure,* 200 N.C. 171, 156 S.E. 542 (1931). "Annexation by a municipal corporation is a political question which is within the power of the state legislation to regulate." *Texfi Industries v. City of Fayetteville,* 301 N.C. 1, 7, 269 S.E. 2d 142, 147 (1980). *See also Hunter v. City of Pittsburgh,* 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40 (1907).

In spite of the foregoing general comments, the power of the legislature to expand the boundaries of cities, towns, or other

local units, though great, is not unlimited. The caveat in *Lutterloh*—that annexation rests in the discretion of the legislature "[i]n the absence of constitutional restrictions" *id.* at 69, 62 S.E. at 760—tells us that a local act is not insulated from judicial review when it is an instrument for circumventing a constitutionally protected right.

II

With these principles in mind, we address plaintiffs' first contention—that the Act is constitutionally infirm since, as they argue, they will be wrongfully denied sewer services. We are not persuaded that the Act is an instance of over-reaching by the General Assembly or that the General Assembly's involvement in the extension of the Town's boundaries is "suspect" and deserving of close scrutiny.

> Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made. *See generally* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 522-527 (1978); L. Tribe, American Constitutional Law §§ 16-2, 16-6 (1978); *compare Craig v. Boren*, 429 U.S. 190, 210, 50 L.Ed. 2d 397, 415, 97 S.Ct. 451-463 (1976) (Powell, J., concurring) *but see San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 70, 36 L.Ed. 2d 16, 64, 93 S.Ct. 1278-1315 (1973) (Marshall, J., dissenting).
>
> When a governmental act classifies persons in terms of their ability to exercise a fundamental right, e.g., *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 23 L.Ed. 2d 583, 89 S.Ct. 1886 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969), or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, e.g.; *Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954), the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. E.g., *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed. 2d 306, 94 S.Ct. 1076 (1974).
>
> When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. E.g., *Vance v. Bradley*, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979). This mode of

analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. E.g., *New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed. 2d 511, 96 S.Ct. 2513 (1976); *Hagans v. Lavine*, 415 U.S. 528, 39 L.Ed. 2d 577, 94 S.Ct. 1372 (1974).

Texfi Industries v. City of Fayetteville, 301 N.C. at 10-11, 269 S.E. 2d at 149. This case does not involve an infringement of a fundamental right. This case presents no issues involving discrimination on account of race or national origin or on the bases of any other suspect classifications. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 2d 110, 81 S.Ct. 125 (1960); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F. 2d 799 (5th Cir. 1974). Consequently, our equal protection analysis (under both the federal and state equal protection provisions) is to determine on the facts of this case if the Act is reasonably related to a valid legislative purpose. *See Watson v. Maryland*, 218 U.S. 173, 54 L.Ed. 987, 30 S.Ct. 644 (1910) and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337 (1911).

We conclude that the Act is reasonably related to a valid legislative purpose and that the Act does not unlawfully discriminate against property owners in the newly annexed area for the following reasons.[2]

The record does not show that the plaintiffs will be the victims of unlawful discrimination in the provision of sewer services. First, this is not a case where all original residents of the Town receive sewer service, and none of the newly annexed residents of the Town whose lands are described in the Act will receive such service. The Judicial Stipulation is clear. The Town "furnishes sewer services to its business or commercial district and to some apartment houses and residences within the existing town limits, . . . The [Town] also provides water services to its residents and to some property outside its corporate limits," including property

2. Although the trial judge ultimately reached the same conclusions we reach, we find error in the following statement by the trial judge prefacing Conclusion of Law Number 4: "[T]he addition of plaintiffs' property to the Town of Highlands (with the attendant taxation and enforcement of ordinances and regulations) without providing plaintiffs with equal, or substantially equal sewer services as the Town of Highlands provides some of its other residents fails to comport with the equal protection of the laws requirements . . ."

of some of the plaintiffs. The Town has sought to provide water and sewer services to its commercial properties and to property with a high population density (apartment complexes). Although plaintiffs will not receive sewer services upon annexation, their situation in this regard is no different from that of the many original residents of the Town who do not receive sewer services.

A crucial second point is that there are adequate mechanisms for eventually providing sewer services for plaintiffs under the ordinance and under 160A-216 *et seq.* The Town's 16 May 1979 sewer use ordinance contains separate articles concerning use of public sewers, use charges, and sanitary sewer extensions. The fact that sewer services can only be made available to plaintiffs at some cost or "user fee" does not invalidate the Act. Moreover, G.S. 160A-237 provides a procedure for establishing sewer services or extending sewer services in all North Carolina Municipalities. G.S. 160A-216(4) (Supp. 1979) provides that the statutory special assessment procedure may be used for the construction of "sewage collection and disposal systems of all types, including septic tank systems and other on-site collection or disposal facilities or systems." So, even if traditional sewer lines cannot economically be installed to provide services to plaintiffs, this legislation authorizes the Town to provide sewer services by the use of alternative methods.

Finally, appellants do not deny that the police, fire, rescue, ambulance, utilities, garbage, zoning, street maintenance and recreational services which they receive from the Town will be provided them in the same manner in which these services are provided to all other persons in the Town. Consequently, because sewer service is but one of a host of municipal services which a resident of a municipality may receive, we do not believe that the Town's failure to provide one of many essential services is sufficient *on these facts* to declare the Act altering the municipal boundaries to be unconstitutional.

III

Plaintiff's second constitutional argument is that the Act's failure to include a golf course within the municipal boundaries of the Town denies them equal protection. The General Assembly in its discretion added new territory to the Town but excluded an island or enclave therein, used as a golf course, from the boundaries of the Town. Although plaintiffs state in their brief that "the idea of a town includes the notion of contiguity and cohesive-

ness," plaintiffs nowhere suggest the presence of a "constitutional restriction" limiting the power of the legislature under *Lutterloh v. Fayetteville.* Plaintiffs allege that they "are not treated in the same way," but have failed to show in what way they are treated differently. Indeed, they have not shown that the General Assembly's action in any way harmed them or that the exclusion of the golf course affected them any differently from the way it affects all other residents of the Town.

Contiguity and cohesiveness are not constitutionally required in this annexation proceeding under G.S. 160A-21,[3] *see Chimney Rock Co. v. Lake Lure,* 200 N.C. 171, 156 S.E. 542 (1931). And, unless contiguous areas are excluded for constitutionally impermissible reasons, we cannot substitute our judgment for that of the legislature. The legislative judgment may have been based on the fact that the excluded land contains no structures and would obviously require little or no municipal services. We conclude that the exclusion of undeveloped land used as a golf course from the territories described in the Act does not violate the equal protection of law requirements of the state or federal constitutions.

IV

We treat plaintiffs' final contention—that the Senate's adjournment without a joint resolution of both houses of the General Assembly invalidates the Act—summarily. Our review of the record indicates that the Senate adjourned on Friday, 13 April 1979 and resumed its session on Tuesday, 17 April 1979. Because it is clear that the Senate was adjourned for a period of three days only—Saturday, Sunday and Monday—there is absolutely no evidence that it adjourned for more than three days.

North Carolina Constitution Article II, Section 20 provides:

> Powers of the General Assembly. Each house shall . . . sit upon its own adjournment from day to day, . . . The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

Even if the adjournment had been for more than three days, the recess could not serve as the basis for declaring legislation enacted by the General Assembly to be unconstitutional.

3. Non-contiguous satellite annexation is specifically authorized pursuant to G.S. 160A-58.1. *See Hawks v. Town of Valdese,* 299 N.C. 1, 261 S.E. 2d 90 (1980) for a detailed analysis of the requirements of "contiguity" and "cohesiveness."

V

The Town cross-assigns as error the trial court's decision to stay its judgment pending appeal which prohibited the Town from taxing plaintiffs pending this appeal. The plaintiffs won round one in 1977—their equal protection challenge was upheld in 77CVS153. Even in this their second attempt to thwart the Town's effort to annex their property, plaintiffs convinced the trial judge that the Act "failed to comport with the equal protections of the law." Although the trial judge ultimately concluded that the equal protection violation did not constitute grounds for invalidating the Act, we cannot say that the plaintiffs' claims were wholly frivolous. There were some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured. Consequently, we find no abuse of discretion in the judge's decision to stay the judgment pending appeal. In this case, we find

No prejudicial error.

Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU

No. 8010INS953

(Filed 19 May 1981)

Insurance § 116— fire and extended coverage rates—withdrawal of filing—voidness of order entered by Commissioner of Insurance

The N. C. Rate Bureau could withdraw a voluntary filing for dwelling fire and extended coverage rates after the Commissioner of Insurance had set the filing for a public hearing, and an order entered by the Commissioner of Insurance after such withdrawal disapproving the fire insurance filing and approving a decrease in extended coverage rates was null and void. Furthermore, the Commissioner of Insurance was estopped from claiming that the filing could not be withdrawn by a press release he issued on the same date the filing was withdrawn, and the Commissioner's order was also void because it was rendered without the hearing on the filing required by G.S. 58-124.21(a).

APPEAL by respondent, the North Carolina Rate Bureau, from an order issued by the Commissioner of Insurance on 20 June 1980. Heard in the Court of Appeals 8 April 1981.

On 24 March 1980, the North Carolina Rate Bureau (hereinafter the Rate Bureau), which was created pursuant to the provisions of G.S. 58-124.17 *et seq.* (Cum. Supp. 1979), filed with the North Carolina Commissioner of Insurance (hereinafter the Commissioner) proposed revisions in dwelling fire and extended coverage insurance rates. In its "filing"[1] the Rate Bureau set forth its need for an average statewide rate-level increase of 18.1% for fire coverage and an average statewide rate-level decrease of 18.5% for extended coverage. The cover letter pointed out, however, that "[i]n accordance with G.S. 58-124.26 the increase in the overall level of rates in this filing has been limited to 6% over the general rate level in effect as of the effective date of G.S. 58-124.26, as amended." The Rate Bureau, therefore, filed for a 10.6% increase in fire rates and a 6.5% decrease in extended coverage rates.[2] The data used to develop rate level indications were for five years ending December 31, 1977 for fire and for ten years ending December 31, 1977 for extended coverage.

On 23 April 1980, the Commissioner filed a notice of a public hearing to be held on 10 June 1980. In his notice, the Commissioner, pursuant to G.S. 58-124.21, contended that the Rate Bureau's filing failed to comply with the requirements of Article 12B of Chapter 58 of the General Statutes (G.S. 58-124.17 *et seq.*), and he requested further information and breakdown of data. In paragraph (5), the Commissioner stated:

> The filing does not indicate whether the experience upon which this filing is based has been audited. The accuracy of

1. The "filing" consisted of the 24 March 1980 cover letter, memoranda, and supporting exhibits.

2. We note that (1) an extended coverage policy can only be purchased as an optional addition to a dwelling fire insurance policy; (2) approximately 95% of all insureds who purchase dwelling fire insurance also purchase extended coverage insurance; (3) extended coverage changes are allocated by territory; and (4) the statewide rate-level change sought in the filing was an *average* change. The Rate Bureau argues that its computations "supported an overall increase in dwelling fire and extended coverage rates of 8.3%." The existence of the statutory cap set forth in G.S. 58-124.26 "necessitated the allocation of the rate indications to arrive at the 6% figure, and, accordingly, the filing sought a 10.6% [not 18.1%] increase in the fire portion and a 6.5% [not 18.5%] decrease in the extended coverage portion." As noted by the Commissioner "there was no explanation in the filing for the discrepancy between the 'need' and the 'change contained in the material' (and the only explanation we can think of is an attempt by the Bureau to combine the fire and extended coverage results so that the 6% statutory . . . cap on rates would not be applied separately) . . . ."

> unaudited data cannot be assumed. You are hereby directed to furnish verification as to whether the experience upon which this filing is based was audited by independent auditors. . . .

In response to the Commissioner's notice of hearing, the Rate Bureau sent a letter furnishing the information requested by the Commissioner. The Rate Bureau stated that the aggregate experience of the filing had not been audited by independent auditors.

On 6 June 1980, the Rate Bureau sent the Commissioner a short letter withdrawing the filing of 24 March[3] and indicating that a new filing containing 1978 data would be made at an early date. On that same day, the following press release issued from the Commissioner's office:

> News from:
> Insurance Commissioner's Office, Raleigh, N.C. 27611
> Contact: Oscar S. Smith, Jr. June 6, 1980
> Media News Line (919) 733-5424
>
> THE NORTH CAROLINA RATE BUREAU BACKS OFF REQUEST FOR FIRE AND EXTENDED COVERAGE INCREASE
>
> RALEIGH, N.C. . . . . The North Carolina Rate Bureau has backed off a filing that would increase Fire and Extended coverage in North Carolina.
>
> State Insurance Commissioner John Ingram told reporters Friday that one of the main reasons for withdrawing the filing was the ability of the Insurance Commissioner's Office to obtain a Fellow from the Casualty Actuarial Society to serve as an expert consultant for the North Carolina Insurance Commissioner's Office. Ingram received approval for $90,000.00 to secure the services of the expert consultant by transferring unused salary funds from his 1979-80 budget to the coming fiscal year. Ingram said he obtained the services of Doctor Phillip Stern, a Fellow in the Casualty Actuarial Society, to assist in the Rate Hearing that was scheduled to begin on Tuesday (the 10th) of next week.

3. The 24 March 1980 filing was voluntary. Unlike the procedure set forth in G.S. 58-124.20(d) with respect to motor vehicle liability insurance, there is *no requirement* that the Rate Bureau make an annual filing for dwelling fire and extended coverage insurance.

Ingram said Stern gave the Insurance Commissioner's Office "certain questions to ask insurance companies through the Rate Bureau". Ingram says when they received the questions and found out that Stern would be a witness in the Hearing on Tuesday they backed off and withdrew the filing.

Ingram says the withdrawal will save the people of North Carolina $1,500,000.00, an increase that in all probability would have been put into effect regardless of the Commissioner's decision on the Hearing. Ingram says with the use of the Actuary there could have been additional savings had the Hearing proceeded because a rate reduction was indicated.

* * *

On 10 June 1980, the date originally set for the public hearing, neither the representatives of the Rate Bureau nor representatives of the Commissioner appeared at the time and place set for the hearing. No evidence was presented. Nevertheless, on 20 June 1980, the Commissioner issued an order in which he made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That the North Carolina Rate Bureau made a filing for revised rates for Dwelling Fire and Extended Coverage.
2. That said filing proposed an indicated need for an 18.1% increase for fire and an average statewide rate level decrease of 18.5% for Extended Coverage.
3. That said filing is subject to a 6% rate increase cap pursuant to North Carolina General Statute 58-124.26.
4. That the North Carolina Rate Bureau was served with a Notice of Public Hearing dated April 23, 1980, which scheduled a hearing for June 10, 1980.

* * *

9. That the staff of the Department of Insurance has expended significant time and energy in preparing for this matter.
10. That the Commissioner of Insurance has expended significant time and energy in securing the services of an ac-

tuary to review the captioned filing, including a trip to Wilmington, Delaware to interview Dr. Phillip Stern.

11. That the Commissioner of Insurance contracted for the services of Dr. Phillip Stern to review the captioned filing and appear as an expert witness.

12. That the North Carolina Rate Bureau was provided with the names of the individuals who would appear on behalf of the Department, including the name of Dr. Phillip Stern, in response to the North Carolina Rate Bureau's request for a witness list dated May 30, 1980.

13. That by letter dated June 6, 1980 the North Carolina Rate Bureau stated it was withdrawing the above captioned filing.

14. That the withdrawal of the filing was subsequent to the setting of the captioned matter for public hearing.

15. That the North Carolina Rate Bureau did not appear at the June 10, 1980 hearing and no evidence was presented.

16. That by letter dated May 20, 1980 the North Carolina Rate Bureau stated that the filing was not audited.

17. That the filing as it relates to the fire coverage is not credible because it is based on unaudited information and it should be disapproved and permission to withdraw the filing as it relates to the fire coverage should be allowed.

18. That unaudited data or financial information which is the basis for the rate calculations in this filing is not reliable as a basis for making rate projections.

19. That by requesting the 18.5% reduction in extended coverage contained in the Rate Bureau filing of March 24, 1980, the Rate Bureau is estopped to claim that such 18.5% decrease will produce rates that are inadequate, and such 18.5% decrease in extended coverage should be approved as more reasonable, less excessive and less unfairly discriminatory than the present rates.

CONCLUSIONS OF LAW

1. That in accordance with *State of North Carolina, ex rel. Commissioner of Insurance v. North Carolina Fire In-*

surance Rating Bureau, 29 N.C. App. 237 a filing cannot be withdrawn after the setting of a public hearing without the permission of the Commissioner of Insurance.

2. That permission to withdraw a filing after the setting of a public hearing is within the discretion of the Commissioner of Insurance.

3. That the North Carolina Rate Bureau did not appear at the June 10, 1980 hearing and no evidence was presented.

4. That by failing to appear the North Carolina Rate Bureau waived its right to be heard.

5. That the Rate Bureau has failed to carry its burden of proof and satisfy the Commissioner that the requested increase for the fire coverage is adequate, not excessive and is not unfairly discriminatory.

6. That by requesting an 18.5% reduction in extended coverage contained in the Rate Bureau filing of March 24, 1980, the Rate Bureau is estopped to claim that such 18.5% decrease will produce rates that are inadequate and such 18.5% decrease in extended coverage should be approved as more reasonable, less excessive and less unfairly discriminatory than the present rates.

7. That the filing as it relates to the fire coverage is not credible because it is based on unaudited information and should be disapproved and permission to withdraw the filing as it relates to the fire coverage be allowed.

8. That unaudited data or financial information which is the basis for the rate calculations in the filing is not reliable as a basis for making rate projections.

Based on these findings of fact and conclusions of law, the Commissioner *disapproved* the fire insurance filing and *approved* an 18.5% decrease in extended coverage. To each and every finding of fact, conclusion of law, and order, the Rate Bureau excepted. Thereafter, on 11 July 1980, the Rate Bureau filed with the Commissioner a Motion to Vacate his 20 June Order. The record is silent as to the Commissioner's ruling, if there was a ruling, on that motion. On 18 July 1980, the Rate Bureau filed notice of appeal to this Court.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the Commissioner of Insurance.

Young, Moore, Henderson & Alvis, by William M. Trott and Dan J. McLamb, for the North Carolina Rate Bureau, Appellants.

BECTON, Judge.

Article 12B of Chapter 58 of the North Carolina General Statutes is the enabling legislation for the North Carolina Rate Bureau which was designed to assume the rate-making functions formerly performed by the North Carolina Rating Bureau, the North Carolina Automobile Rate Administrative Office and the Compensation Rating and Inspection Bureau of North Carolina. G.S. 58-124.17. Under G.S. 58-124.20, the Rate Bureau must file with the Commissioner copies of the rates, classification plans, rating plans and systems used by member insurance companies. Each filing becomes effective as of the date specified in the filing, but no earlier than ninety days from the date the Commissioner receives the filing. G.S. 58-124.21 gives the Commissioner discretionary authority to give the Rate Bureau written notice, within thirty days of a filing, that such filing does not comply with the requirements of Article 12B and that a date not less than thirty days from the mailing of such notice has been set for a public hearing on the filing.

Article 12B is silent on the questions of how and when a filing might be withdrawn by the Rate Bureau. In *Comr. of Insurance v. Rating Bureau,* 29 N.C. App. 237, 224 S.E. 2d 223, *affirmed,* 291 N.C. 55, 229 S.E. 2d 268 (1976), the North Carolina appellate courts agreed that a rating bureau (in that case, the North Carolina Fire Insurance Rating Bureau) could withdraw a filing if it did so before the Commissioner took any action on the filing and before the filing could go into effect pursuant to G.S. 58-131.1.[4] Both this court and the Supreme Court held open the question of whether a rating bureau could withdraw a filing after the Commissioner had set the filing for a public hearing. That issue now confronts us.

4. G.S. 58-131.1, the so-called "deemer" provision, has been replaced by G.S. 58-124.21(b) by which a filing is "deemed to be approved" if no notice of hearing is issued within thirty days from the date of the filing.

We hold that it was proper for the Rating Bureau to withdraw its voluntary filing in this case.[5] In reaching this conclusion, we have been guided by the reasoning found in the following words of the Supreme Court decision in *Comr. of Insurance v. Rating Bureau:*

> We have heretofore said that when the Bureau makes a filing in which it proposes an increase in the premium rates, "unquestionably, the Bureau may amend its filing so as to propose a smaller increase in premium rates than that proposed in the original filing." [Citation omitted.] We find no merit in the contention of the Commissioner that once a filing is made the Bureau cannot withdraw it, but it remains before the Commissioner for his approval, disapproval or modification.
>
> If a filing, once made, could never be withdrawn, it would follow that if the Bureau made a filing proposing a substantial increase in the premium rates which the Commissioner, with or without justification, failed to disapprove within 60 days after its submission, such increase would go into effect, at least temporarily, pursuant to the "deemer" provision of G.S. 58-131.1, even though the Bureau were to find that its calculations were in error and no increase was justified and were to advise the Commissioner of such an error and of its desire to withdraw the proposal. It can hardly be supposed that the Legislature, by the enactment of Article 13 of Chapter 58 of the General Statutes, creating the Bureau, so intended. Nothing in the statute relating to filings by the Bureau supports the contention that a filing, once made, cannot be withdrawn for any reason satisfactory to the Bureau. In this respect, there is no basis for making a distinction between a filing which proposes an increase in the premium rate and a filing which proposes a decrease in such rate. We, therefore, hold that the Court of Appeals was correct in its determination that the Bureau was acting within its rights in withdrawing this filing . . . .

291 N.C. at 66, 229 S.E. 2d at 274. This analysis applies with equal force to the situation before us. We find no compelling

5. There is no suggestion in the Record before us that the Commissioner has been bombarded with a series of filings and last-minute withdrawals which might naturally tie the Commissioner's hands. We save for another day our judgment on the propriety of a well-calculated withdrawal by the Rate Bureau to gain a tactical advantage over the Commissioner.

reason to conclude that a voluntary filing may not be withdrawn. The Commissioner's argument that allowing withdrawals will thwart the intent of Chapter 12B to avoid delays in the rate-making process is not persuasive. Withdrawals of filings for rate increases will delay the effective dates of such increases and will, it seems logical to assume, be avoided by the Rate Bureau. Furthermore, the references in the Commissioner's Order to expenditure of time and energy by Commission staff is also unpersuasive. The withdrawal of the filing reduced the amount of work necessitated by the filing. Much of the preparation for the 10 June hearing should prove beneficial if, and when, the Rate Bureau resubmits a filing. Moreover, the Commissioner performs his service ably and well and saves the State money when he prevails at a hearing or forces the Rate Bureau to withdraw or amend its filing prior to a hearing.

Since the Rate Bureau withdrew its filing, the matter was concluded. There was, therefore, no proposal before the Commissioner for a change in fire and extended coverage rates. The order appealed from was null and void and is vacated.

For two additional reasons, the order appealed from must be vacated. First, the Commissioner was, by virtue of his press release of 6 June 1980, estopped from claiming that the filing could not be withdrawn. We read the last paragraph of that press release, containing the phrases "the withdrawal will save the people . . ." and "had the Hearing proceeded," as clear indications that the Commissioner acquiesced in the withdrawal of the filing and in cancellation of the hearing. We are not here implying that the Commissioner intentionally or fraudulently misled the Rate Bureau by his press release. It is not necessary to show bad faith, fraud, or intent to deceive before the doctrine of equitable estoppel can be applied. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971).

> [A] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. . . . [T]he fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party.

Hamilton v. Hamilton, 296 N.C. 574, 576-77, 251 S.E. 2d 441, 443 (1979), *quoting* H. McClintock, Equity § 31 (2d ed. 1948).

At no point in the case before us did the Commissioner indicate to the Rate Bureau that the withdrawal of its filing was unacceptable. Indeed, the record shows that at the time and place set for the hearing, neither the Commissioner nor the Rate Bureau sent representatives. No evidence was presented. The 20 June 1980 filing of an order in this matter was entirely inconsistent with the Commissioner's earlier position. He was, therefore, estopped from issuing an order in this matter.

Finally, the Commissioner's Order is void because it was rendered in the absence of a hearing on the filing. G.S. 58-124.21(a) states, in part, that at the hearing set by the Commissioner, evidence as to factors pertinent to the proposed rate *shall* be considered. "If the Commissioner *after hearing* finds that the filing does not comply with the provisions of this Article, he may issue his order . . . ." (Emphasis added.)

We find it unnecessary to address the obvious question of the due process rights of the member companies of the Rate Bureau. The statutes referred to above make adequate provisions for protecting their due process rights to notice and hearing. "It is only necessary that the Commissioner comply with the mandates of the statutes." *Comr. of Insurance v. Rating Bureau*, 29 N.C. App. at 248, 224 S.E. 2d at 229. Here, the Commissioner entered an order even though there had been no hearing.

The order appealed from is, therefore,

Vacated.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

CASSIE LEE BUCK, EMPLOYEE v. PROCTER & GAMBLE MANUFACTURING COMPANY, EMPLOYER; SELF-INSURER COMMON DEFENDANT

No. 8010IC817

(Filed 19 May 1981)

Master and Servant § 65.2— back injury—causal connection between injury and accident—sufficiency of evidence

There was sufficient competent evidence to support the conclusion of the Industrial Commission that plaintiff sustained an injury by accident arising out

of and in the course of her employment with defendant which resulted in a fifteen percent permanent partial disability of the back where an expert medical witness expressed an opinion, "based on reasonable medical certainty," that plaintiff's disc defect could have been caused by her fall at work and that the defect also could have been the result of an aggravation, caused by the fall, of a preexisting back condition.

APPEAL by defendant from the North Carolina Industrial Commission opinion and award of 5 March 1980. Heard in the Court of Appeals 10 March 1981.

The Full Commission affirmed the opinion and award filed 27 April 1979, wherein the deputy commissioner concluded that plaintiff had sustained an injury by accident arising out of and in the course of her employment with defendant which resulted in a fifteen percent permanent partial disability of the back entitling her to compensation at the rate of $80.00 per week for forty-five weeks.

The following evidence, in pertinent part, was presented at the hearing held before the deputy commissioner to determine the compensability of plaintiff's claims against her former employer. Plaintiff slipped and fell on some oily stairs at defendant's plant while she was fulfilling her normal work duties as a salter cooler technician on 21 September 1975.[1] She testified that her back became sore, but the pain was not severe. She, however, continued to experience sharp pains in her back whenever she attempted to straighten up after sitting down during the next few months. She stated that:

> [f]rom the time I fell and afterwards as I sat down, I felt the sharp pain in my back, tried to straighten up and move it on out after a few seconds. Any time I tried to do any work, even around my house or around the yard, I could tell a difference. And that was the biggest thing I could tell, a big difference. Prior to that time I could do any kind of work. I never had anything to bother me.

Thus, in December, she went to see her family doctor, Dr. Joseph M. Ward, about some pain she was having in the back of

1. A former co-employee of plaintiff at defendant's plant corroborated her testimony about the slip and fall at work. Further facts concerning the incident are omitted because defendant has conceded any issue regarding the actual occurrence of the accident in September 1975.

her leg. She said that he told her that she might have a pinched nerve or rupture.

Dr. Ward testified that plaintiff had a prior medical history of back discomfort. Specifically, some x-ray reports taken in 1970 showed that plaintiff had a mild narrowing of the L-4 and L-5 interspaces in her back. Dr. Ward concluded that this narrowing "meant Mrs. Buck would likely have disc trouble." Dr. Ward further testified that he next saw plaintiff on 4 September 1975. During this visit, she mentioned lower back pain and said that she had had back trouble off and on "all [her] life." Dr. Ward's diagnosis on 4 September 1975 was acute recurrent low back syndrome. Dr. Ward again examined plaintiff in December 1975 (after the accident) with regard to her complaint about radicular pain in the area of her thighs. He concluded that her problem was due to "radicular syndrome pressure on the nerve roots causing her to have pain in the lower extremities" and that this symptom was "more suggestive in regard to disc trouble." On cross-examination, Dr. Ward stated that plaintiff had a preexisting back condition "to some degree or another" when she started working for defendant in 1974. Nevertheless, he also admitted that he did not know whether or not she aggravated that condition subsequent to her employment.

Dr. Richard Gavigan subsequently treated plaintiff on 12 February 1976 on referral from defendant's plant physician concerning her complaints about involuntary loss of control of urination and a six-month history of pain in her lower back radiating into her right lower extremity. As a medical expert in urology, Dr. Gavigan responded to a hypothetical question that plaintiff's urinary incontinence could have or might have been caused by her slip and fall in 1975.

Dr. Robert L. Timmons, a medical expert in neurosurgery, began treating plaintiff for her back problems in May 1976. His associate, Dr. Hardy, examined plaintiff on 31 March 1976 and performed a myelography on 11 May 1976 which revealed a disc defect between the fourth and fifth lumbar vertebra, L-4, L-5 interspace on both sides. Dr. Timmons concluded that the defect was "most likely" due to a herniated or protruded disc. During the subsequent surgery performed on 17 May 1976, Dr. Timmons noted that the L-4 and 5 disc was protruded under the nerve root.

On direct examination at the hearing, Dr. Timmons testified that plaintiff's fall at defendant's plant could have or might have caused this disc protrusion. On cross-examination, however, he stated that it was equally possible that the defect was caused by a degenerative condition. Nevertheless, on redirect examination, he said that it was probable that the fall of 21 September 1975 could have aggravated that degenerative condition and caused the disc to rupture ultimately. Finally, on recross-examination, Dr. Timmons stated that the fall could have caused the protrusion but that it would not have caused the damage to the disc.

At the conclusion of the hearings, the deputy commissioner awarded plaintiff compensation for the permanent partial disability to her back. The critical findings made by the commissioner to support this award are as follows:

> 10. Dr. R. L. Timmons expressed an opinion, which was based on reasonable medical certainty, that the plaintiff's defect at the L4-L5, bilateral could or might be the result of the fall on September 21, 1975. It was also the opinion of Dr. Timmons that the fall on September 21, 1975 could have aggravated a pre-existing back condition thereby resulting in the defect at the L4-L5, bilateral.
>
> . . . .
>
> 15. There was a showing of an interruption of the plaintiff's regular work routine. The plaintiff did in fact, at the time complained of, sustain an injury by accident arising out of and in the course of her employment.
>
> 16. The plaintiff's bladder, leg and back difficulties were the direct and natural result of the injury by accident on September 21, 1975.
>
> 17. The plaintiff was out of work and temporarily totally disabled from March 31, 1976 to September 27, 1976, as a result of the injury by accident arising out of and in the course of her employment.
>
> 18. The plaintiff sustained a fifteen percent permanent partial disability of the back as a result of the injury by accident arising out of and in the course of her employment.

Defendant took exception to each of these findings and now appeals from the opinion of the Full Commission which, after review of the record, found no reversible error and affirmed the award of the deputy commissioner on 5 March 1980.

Lanier, McPherson and Miller, by Jeffrey L. Miller, for plaintiff appellee.

Maupin, Taylor and Ellis, by Albert R. Bell, Jr., and Jane Fox Brown, for defendant appellant.

VAUGHN, Judge.

At the outset, we must determine the applicable scope of judicial review on this appeal.[2] G.S. 97-86 states the review standard for awards of the Industrial Commission. The statute provides that such awards "shall be conclusive and binding as to all questions of fact; but either party to the dispute may . . . 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." (Emphasis added.) G.S. 97-86, in effect, requires appellate courts to limit their review of workers' compensation awards for legal errors to a two-fold determination of whether the Commission's findings are supported by *any* competent evidence and whether its subsequent legal conclusions are justified by those findings. *See Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980). Clearly, it is not the function of any appellate court to retry the facts found by the Commission or weigh the evidence received by it and decide anew the issue of compensability of an employee's claim. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965); *see* G.S. 97-86, *supra*. The Supreme Court has recently reiterated these well established restrictions upon the appellate review of such awards in *Morrison v. Burlington Industries:*

> the Industrial Commission has the exclusive duty and authority to find the facts relative to disputed claims and

2. In two recent opinions of the Supreme Court, Justice Carlton has indicated that "the reviewing court should make clear the review standard under which it proceeds" when the appeal concerns the decision of an administrative agency. *Utilities Commission v. Oil Company*, 302 N.C. 14, 273 S.E. 2d 232 (1981); *In Re Savings and Loan League*, 302 N.C. 458, 276 S.E. 2d 404 (1981). Clarification of the scope of review necessarily requires the appellate court to determine, as a preliminary matter, whether the particular agency involved is governed by the Administrative Procedure Act, G.S. Chapter 150A. *Id.* In this case, that Act does not apply because the Industrial Commission is specifically exempted from its coverage. G.S. 150A-1(a).

> such findings are conclusive on appeal when supported by any evidence. Moreover, where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal and the mere fact that an appellate court disagrees with the findings of the Commission is not grounds for reversal.

301 N.C. 226, 232, 271 S.E. 2d 364, 367 (1980). We shall now proceed to address the merits of defendant's appeal in accordance with these sound principles of judicial review.

In the instant case, defendant essentially contends that the Commission committed an error of law in affirming the award because plaintiff did not present sufficient evidence to establish a prima facie case demonstrating her entitlement to compensation. We disagree and affirm the Commission's opinion and award.

It is, of course, true that plaintiff had to prove that she was injured "by accident arising out of and in the course of the employment" with defendant to recover compensation for her alleged disability under the Workers' Compensation Act. G.S. 97-2(6); *Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). Since defendant has conceded that plaintiff suffered an accident in the course of her employment, however, the only question raised here is whether plaintiff's injuries did, in fact, arise out of that accident.

The term "arising out of" requires an employee to demonstrate a causal connection between the injury complained of and an accident which occurred in the course of employment. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980). The deputy commissioner specifically found, as a matter of fact, that plaintiff established a direct causal link between her bladder, leg and back problems and her slip and fall accident at defendant's plant. Nonetheless, defendant argues that the commissioner's findings cannot be sustained because there was no *competent* expert testimony in the record which established, within the required degree of reasonable probability, that plaintiff's back injuries were caused by the work-related accident of 21 September 1975. Contrary to defendant's contention, however, the commissioner found that Dr. Timmons expressed an opinion, "based on reasonable medical certainty," that plaintiff's disc defect could have been caused by her fall at work and that the defect also could

have been the result of an aggravation, caused by the fall, of a preexisting back condition.[3] Defendant excepted to this finding on the ground that Dr. Timmons' testimony, viewed as a whole, disclosed that his opinion as to the cause of plaintiff's disc defect was based upon mere speculation and not medical probability. Our review of the content of Dr. Timmons' expert testimony compels us to overrule defendant's exceptions to this evidence.

In *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964), the Supreme Court held that an expert's opinion that a particular cause "could" or "might" have produced the result indicates that the result is capable of proceeding from the particular cause within the realm of reasonable probability. The Court further stated that the fact finder is not required "to make subtle and refined distinctions" and that it is within his discretion to admit expert testimony whenever "it reasonably appears to him that the expert witness, in giving testimony supporting a particular causal relation, is addressing himself to reasonable probabilities according to scientific knowledge and experience, and the testimony *per se* does not show that the causal relation is merely speculative and mere possibility. . . ." *Id.* at 669, 138 S.E. 2d at 546. Defendant contends that Dr. Timmons' testimony in the instant case *per se* demonstrated the speculative nature of the causal relation between plaintiff's disc injury and the work accident. We cannot agree.

In response to two separate hypothetical questions on direct examination, Dr. Timmons affirmatively stated, as required by *Lockwood v. McCaskill, supra*, that plaintiff's accident at defendant's plant could have caused the disc protrusion that produced the nerve root compression and pain. Though he later testified, on cross-examination, that it was "equally possible" that "the defect was degenerative in nature" and could have been caused by "recurrent and chronic stress," Dr. Timmons never retracted his

3. The disc injury would be compensable if either theory of causation were sufficiently established, *i.e.*, that the defect was directly caused by the accident or that the accident materially aggravated a preexisting disease and proximately contributed to the disability. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743, (1978); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951); *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972). *See generally* 1 Larson, Workmen's Compensation Law § 12.20 (1978).

prior opinion, based on a reasonable medical certainty, that plaintiff's slip and fall "certainly could have" caused the disc defect. In fact, Dr. Timmons also said, in the course of defense counsel's questioning about the degenerative process, that "nobody knows the cause of degeneration and it of course could be repeated [stress] or chronic trauma that is repeated *or an injury.*" (Emphasis added.)

Defendant, nevertheless, argues that Dr. Timmons admitted that his opinion on causation was not based upon medical probability when he said that "[a]n attempt to determine today that it was the fall or that this degenerative condition existed over a substantial period of time would be mere speculation." This statement, standing alone, is insufficient to show that Dr. Timmons was "testifying in terms of possibilities rather than probabilities." *See Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 181, 237 S.E. 2d 542, 545 (1977). It seems obvious to us that the doctor was *not* saying that the fall could not have caused the disc protrusion nor was he saying that the protrusion could not have been the result of a degenerative condition. Dr. Timmons was simply stating that he could not choose which of the two, the event of a fall or the existence of a degenerative condition, was the *single* most probable cause without engaging in speculation.[4] Indeed, medical experts are not required to make such a choice in order to render their opinion testimony competent and admissible. In *Lockwood v. McCaskill*, the Court recognized that "[a] result in a particular case may stem from a number of causes." 262 N.C. at 668, 138 S.E. 2d at 545. All that is necessary is that expert express an opinion that a *particular* cause was *capable* of producing the injurious result. *Id.* It is manifest that this requirement was fulfilled in the instant case. For instance, Dr. Timmons proceeded, on redirect examination, to restate his opinion that it was "equally likely or equally probable that the slip and fall on the stairs could or might have caused the disc defect that [he] discovered." Moreover, he also stated "[t]o a reasonable degree of medical certainty" that plaintiff's fall could have (1) made a degenerated disc protrude and caused nerve root pressure and

4. We also note that Dr. Timmons further qualified what he meant by "speculation" in his very next sentence: "I think that's speculation on the basis that this is answering a hypothetical question."

pain or (2) aggravated a preexisting degenerative condition and caused the disc to rupture.

This is not, therefore, a case where the record is devoid of a "scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the accident," and we do not believe that the commissioner was "left to speculate about a matter which frequently troubles even orthopedic specialists." *See, e.g., Gillikin v. Burbage*, 263 N.C. 317, 324-25, 139 S.E. 2d 753, 759-60 (1965). Rather, we believe that, viewing the totality of the expert testimony in the light most favorable to plaintiff, there was "*some* evidence that the accident at least might have or could have produced the particular disability in question," and the commissioner's finding, with respect to the sufficiency of Dr. Timmons' opinion on causation, is, therefore, conclusive on this appeal.[5] *Click v. Freight Carriers*, 300 N.C. 164, 166-67, 265 S.E. 2d 389, 390-91 (1980).

In sum, we hold that the commissioner's critical findings and conclusions that were amply supported by competent evidence in the record consisting both of the expert testimony of Dr. Timmons, as well as that of Dr. Gavigan (the urologist), and the lay testimony of plaintiff that after the fall, she began to experience sharp pains in her back.

Defendant's assignments of error are overruled, and the opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges WELLS and BECTON concur.

5. We would again emphasize that we may not reverse the findings of the Industrial Commission just because there may be other evidence in the record which would support findings to the contrary. *Click v. Freight Carriers, supra*; *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980).

In re Farmer

IN THE MATTER OF THE MINOR CHILDREN, JENNIFER LYNN FARMER AND LAURA ANN FARMER

No. 806DC1079

(Filed 19 May 1981)

Appeal and Error § 39.1— appeal dismissed for failure to docket in time

Appeal is dismissed where the record on appeal was filed in the appellate court more than 150 days after the notice of appeal was given in violation of Appellate Rule 12(a).

Judge MARTIN (Harry C.) dissenting.

APPEAL by respondent from *Williford, Judge.* Judgment entered 21 May 1980 in District Court, HERTFORD County. Heard in the Court of Appeals 5 May 1981.

Cherry, Cherry and Flythe, by Larry S. Overton, for the petitioner appellees.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser and Associate Attorney Blackwell M. Brogden, Jr., as amicus curiae.

Carter W. Jones for respondent appellant.

HEDRICK, Judge.

The judgment from which this appeal was taken was entered 21 May 1980. Notice of appeal was given on 23 May 1980. The record on appeal was filed in this Court on 11 November 1980 which was more than 150 days after the notice of appeal was given in violation of Appellate Rule 12(a). The time within which to file the record on appeal has not been extended by this Court. The appeal will be

Dismissed.

Judge WELLS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

Although it is certainly true that respondent failed to file the record on appeal within 150 days as required by Rule 12(a) of the North Carolina Rules of Appellate Procedure, I most respectfully dissent from the decision of the majority to dismiss the appeal. I vote to exercise our discretion under App. R. 2 and treat the appeal as a petition for certiorari, allow the petition, and pass upon the merits of the appeal.

Respondent argues that the evidence is insufficient to support a conclusion that he has forfeited his parental rights pursuant to N.C.G.S. 7A-289.32(5). I agree with respondent.

The statute reads:

> The court may terminate the parental rights upon a finding of one or more 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.

N.C. Gen. Stat. 7A-289.32, 1979 Supp.

The following evidence in the record supports respondent's contentions: The two female children involved were born 21 February 1971 and 24 November 1975, respectively. The parties separated in February 1976 and agreed that the mother would have custody of the children and respondent father could visit them at reasonable times. Respondent agreed to pay $75 a week for the support of the children. No written separation agreement appears in the record on appeal, nor is there any testimony that the agreement was in writing. The parties did testify that there was an understanding as to support payments and visitation privileges. Thus it appears that this agreement was not a formal written contract, but a verbal understanding of the parties when they separated.

On 11 March 1977, the parties were divorced and on the same day the mother married petitioner Charles Whitaker. The children have remained with the petitioners since their marriage. At the time of the separation, respondent was working with John Cross and Company of Charlotte and earning substantial wages. Within five or six months he left that employment as it required him to move from Aulander to Winston-Salem. He went to work with Bob Francis, earning about $140 take-home pay a week.

Petitioner Linda Whitaker testified:

> After we separated he made the seventy-five dollar a week payments. I think he probably made two full seventy-five dollar payments. . . . He said he wasn't making the payments because he didn't have the money. In fact, he said that I was probably making more than he was. He was still working then. I didn't talk with him very many times about the child support payments. . . .
>
> . . . .
>
> Q: Has Osie's sister ever been to your house to pick up the children?
>
> . . . .
>
> A: Unh-hunh (yes), she has.
>
> . . . .
>
> Q: And when she came to pick 'em up would you tell her to make sure that they didn't see Osie?
>
> A: No, I wouldn't say exactly make sure.

Respondent testified:

> I did not buy any furniture for the trailer. Linda, my ex-wife bought some and put it in the trailer. I made payments of Four Hundred and Fifty-Dollars on the furniture. I paid it off after she left. . . . I saw the children after I separated. Sometimes I would see them every weekend. Some weekends I had to work on Saturdays, and I wouldn't get down on Saturday, it would be late Sunday evening when I got home and they'd be gone. I [saw] them three weeks out of the month on an average. I would see them at my mother's

house. The children would stay with their grandparents and not their mother, nearly every weekend. Laura Ann would go to Church with my father on Sundays.

. . . I paid for the first year, not seventy-five dollars every week, but she did receive money from me every week. Some weeks it would have been twenty dollars, and sometimes as low as ten. I would give her what I could. . . . When Linda and I got divorced, we discussed child support at that time. I asked her how much child support was set. She said there wasn't anything set in Court. She said, "I told them that you had looked out for them, you knew they were yours and you would if you could." I have carried the children on trips. I've carried them to Tuscarora Beach swimming. We have carried them to the Town House in Windsor to eat supper. We have carried them to the Horseshow in Windsor. We have carried them to my house and cooked in the yard. We asked to carry them to King's Dominion, but she refused to let them go. That was last year. I have bought the children Christmas presents every Christmas. The first year, I give Linda a hundred and twenty-five dollars about 1:00 that afternoon they were going to do last minute shopping. . . . I bought presents for the kids this past Christmas. I spent over two hundred dollars on them. . . .

Defendant's Exhibit No. 1 is a picture of Laura Ann and I in my trailer. . . .

. . . .

One Friday afternoon, I went down to pay her, but she wasn't home. I paid the money to my mother. I gave her seventy-five dollars to give to Linda. I went back on Saturday to see the kids. When I approached the door, she told me I wasn't coming in. I asked her to move away from the door. I told her I had paid the money and I wanted to see my kids. She wouldn't let me—I hadn't seen them in two weeks then. I told her to move away from the door and I broke the glass and went in to see the kids. She fussed and raised cane, but I still saw them. . . .

. . . .

Q: Do you love the children, Osie?

A: Yes, sir, I do.

. . . .

I was working at Harrington Manufacturing Company, and I got laid off because the carpenter work just give (sic) out over there and they closed the plant. I am now working with George Bell running a bulldozer. I make Five Dollars an hour.

Q: Since you and your wife separated in January of 1976, have you remained steadily employed?

A: No, sir.

Q: Did you have trouble finding work during that period of time?

A: Yes, sir.

Sometimes I work fifty hours and week, it just depends on if it rains, or if we have anything to do. If it is raining we can't work. I do not get paid if it is raining. . . .

. . . .

. . . I was paying her seventy-five dollars a week, like some weeks down as much as thirty dollars a week, thirty-five. I've give her—I've had say fifty dollars in my pocket and I'd give her thirty-five of it.

Q: Did you give her something every week?

A: Yes, sir.

. . . .

. . . I would pay the money in cash. I would give her some months ten dollars. Some months I would give her more than others. I gave them maybe ten dollars one week, five dollars one week and maybe twenty dollars sometimes when I saw them. I did not see the children every week. I would say I would see them about three weeks out of the month, in 1979. I would see the children at my mother's mostly on Sundays. My mother, father, sister, brothers and their kids would be there too. I don't remember the exact dates when I would take them on trips to the beach and out for dinner. It has been four years since we separated. I took them to the

beach in 1977. I took them to Tuscarora Beach with my wife. I have carried them to the Beach twice. I have taken them to dinner two or three times. I have taken them to the horse-show once. For four years I have carried them to the beach twice, out to dinner about four times, and to the horseshow once. I have also carried them to my house to cook out in the yard four or five times. I have been able to visit my children at my mother's about three times a month. I could not afford to get an attorney about visitation rights for myself, so I wouldn't have to see the children at my mother's.

The termination of parental rights is a drastic remedy and should not be entered into lightly, but only after careful, reasoned and mature reflection. Although there is no present case law interpreting N.C.G.S. 7A-289.32(5), it would seem that the standard should be no less than that required for a finding of abandonment under the prior language of N.C.G.S. 48-5 and 48-2(3a). The Supreme Court stated that rule to be:

> To constitute an abandonment within the meaning of the adoption statute it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. If his conduct over the six months period evinces a settled purpose and a wilful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been an abandonment within the meaning of the statute.

Pratt v. Bishop, 257 N.C. 486, 503, 126 S.E. 2d 597, 609 (1962). *Accord, In re Stroud*, 38 N.C. App. 373, 247 S.E. 2d 792 (1978).

There is no evidence that petitioners made any effort to require respondent to pay according to their version of the agreement. Respondent was living in the area the entire time and available for the service of process, as well as informal demands for payment. This lack of evidence supports an inference that petitioners did not want any payments from respondent, and were in reality building a case against respondent. This is further buttressed by respondent's evidence that he offered payments to petitioners and they refused the money.

The statute requires that the failure to pay must be willful and without justification. In interpreting the willfulness require-

ment as applied to abandonment, this Court stated: "The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*." *In re Maynor*, 38 N.C. App. 724, 726, 248 S.E. 2d 875, 877 (1978) (emphasis in original). Respondent's mere failure to pay as agreed does not meet this standard.

A question also arises whether the agreement described by the parties in their testimony is a "custody agreement" within the meaning of the statute. It certainly does not qualify as a separation agreement pursuant to N.C.G.S. 52-10.1. This statute requires separation agreements to be in writing and acknowledged by both parties before an officer so authorized by N.C.G.S. 52-10(b). The termination of parental rights statute is contrary to the common law and must be strictly construed. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). A reasonable interpretation is that N.C.G.S. 7A-289.32(5) requires that there be a formal custody agreement, executed in accordance with N.C.G.S. 52-10.1. It is illogical that the legislature would require the custody agreement to be embodied either in a judicial decree, or alternatively, in the form of an informal, oral agreement. This conclusion is further supported by the rule of law that agreements dealing with custody and support are not binding on the court, as the court has both inherent and statutory authority to protect the interests of and to provide for the welfare of children. *Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449, *disc. rev. denied*, 292 N.C. 730 (1977); *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E. 2d 616 (1976). An order setting child support may be modified by the court under N.C.G.S. 50-13.7, 1979 Supplement. The law should require a definite written statement of the support duties of a parent to sustain a termination of parental rights based upon the breach of such agreement. I would hold that the informal, oral agreement testified to by the parties is not a custody agreement within the meaning of N.C.G.S. 7A-289.32(5).

I cannot conclude as a matter of law that petitioners have by clear, cogent and convincing evidence, as required by N.C.G.S. 7A-289.30(e), supported the conclusion that respondent has for a period of one year willfully failed without justification to pay for the care, support, and education of his children, as required by a custody agreement within the meaning of the act. Nor have they

shown by such evidence that the best interests of the children would be served by terminating their natural father's parental rights. *See* N.C. Gen. Stat. 7A-289.22(3).

One of the legislative purposes of the statute is "to protect all children from the unnecessary severance of a relationship with biological or legal parents." N.C. Gen. Stat. 7A-289.22(2). The result in this case violates that stated purpose.

I vote to reverse and remand the proceeding for dismissal.

SUSAN CRANK JONES v. REGINALD TIMOTHY JONES

No. 8014DC772

(Filed 19 May 1981)

1. **Divorce and Alimony § 24.1 – child support – credit for voluntary expenditures**

The trial court did not err in allowing defendant credit against his child support obligation for certain expenses for clothing, food and day care which he incurred for the children during their visitation with him, and there was no merit to plaintiff's contention that the trial court erred in allowing the credit since debt payments were made to parties other than as specified in the support order and the child support payments deducted by defendant were proportionate to the visitation time he spent with the children.

2. **Divorce and Alimony § 24.4 – voluntary expenditures deducted from child support payments – no contempt**

The element of willfulness is required for a finding of civil contempt under G.S. 50-13.4(f)(9) and G.S. 5A-21, and evidence before the trial judge was sufficient to support his conclusion that defendant was not in willful contempt of court by deducting from his child support payments made to plaintiff amounts representing voluntary expenditures for needs of the parties' children while they were visiting him.

APPEAL by plaintiff from *Pearson, Judge*. Order entered 19 March 1980 in District Court, DURHAM County. Heard in the Court of Appeals 4 March 1981.

Pursuant to a judgment entered 6 January 1977, plaintiff and defendant were divorced and plaintiff was awarded custody of the three minor children of the parties. Under this court order defendant was granted liberal visitation privileges and ordered to pay the sum of $325 per month to the plaintiff for child support.

On 3 August 1979 plaintiff filed an amended motion and affidavit, with the court's permission, seeking to hold defendant in contempt for failure to make the child support payments as previously ordered by the court. Based upon plaintiff's motion and affidavit, that same day the district court ordered defendant to show cause why he should not be held in contempt for failure to pay child support as directed for the months of June and July, 1977 and June and July, 1979.

Following a hearing on 13 August 1979, the court entered an order based upon the following pertinent facts:

"4. That there was in effect at all times pertinent to the Plaintiff's claim in her Motion a valid and enforceable Judgment and Order of the District Court of Durham County, North Carolina, dated January 6, 1977, granting custody and control of the parties' three (3) minor children to the Plaintiff, allowing the Defendant liberal visitation privileges and providing:

'3. That the defendant is ordered to pay the sum of Three Hundred Twenty-Five Dollars ($325.00) per month to the plaintiff for the support of the minor children.'

5. That the Defendant paid the following amounts of child support to the Plaintiff for the months indicated:

June 1977	$216.50
July 1977	108.00
June 1979	100.00
July 1979	175.00

and that these amounts are $700.50 less than the amount ordered in the Court's Judgment for these months.

6. That the Plaintiff did not consent to a reduction of child support payments for the indicated months and made both oral and written demands on the Defendant to pay the court ordered amount for the four months in question, which demands the Defendant refused.

7. That the Defendant has been employed by Southern Bell since prior to June, 1977, is an able-bodied man with a present salary of $25,900.00 gross per year and that from March, 1979, until just prior to the hearing, the Defendant was earning $24,000.00 gross per year.

8. That the Defendant during the period he earned $24,000.00 gross per year estimated that his total taxes amounted to 20% of his gross, and his listed expenses, exclusive of child support, were $1,148.00 per month; that the Defendant's income has increased by $1,900.00 gross per year and that he is awaiting his first paycheck reflecting this increase at the time of hearing; that the Defendant has savings and checking accounts totalling approximately $890.00; and, that the Defendant presently possesses the means to comply with the court order of $325.00 per month child support for June and July of 1977 and 1979.

* * * *

10. That in the exercise of his visitation privileges as provided in the Judgment dated January 6, 1977, the Defendant had his three children visit him at his home six weeks in June and July of 1977, three weeks in June, 1979, and two weeks in July, 1979.

11. That the reductions in the monthly amount of child support made by the Defendant to the Plaintiff, found in Paragraph 5, *supra*, were reductions willfully and intentionally made by the Defendant unilaterally and without the consent of the Plaintiff and were based upon the proportionate time that the children spent with the Defendant in June and July of 1977 and 1979, as found in Paragraph 10, *supra*.

12. That the Defendant, while the children were visiting him as found in Paragraph 10, *supra*, paid that proportionate share of child support not paid to the Plaintiff as found in Paragraph 11, *supra*, for the following items and to the following persons:

Item	Paid to	Amount
Clothing	Various clothing stores	$ 90.00 (approx.)
Food	Various grocery stores	Not known
Day Care: July, 1979 (2 weeks)	Chatalon Day Care	150.00

Day Care Activities (movies, roller skating, swimming)	Chatalon Day Care (approx. $2.75/child/day)	Not known
Day Care	Mrs. Hill	60.00
YMCA	Tanglewood YMCA	90.00
Mr. Jones: expenses for psychological counseling	Durham Family Clinic	(approx.) 190.00
		$ 580.00 (approx. known amount)

* * * *

14. That the Plaintiff is presently employed by the National Lutheran Campus Ministry and receives $135.00 gross per week, and that her net income is $440.00 per month plus whatever child support the Defendant sends her.

15. That the Plaintiff also qualifies for public assistance from the Durham Housing Authority in the amount of $130.00 per month based upon her aforesaid income and child support in the amount of $325.00 per month as set out in the Judgment; that the said $130.00 per month is paid directly to her landlord and not to her; and that the children, due to the Plaintiff's income, are eligible for decreased rate lunches at school.

16. That the Plaintiff's itemized monthly expenses for herself and her children amount to $1,309.50 per month and she has additional medical and other bills on herself and the children amounting to $1,736.00 which she is unable to pay."

From these facts the court concluded that, although Plaintiff did not consent to any reduction in child support, the expenditures made by defendant for the children during their visitation with him satisfied his obligation to the plaintiff for child support under the Judgment and Order dated 6 January 1977. The court further

concluded that defendant was not in contempt of court and dismissed plaintiff's motion and order to show cause.

Plaintiff appeals from this order.

R. Michael Pipkin for plaintiff appellant.

No counsel contra.

CLARK, Judge.

[1] Principally relying on this Court's opinion in *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977), appellant argues that the trial judge committed error in allowing defendant credit against his child support obligation for certain expenses he incurred for the children during their visitation with him.

The *Goodson* court, for the first time in this State, established guidelines for a trial judge in making the decision of whether to allow credit to a delinquent parent for expenditures made on behalf of dependents. In pertinent part the court stated as follows:

> "We think that the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case. We cannot begin to detail every case in which credit would or would not be equitable. However, since we are enunciating this principle for the first time in this State, we feel a duty to offer some guidelines for the trial judge. The delinquent parent is not entitled as a matter of law to credit for all expenditures which do not conform to the decree. Nor should the delinquent parent be entitled to credit for obligations incurred prior to the time of the entry of the support order. . . . The delinquent parent is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child. Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods. . . . Credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody. Payments made under compulsion of circumstances are also more likely to merit credit for equitable reasons. . . . We emphasize that these are not hard and fast rules, and that the

> controlling principle is that credit is appropriate only when an injustice would exist if credit were not given."

Id. at 81, 231 S.E. 2d at 182.

Appellant contends the trial court erred in allowing the credit since debt payments were made to parties other than as specified in the court order and the child support payments deducted by defendant were proportionate to the visitation time he spent with the children. Appellant does not assert that the trial court's order is not supported by the evidence. Instead, she argues that because *Goodson* states that a party is not entitled as a *matter of law* to these deductions, then a trial court would be in error to ever allow credit in this manner regardless of the circumstances.

We do not agree. The *Goodson* court emphasized, and we now reiterate, that these situations are not bound by hard and fast rules, but are to be decided according to the equitable considerations of the facts and circumstances in each case. A paramount aim of the trial judge in allowing or disallowing a credit is to avoid injustice to either party. Not every expense incurred by the non-custodial parent is worthy of an equitable adjustment in the basic child support obligation. Indeed, under certain circumstances, we recognize that any adjustment at all in the amount of child support would do an injustice to the custodial parent, who is entitled to rely on the continuation of monetary payments to defray necessary living expenses for the children. However, we also acknowledge that the equities may dictate that a credit should be given. The trial court has a wide discretion in deciding initially whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded. *See, Lynn v. Lynn*, 44 N.C. App. 148, 260 S.E. 2d 682 (1979).

In the case at hand, we find no abuse of the trial court's discretion based upon the circumstances revealed by this record.

[2] Appellant also argues that the trial judge erred in concluding that defendant was not in contempt of court. She contends that once she established, and the court found, that there was an order in force whose purpose may still be served by the defendant's compliance, that defendant willfully refused to pay the ordered

child support, and that defendant had the present means to comply with the court's order, then the court was precluded from reaching its conclusion that defendant was not in contempt of court.

Appellant is correct that under the above findings the court could have concluded that defendant was in contempt even though he was given credit for unauthorized expenditures for the children. *See Lynn v. Lynn, supra.* However, we do not agree that the trial judge was thereby compelled to find defendant in contempt.

The willful disobedience of an order for the payment of child support renders one subject to proceedings for contempt. G.S. 50-13.4(f)(9). Willful disobedience has been variously defined by our courts as disobedience "which imports knowledge and a stubborn resistance," *Mauney v. Mauney,* 268 N.C. 254, 257, 150 S.E. 2d 391, 393 (1966); and as " 'something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law . . . .' " *West v. West,* 199 N.C. 12, 15, 153 S.E. 600, 602 (1930). Upon a similar factual situation to the case at hand, the court, in *Jarrell v. Jarrell,* 241 N.C. 73, 84 S.E. 2d 328 (1954), held that the evidence failed to show willful contempt where the father in good faith unilaterally reduced his court ordered child support payments during the weeks his minor child was living with him.

It is true that the foregoing cases were decided under a prior contempt statute which defined contempt as "willful disobedience of any process or order lawfully issued by any court." G.S. 5-1(4) (1969) (now repealed). The version of G.S. 50-13.4(f)(9) then in effect similarly provided "The willful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and 5-9." G.S. 50-13.4(f)(9) (1975) (since rewritten). The present version of each statute omits the language of willfulness. "An order for the payment of child support is enforceable by proceedings for civil contempt. . . ." G.S. 50-13.4(f)(9), as amended 1977 N.C. Sess. Laws Ch. 711 § 26 (effective 1 July 1978). The new contempt statute provides:

> "Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The Order remains in force;

(2) The purpose of the order may still be served by compliance with the order; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order."

G.S. 5A-21(a) (1979 Cum. Supp.).

Notwithstanding this omission in the new statutes, we believe the element of willfulness must be retained by implication. That the element of willfulness goes to the very essence of any contempt is made manifest by the following commonly accepted definitions of the term: "A willful disregard or disobedience of a public authority," Black's Law Dictionary 390 (4th Ed. 1951); "[W]illful disobedience to or open disrespect of the valid rules, orders, or process or the dignity or authority of a court or a judge acting in a judicial capacity whether by contumacious or insolent language, by disturbing or obstructive conduct, or by mere failure to obey the order of the court . . . ," Webster's Third New International Dictionary 491 (1968). Further, the intent to retain the requirement of willfulness is confirmed by one of the former members of the North Carolina Criminal Code Commission, the body which recommended the present Chapter 5A. Billings, *Contempt, Order in the Courtroom, Mistrial*, 14 Wake Forest L. Rev. 909, 910, 917, 920 (1978). *Accord* 2 R. Lee, North Carolina Family Law § 166 (1980). Finally, we note that this court has, on at least one prior occasion, assumed without deciding that the element of willfulness remained a requisite for a finding of civil contempt under G.S. 5A-21. *See Lowder v. Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980), *reversed on other grounds*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

On the foregoing basis we conclude that the acts of the defendant were not subject to contempt proceedings under G.S. 50-13.4(f)(9) and 5A-21 unless willful.

In proceedings for contempt the court's findings of fact are conclusive on appeal when supported by any contempt evidence. Our review on appeal is limited to ascertaining their sufficiency to warrant the judgment. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d

129 (1978). We find that the evidence before the trial judge was sufficient to support his conclusion that defendant was not in willful contempt of court.

Affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES AND MARGARET THOMAS v. JIMMIE WILLIAMS

No. 8014DC764

(Filed 19 May 1981)

Bastards § 10; Parent and Child § 7— voluntary child support agreement—approval by court—necessity for mother's affirmation of paternity

The district court had no jurisdiction to enter an order approving defendant's voluntary agreement for support of an illegitimate child where defendant's acknowledgment of paternity was not simultaneously accompanied by a sworn affirmation of paternity by the child's mother as required by G.S. 110-132(a).

APPEAL by defendant from *LaBarre, Judge*. Order entered 28 April 1980 in District Court, DURHAM County. Heard in the Court of Appeals 3 March 1981.

Defendant executed a voluntary support agreement and acknowledgment of paternity of Genelle Renee Mitchell on 24 September 1979. The District Court approved the support agreement on 2 October 1979. Defendant's subsequent motions to set aside the agreement and to dismiss the court's order of approval for lack of jurisdiction were denied.

The facts are as follows. On 24 September 1979, defendant executed a voluntary support agreement at the Durham County Department of Social Services. He acknowledged that he was the responsible parent of Genelle Renee Mitchell, born 3 February 1972, and promised to pay $25.00 a week for her support. Defendant also signed, on the same day, a formal document acknowledging his paternity of the child.

The district court entered an order approving the support agreement on 2 October 1979. Two days later, defendant filed a

motion to set aside the agreement and judicial order of approval primarily on the following grounds:

> That the Department of Social Services failed to inform the defendant that he could not be prosecuted for being the reputed father of the minor child named in this proceeding under the provisions of GS 49-4(1) in that the date of birth of the minor child is February 3, 1972 and prosecution is barred after three years from the date of birth.
>
> That the paternity of the child named in the agreement had not been judicially determined within three years next after the birth as required by GS 49-4(2). . . .
>
> That the defendant was not informed by a representative of the plaintiff that he could not be prosecuted as a reputed father where he had not acknowledged paternity by payments for support within three years after birth as provided by GS 49-4(3).
>
> That the representative of the plaintiff failed to inform the defendant that he was not a responsible parent as defined by GS 110-129(3).
>
> That the defendant was expressly informed by a representative of the plaintiff that he had no choice but to sign said agreement if he desired to avoid substantial cost and back payments.

Pending a determination of this motion, the court ordered a stay of the provisions of the agreement requiring defendant to pay support for the minor child. Subsequently, on 17 March 1980, defendant moved to dismiss Judge LaBarre's order because "the Court was without jurisdiction to enter the Order in that the agreement based upon the Acknowledgment of Paternity was invalid because there did not appear in the record a written Affirmation of Paternity by the natural mother, as expressly required by G.S. 110-132(a)." The motion to dismiss was denied, and the court proceeded to receive evidence from both sides on defendant's original motion to set aside the agreement.

In sum, defendant testified that he had never acknowledged that he was the father of the child, that he had never paid support for the child and that the mother, Margaret Thomas, had never made demands upon him for child support. He said he could

not read or write and that even though the Department's representative read the papers to him, he did not understand what he was doing when he signed the agreement. He, nonetheless, admitted the possibility that he "could be" the father of the child. Defendant, however, introduced as an exhibit the birth certificate of Genelle Renee Mitchell which stated her birth date as 3 February 1972 and the name of her father as William Mitchell.

Plaintiffs first introduced into evidence a document, executed by the mother, on 9 October 1979, entitled "Affirmation of Paternity" which included her sworn statement that defendant was the natural father of Genelle Renee Mitchell. Ms. Thomas then testified that defendant was, in fact, the father of the child and that she had named her former husband, who had divorced her in 1970, as the father on the birth certificate to avoid embarrassment to herself and the child. Janet Sparks, an employee of the Department, admitted that she had told defendant that if the court concluded he was the child's father, he might be ordered to make back payments for her support. She further said, however, that defendant told her that he was the father and that he voluntarily signed the support agreement and acknowledgment of paternity with full understanding of its contents.

Defendant now appeals from the order entered 28 April 1980 in which Judge LaBarre concluded, among other things, that: (1) he was the father of Genelle Renee Mitchell; (2) he voluntarily and knowingly executed the acknowledgment of paternity and support agreement, free from duress or coercion; (3) the belated execution of an affirmation of paternity by the mother, after the support agreement was approved and accepted by the court, was not fatal to the validity of the agreement; and (4) the support agreement and acknowledgment of paternity were valid and binding upon defendant from the date of entry.

Thomas Russell Odom, for plaintiff appellee.

C. Horton Poe, Jr., for defendant appellant.

VAUGHN, Judge.

A single issue is dispositive of this appeal: whether the district court had jurisdiction to enter the order of 2 October

1979, approving the support agreement when defendant's written acknowledgment of paternity was not simultaneously accompanied by the mother's sworn affirmation of paternity as required by G.S. 110-132(a). We conclude that the mother's written affirmation of paternity was a prerequisite to the court's acquisition of jurisdiction in these circumstances and reverse Judge LaBarre's subsequent order of 28 April 1980 confirming the validity and binding effect of the support agreement executed by defendant.

At the outset, we note that one of the express purposes of Article 9 of Chapter 110 of the General Statutes is "to provide for enforcement of the responsible parent's obligation to furnish support" for his or her child. G.S. 110-128. It is, therefore, at once clear that the provisions of Chapter 110 have no application, and there is no enforceable duty to support a child under that Chapter, until somebody is determined to be a "responsible parent." A responsible parent is "the natural or adoptive parent of a dependent child *who has the legal duty to support said child* and includes the father of an illegitimate child." G.S. 110-129(3) (Emphasis added). In this case, it appears that G.S. 110-132 provided the sole means for establishing and enforcing a *legal duty* on defendant's part to support Genelle Renee Mitchell.[1] It is elemental then that full compliance with the statutory requirements was necessary to confer proper jurisdiction upon the district court for the entry of an order approving the voluntary support agreement so as to make it "enforceable and subject to modification in the same manner as is provided by law for [support] orders of the court. . . ." G.S. 110-132(a).

G.S. 110-132(a), in pertinent part, provides the following:

1. Although Judge LaBarre found as a fact that defendant "provided limited support, gifts and remembrances at birthdays and holidays" until October 1979 in his order of 28 April 1980, he did not conclude, as a matter of law, that defendant had acknowledged his paternity of the child by making payments for her support. Thus, it seems that defendant could not have been prosecuted for wilful nonsupport of an illegitimate child because (1) three years had elapsed since the child's birth (3 February 1972); (2) his paternity had not been judicially determined within that period; and (3) he had not acknowledged his paternity by making support payments during the first three years of the child's life. G.S. 49-4(1)-(3).

> the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge of the district court . . . shall have the same force and effect as a judgment of that court; and a written agreement to support said child by periodic payments . . . when acknowledged before a certifying officer or notary public . . . filed with, and approved by a judge of the district court, at any time, shall have the same force and effect, retroactively or prospectively, in accordance with the terms of said agreement, as an order of support entered by that court. . . .

This statute, in effect, makes a father's voluntary written acknowledgment of paternity, and agreement to support his illegitimate child, a binding and fully enforceable substitute for a judicial determination of paternity and order of support. Three requirements, however, must be met to achieve this result: (1) the father must, of course, acknowledge his paternity of the child in writing; (2) the mother must also affirm in writing that he is, in fact, the natural father of the child; and (3) these documents must be filed with and approved by a district court. With respect to the jurisdictional issue at bar, the pivotal term to be construed within the stated requirements of G.S. 110-132(a) is the word "accompanied."

In plain language, G.S. 110-132(a) permits the court to approve a father's acknowledgment of paternity when it is "accompanied" by the mother's corresponding statement of his paternity. The accepted meaning of the word "accompany" is "to go along with" or "to exist or occur in conjunction or association with." Webster's Third New International Dictionary, at 12 (1968). We must conclude, on this record, that the mother's affirmation of paternity did not accompany the father's acknowledgment in the manner contemplated by the statute. When Judge LaBarre entered the initial order approving defendant's acknowledgment of paternity and his agreement to support the child on 2 October 1979, the mother had not executed (or filed) her own written affirmation of defendant's paternity. This document was not executed until 9 October 1979, seven days after the court entered its order of approval and five days after defendant moved to set aside the

agreement and court order.[2] In these circumstances, we simply cannot say that the mother's affirmation of paternity "accompanied" that of the father when the judge entered the order approving defendant's acknowledgment of paternity and the support agreement. Moreover, the contents of the acknowledgment of paternity form itself clearly indicate that the parties understood that the execution and filing of the mother's affirmation of paternity was a prerequisite to the court's exercise of jurisdiction to approve the documents submitted by defendant in this case. The form signed by defendant included the following statement:

> I understand that this written Acknowledgment of Paternity shall have the same force and effect as a judgment of the District Court as provided in NCGS Chapter 110 *when accompanied by the sworn, written Affirmation of Paternity by the natural mother named above* and filed with the Clerk of Superior Court and approved by the District Judge. (Emphasis added.)

In sum, we are compelled to hold that the court had no jurisdiction to accept or enforce defendant's acknowledgment of paternity under G.S. 110-132 on 2 October 1979 because it was not *simultaneously* supported by the mother's written affirmation of paternity.[3]

The Department and the mother, nonetheless, argue that the court, even if it did not have jurisdiction to approve defendant's acknowledgment of paternity under G.S. 110-132(a), still had jurisdiction to enter a judgment accepting the voluntary support agreement in accordance with G.S. 110-133. We disagree.

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2. We would also observe that the record does not show that the mother's affirmation, once executed, was ever presented to the district court for the express purpose of fulfilling the requirements of G.S. 110-132(a) with respect to the order entered on 2 October 1979. Rather, her affirmation was only filed as an exhibit in the hearing on defendant's motion to set aside the court order of approval on 17 March 1980.

3. It occurs to us that any other conclusion would create a curious result indeed. It is certainly true that the statutory requirement for the filing of the mother's written affirmation of paternity is intended to assure that men only become legally obligated to fulfill those "responsibilities" which they did, in fact, create and accept. It is equally true, however, that this requirement protects the mother and child from unfounded, and uninvited, intrusions into the independence and privacy of their own lives. Otherwise, a man of generous heart might simply declare his paternity of a child unilaterally and easily file for a court order approving his acknowledgment and agreement to support a child that is not his.

G.S. 110-133 provides a mechanism for the judicial enforcement and modification of a written agreement "executed by the responsible parent" to support his or her dependent child. In the instant case, "responsible parent" is the critical statutory phrase. We have already stated that a responsible parent is one "who has the legal duty to support" a dependent child, G.S. 110-129(3), and that defendant's legal duty to support Genelle Renee Mitchell had to be established under the provisions of G.S. 110-132(a). Here, a legal duty to support the child on defendant's part could not exist until his acknowledgment of paternity was accompanied by the mother's affirmation of the same and approved by the court. Thus, defendant was not a "responsible parent," and the court had no authority to enter an order approving the support agreement under G.S. 110-133.

Defendant's motion to dismiss the order of 2 October 1979 for lack of jurisdiction should have been granted, and the order appealed from is reversed.

Reversed and remanded.

Judge WELLS and BECTON concur.

NORTH CAROLINA REAL ESTATE LICENSING BOARD v. CHARLES L. GALLMAN, MYERS PARK REALTY

No. 8010SC797

(Filed 19 May 1981)

1. Brokers and Factors § 4.1— real estate broker—dealings with principal

The general rule is that a broker can neither purchase from nor sell to his principal unless the principal expressly consents thereto, or with full knowledge of all the facts and circumstances acquiesces in such transactions.

2. Brokers and Factors § 4.1— real estate broker—option to purchase property

While an option to purchase real estate, given by the seller to a broker employed to sell the property, is generally valid, the broker cannot enforce the option without making a full disclosure to his principal of any information which he has relating to other prospective sales or the value of the property.

3. Brokers and Factors § 8—real estate broker's license revoked—sufficiency of findings of fact

Findings of fact by the Real Estate Licensing Board were sufficient to support its conclusion that respondent made substantial and willful misrepresentations in violation of G.S. 93A-6(a)(1) and acted for more than one party in a transaction without the knowledge of all parties for whom he acted in violation of G.S. 93A-6(a)(4) where the Board found that seller listed a house for sale with respondent at an asking price of $15,000; the owner executed to respondent an option to purchase the property within 30 days for $11,000; respondent did not disclose to seller an offer subsequently made by a third person to buy for $15,000; respondent represented to the third person that the seller was the owner of the property and that the seller had accepted the third person's offer of $15,000; respondent made a secret profit of $4,000 by representing to the third person that he was acting as a broker for the seller when in fact he was acting for himself; respondent falsely represented to the third person that the seller had received an offer of $14,500 for the property; and even if respondent was not an agent for the third person, once respondent discussed the transaction with the third person, he had the duty of dealing with honesty and integrity.

APPEAL by defendant Gallman from *Preston, Judge.* Judgment entered 25 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 6 March 1981.

Complaint was filed against respondent by another licensed real estate broker and supported by letter from George A. Rubis, the buyer from respondent of a house and lot near Lexington. After a hearing under G.S. 93A-6(a), the Licensing Board made, in pertinent part, the following findings of fact:

"(2) In early November, 1978, Mr. Robert L. Billings, III, contacted Respondent concerning the sale of a house owned by him at 117 Willowbrook Circle, Lexington, North Carolina.

(3) Mr. Billings listed the house for sale with Respondent at an asking price of $14,500. Mr. Billings, signed a listing contract with Respondent's firm, Myers Park Realty.

(4) Mr. Billings' wife, Mrs. Judy Billings, subsequently signed the listing contract and changed the asking price to $15,000.

(5) Respondent never gave Mr. or Mrs. Billings a copy of the listing contract.

(6) Respondent advertised the Billings house for sale in his company's regular newspaper advertising, and placed the house in the Lexington Multiple Listing Service.

(7) On or about November 11, 1978, Respondent contacted Mr. and Mrs. Billings and expressed interest in personally purchasing said house for $10,500. Mr. and Mrs. Billings told him that they could not sell for less than $11,000.

(8) On or about November 14, 1978, Respondent presented Mr. and Mrs. Billings with an 'option to purchase' contract, whereby Mr. and Mrs. Billings agreed to sell the property to Respondent for $11,000. The option was to be valid for 30 days. Mr. and Mrs. Billings signed the option contract.

(9) On or about November 25, 1978, Mr. and Mrs. George A. Rubis contacted Respondent as the listing agent, concerning the purchase of the house at 117 Willowbrook Circle.

(10) Respondent told Mr. and Mrs. Rubis that Mr. Billings owned the property, and that another offer had been submitted to purchase the property for $14,500.

(11) No other offer to purchase the property for $14,500, or for any amount, had been submitted by any person.

(12) Respondent did not disclose to Mr. and Mrs. Rubis that he had an option to purchase the property for $11,000.

(13) Mr. and Mrs. Rubis submitted a written offer to purchase the property for $15,000, and gave Respondent a check for an earnest money deposit of $500. Respondent deposited the check in the escrow account of Myers Park Realty.

(14) Respondent told Mr. and Mrs. Rubis that he would present their offer to Mr. Billings.

(15) Respondent never presented the offer to Mr. Billings and never presented any other offer to Mr. and Mrs. Billings while Mr. Billings held title to the property.

(16) On or about November 27, 1978, Respondent called Mrs. Rubis and told her that Mr. Billings had accepted the Rubis' offer to purchase the property for $15,000.

(17) This statement was false, since the Rubis offer had not been presented to Mr. Billings, and he had not accepted it.

(18) Mr. and Mrs. Rubis asked Respondent to send them a copy of their offer to purchase, as supposedly accepted by

Mr. Billings, but Respondent never did so.

(19) Respondent called Mr. and Mrs. Rubis several times, telling them that Mr. Billings desired to close the transaction quickly because he needed the money. Respondent again failed to disclose to Mr. and Mrs. Rubis that he had an option to purchase the property for $11,000.

(20) On or about December 5, 1978, Respondent presented a printed form deed to Mr. and Mrs. Billings. This document contained the property description and the names of the grantors (Mr. and Mrs. Billings), but the line for the name of the grantee was blank.

(21) Mr. and Mrs. Billings signed the deed, and Respondent paid them the balance of the purchase price.

(22) Respondent took the signed deed to Mrs. Judith Stewart, a notary public and former employee of Myers Park Realty, and asked her to notarize the signatures of Mr. and Mrs. Billings. Mrs. Stewart did so.

(23) Mrs. Stewart was not present when Mr. and Mrs. Billings signed the deed, and Mr. and Mrs. Billings never appeared before her to acknowledge their signatures.

(24) On December 5, 1978, Respondent caused said deed to be recorded in the Davidson County Registry. Respondent was the grantee on said deed.

(25) Respondent contacted Mr. and Mrs. Rubis, and arranged for them to close their purchase of the property by mail. Respondent did not disclose to Mr. and Mrs. Rubis that he had purchased the property for $11,000 and had taken title thereto.

(26) Mr. and Mrs. Rubis sent Respondent the balance of the purchase price by a check payable to Myers Park Realty. Respondent closed the transaction, and on December 15, 1978, Respondent caused to be recorded in the Davidson County Registry a deed from himself and wife, Margaret Gallman, to Mr. and Mrs. Rubis."

At the hearing respondent testified that when Billings first came to see him about the property, he told Billings the property

was worth on the market from $13,500 to $14,000 and that on 14 November 1978 he prepared and they signed the following "Option To Purchase":

> "For $1.00 (One) Dollar and other valuable considerations Bert & Judy Billings agree to the sale of the property known as 117 Willowbrook Drive to Charles Gallman his heirs and assignees for the sum of $11,000.00 dollars subject to, a loan assumption at Industrial and Savings in the amount of $ *around 9 M or $8,882.00.*
>
> This option good for thirty days plus any days while closing.
>
> Signed:
>
> s/BERT BILLINGS
> BERT BILLINGS, OWNER
>
> s/JUDY BILLINGS
> JUDY BILLINGS, OWNER"

Respondent further testified that when the Rubises came to see him he told them there was an option on the property, but he did not tell them that he had the option.

The Board concluded that respondent was guilty of: (1) "[m]aking any substantial and wilful misrepresentations" in violation of G.S. 93A-6(a)(1); (2) "[a]cting for more than one party in a transaction without the knowledge of all parties for whom he acts," in violation of G.S. 93A-6(a)(4); (3) "conduct . . . which constitutes improper, fraudulent or dishonest dealing," in violation of G.S. 93A-6(a)(10); (4) "[b]eing unworthy or incompetent to act as a real estate broker" in violation of G.S. 93A-6(a)(8) and (5) violating a regulation of the Board in failing to deliver a copy of the listing contract to the sellers in violation of G.S. 93A-6(a)(15). The Board thereupon ordered that respondent's broker's license be revoked.

Respondent petitioned for judicial review by the Superior Court under G.S. 150A-43. The trial court found that the findings of fact and conclusions of law were fully supported by the evidence and affirmed the revocation of the Board.

Attorney General Edmisten by Assistant Attorney General Harry H. Harkins, Jr. for plaintiff appellee.

Morris and Hoke by Charles B. Morris, Jr. for defendant appellant, Charles L. Gallman.

CLARK, Judge.

The respondent did not offer evidence in substantial conflict with that offered by the complainants. We, therefore, find that the findings of fact made by the North Carolina Real Estate Licensing Board were based on all the evidence and were fully supported. The questions before us are whether the conclusions of law are supported by the findings of fact. In determining these questions we direct our attention to the duties which the respondent owed to the seller, to the buyer, and to the public. In doing so we are not as concerned with the technical niceties of the law as we would be if rendering a decision in a case involving a claim by the seller or buyer against the broker. Rather, we consider these duties in light of the nature of this proceeding for sanctions against the respondent-broker for misconduct in violation of the licensing statutes.

In upholding the constitutionality of Chapter 93A, General Statutes of North Carolina, entitled "Real Estate Brokers and Salesmen" the court quoted with approval the language from decisions of other courts: " 'There is involved in the relation of real estate broker and client a measure of trust analogous to that of an attorney at law to his client, or agent to his principal.' . . . 'The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. . . . The broker should know his duty. To that end, he should have "a general and fair understanding of the obligations between principal and agent." ' " *State v. Warren*, 252 N.C. 690, 695-96, 114 S.E. 2d 660, 665 (1960).

It is the duty of the Licensing Board, in determining the qualification of those to be licensed as real estate salesmen or brokers, to have "due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant." G.S. 93A-4(b).

The right of the real estate broker to take an option from or make a contract to purchase with the listing seller and the duty of the broker to optionee-seller has not heretofore been decided by the courts of this State. In determining for the first time the

applicable standards of conduct for real estate brokers and salesmen under these circumstances we are guided by the foregoing statutory language which prescribes a standard of honesty, truthfulness, and integrity.

[1] "The general rule is that a broker can neither purchase from, nor sell to, his principal unless the latter expressly assents thereto, or, with full knowledge of all the facts and circumstances, acquiesces in such course." The reason is that the broker-agent is bound to exercise the best skill and judgment and a high degree of fidelity and good faith to secure for his principal the best bargain possible, even though his own conflicting interests impel him to gain the most advantageous terms for himself. Annot., "Broker With Option To Purchase For Self," 164 A.L.R. 1378, 1378-79 (1946).

[2] While an option to purchase real estate, given by the seller to a broker employed to sell the property, is generally valid, he cannot enforce the option without making a full disclosure to his principal of any information which he has relating to other prospective sales or the value of the property. The leading case on this subject is *Rattray v. Scudder*, 28 Cal. 2d 214, 169 P. 2d 371, 164 A.L.R. 1356 (1946), and its holding has been approved in other cases. *See Bell v. Scudder*, 78 Cal. App. 2d 448, 177 P. 2d 796, *cert. denied*, 332 U.S. 792, 92 L.Ed. 374, 68 S.Ct. 102 (1947); *Vigli v. Davis*, 79 Cal. App. 2d 237, 179 P. 2d 586 (1947); *Wells Fargo Bank v. Dowd*, 139 Cal. App. 2d 561, 294 P. 2d 159 (1956).

[3] Respondent takes the position that when Billings executed to him the option to purchase the property within 30 days for $11,000, there was a severance of the listing agreement, a termination of the broker-agent and seller-principal relationship, and thus no duty on the part of respondent to disclose to Billings the offer subsequently made by Rubis to buy for $15,000. The listing agreement, a copy of which was not given to Billings, is not in the record on appeal, and the evidence does not disclose, and the court did not specifically find, whether there was a termination of the listing. We find respondent's position untenable in light of his representation to Rubis that Billings was the owner of the property and that Billings had accepted his offer of $15,000. Respondent was purporting to act for Billings but in fact was acting for himself without disclosing his role in the transaction to either Billings (seller) or Rubis (buyer).

The record on appeal reveals that respondent made a secret profit of $4,000. He did so by representing to Rubis that he was acting as broker for Billings, when in fact he was acting for himself. He falsely represented to Rubis that the owner (Billings) had received an offer of $14,500 for the property. Even if respondent was not an agent for the buyer (Rubis), once respondent discussed the transaction with Rubis, he had the duty of dealing with honesty and integrity. Instead, he took advantage of the confidence reposed in him as a broker. Under the circumstances it makes no difference whether respondent in dealing with Rubis was acting as broker or as optionee-owner. The licensing act should not be interpreted to require a licensee to be honest as a broker or salesman while allowing him to be dishonest as an owner.

We find that the findings of fact support the conclusion that respondent violated G.S. 93A-6(a)(1) and (4).

The judgement of the Superior Court upholding the license revocation is

Affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. GARRY EDWARD WALDEN

No. 8013SC1037

(Filed 19 May 1981)

Arrest and Bail § 3.4; Searches and Seizures § 8— possession of narcotics—probable cause for warrantless arrest—search incident to arrest

An officer had probable cause to believe that a crime was being committed in his presence and to arrest defendant without a warrant pursuant to G.S. 15A-401(b)(1), and a search of defendant's person immediately prior to his arrest was lawful as incident to the arrest since probable cause to arrest existed prior to the search, where the officer was told by an informant, a person who had been arrested for possession of 2,200 dosage units of LSD, that he was supposed to obtain an additional 2,000 dosage units of LSD from a person named Garry; the informant telephoned a person named "Garry" in the officer's presence and arranged to meet him in the parking lot of a restaurant at 8:00 a.m. the next morning to purchase the additional 2,000 dosage units of

LSD; the informant indicated that the seller would be driving a 1969 black Mustang with chrome-type wheels and gave the officer a detailed description of the seller's appearance; at around 8:00 a.m. the next morning the officer observed defendant drive a 1969 black Mustang with chrome-type wheels into the restaurant parking lot; and the officer then searched defendant and found LSD and other narcotics in his pockets.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 28 July 1980 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 March 1981.

The defendant was indicted for possession of "2,199 dosage units of Lysergic Acid Diethylamide (LSD)," with intent to sell and possession of "approximately two ounces of hashish" with intent to sell. At trial A. R. Stevens, a special agent with the State Bureau of Investigation, testified that on the morning of 23 August 1979 he observed defendant drive into the parking lot of the Sea Captain Restaurant in Southport, North Carolina. Stevens and a law enforcement officer accompanying him approached the vehicle, identified themselves and informed defendant that they were going to conduct a search for LSD. Stevens searched defendant's person, then arrested him and proceeded to search the automobile. At this point in the trial defendant moved for a *voir dire* examination. At the conclusion of the examination, the trial judge entered an order denying defendant's "motion to suppress" the items seized pursuant to the search of defendant and his automobile. Defendant then entered a plea of guilty to the charges imposed against him. From a judgment imposing a sentence of not less than five nor more than five years, defendant appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Walton, Fairley & Jess, by Ray H. Walton and William F. Fairley, for defendant appellant.

MARTIN, (Robert M.) Judge.

At the onset, we note that defendant's appeal is not properly before us. According to G.S. 15A-979(b), as interpreted by our

Supreme Court in *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *U.S. cert. denied*, the defendant must notify the district attorney and the trial court of his intention to appeal the denial of the suppression motion at the sentencing hearing. *See also State v. Afflerback*, 46 N.C. App. 344, 264 S.E. 2d 784 (1980); *State v. Trapper*, 48 N.C. App. 481, 269 S.E. 2d 680 (1980), (appeal pending in U.S. Supreme Court). In the case *sub judice* the record reveals that the defendant withdrew his plea of not guilty and entered a plea of guilty as charged in both counts soon after the entry of the order denying his motion to suppress. Thereafter Judge McLelland continued prayer for judgment from the 24 March 1980 Criminal Session of Brunswick Superior Court until the 28 July 1980 Criminal Session. On this latter date a consolidated sentence of not less than five nor more than five years, with a recommendation for work release, was imposed. It appears from the record that defendant then gave notice of appeal.

Despite defendant's failure properly to give notice of his intention to appeal, we have decided in our discretion to treat the purported appeal as a petition for certiorari, to allow it and to consider the case on its merits.

Defendant's four assignments of error, which have been brought forward in his brief, are directed to the trial court's order denying his motion to suppress drugs seized from the person of defendant and from his automobile. On the *voir dire* concerning this motion to suppress, the State offered evidence tending to show the following: On 22 August 1979 Agent Stevens interviewed a person who had been arrested for possession of 2,200 dosage units of LSD. The person told Stevens that he was supposed to meet a Garry Piggott in the parking lot of the Sea Captain Restaurant in Southport, North Carolina, at 8:00 a.m. on 23 August 1979. This person further indicated that Piggott would be driving a 1969 black Ford Mustang with chrome-type wheels. He described Piggott as being approximately 5'6" to 5'8" tall, weighing 195 to 205 pounds, having medium length brown hair which hung over his collar and wearing glasses. Stevens' source further told him that at this 8:00 a.m. meeting, he was to receive 2,000 dosage units of LSD from Piggott. Stevens asked his source to telephone Piggott. During the telephone conversation, Stevens heard his source ask to speak to "Garry." He was told to wait and a voice then said, "[h]ello." The source then indicated that he

needed to get "2,000 more" and requested the person on the other end to meet him somewhere. The person responded by agreeing to meet him at the parking lot of the Sea Captain Restaurant at 8:00 a.m. The source then stated: "[t]hat's good. I'll be there. I've got the money to pay you for the last I got from you." The person on the other end then ended the conversation by stating: "[f]ine. That's good because I'll have my man with me." Agent Stevens finished interviewing his source around 2:30 or 3:00 a.m. on 23 August 1979. He then drove to Jacksonville and checked the Department of Motor Vehicles files, but he could not find a vehicle registered in Piggott's name. He finished in Jacksonville around 5:30 a.m. and left for Southport. The drive to Southport took approximately two hours and fifteen minutes. When he arrived at the Sea Captain Restaurant accompanied by a law enforcement officer, he observed a 1969 black Ford Mustang with chrome-type wheels drive into the parking lot. Two men were in the vehicle. Stevens and the officer then approached the vehicle. Stevens identified himself to the driver, told him he wanted to search the car and requested that he get out. Stevens then searched the driver and found 1,000 dosage units of LSD in his left rear pocket and hashish in his left front pocket. Stevens informed the driver that he was under arrest for possession of LSD and hashish for the purpose of sale. During his search of the driver, Stevens found identification on him in both the names of Garry Piggott and Garry Walden. The defendant driver indicated that his name was Garry Walden. Immediately after arresting defendant and his passenger, Stevens searched the vehicle. He discovered a chess set in the back seat. When he opened the set he discovered both LSD and hashish inside. More hashish was found in the glove compartment. A wooden smoking pipe and two packs of rolling paper, which were in plain view of Stevens, were also seized from the automobile.

The defendant offered no evidence at the *voir dire.*

At the conclusion of the *voir dire,* the trial judge made findings based upon the evidence presented at the hearing. He then made conclusions as follows:

> From these findings the Court concludes that the officer had probable cause to arrest the defendant for possession of LSD with intent to sell.

That the search of the defendant's person and vehicle were incidental to a lawful arrest, and though without a warrant were lawful.

That the search of the chess set box, an object in plain view, as to the inside of which there was no resonable expectation of privacy, was lawful.

Defendant has assigned error to each of these conclusions as well as to the denial of his motion to suppress. In his sole argument combining all four of these assignments of error, defendant first contends that there was no probable cause for Stevens to arrest defendant. He emphasizes that probable cause was based solely on Stevens' source of information, and that therefore, this source of information had to reveal underlying circumstances showing him to be a credible person and showing the basis of the conclusion reported by him. Defendant argues that no such underlying circumstances were revealed at the suppression hearing. Defendant further argues that since there was no probable cause to arrest, the search of defendant's person or his vehicle cannot be considered a search incident to a lawful arrest. The items then seized from his person and his automobile should have been suppressed.

This Court disagrees with defendant's contentions as to the lack of probable cause to search defendant's person and to arrest him thereafter. We believe that the information learned from the informant, which was corroborated both by the telephone conversation with a man named "Garry" and the later observations of Agent Stevens at the parking lot of the Sea Captain Restaurant, gave Stevens reasonable grounds to believe that a crime was being committed in his presence and to arrest defendant without a warrant pursuant to G.S. 15A-401(b)(1). *State v. Collins*, 44 N.C. App. 141, 260 S.E. 2d 650 (1979), *aff'd on other grounds*, 300 N.C. 142, 265 S.E. 2d 172 (1980). The search of defendant's person immediately prior to his arrest was justified as incident to the arrest, since probable cause to arrest existed prior to the search. *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977). Our decision in *State v. Tickle*, 37 N.C. App. 416, 246 S.E. 2d 34 (1978) offers further support for our position. In *Tickle* the defendant argued that information obtained from a previously unknown informant was not sufficient to constitute probable cause for a warrantless search of an automobile, unless the informant also

related facts showing his reliability to give dependable information. The informant in *Tickle* told the officer that he had purchased marijuana and LSD from defendant in defendant's car an hour earlier, that the car was parked in a named parking lot and that the drugs obtained from defendant had made him sick. A deputy sheriff corroborated the informant's allegations of sickness. The informant also accurately described defendant's height, weight, clothing and automobile. He told the officer exactly where the marijuana would be found in defendant's car. We held that the minute particularity with which the informant described the defendant and his activities and the independent verification of these details by law enforcement officers prior to the search led the officers reasonably to conclude that the informant's information was reliable. We further held that the informant's admission that he had earlier purchased drugs from defendant showed that his information was dependable.

In the case *sub judice*, the informant also gave a detailed description of defendant's appearance and vehicle, as well as the location and time the alleged crimes were to occur. The prior arrest of the informant for possession of LSD would tend to show that his information about an alleged drug dealer would be dependable. Finally the reliability of the information received was corroborated by the telephone conversation wherein a man named "Garry" indicated he would meet the informant at a specified time and place. For these reasons we find that the search of defendant was incident to a lawful arrest and that the drugs seized from defendant's person were admissible.

We find it unnecessary to consider defendant's assignments of error concerning the search of his vehicle, and in particular, the search of the chess set. From the record it appears that defendant was arrested for felonious possession of both LSD and hashish immediately after the search of his person. The drugs seized from the car and from the chess set inside the car therefore were not a necessary element of the charges against defendant.

We affirm the trial court's order denying defendant's motion to suppress.

Affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

ROBERT SNOW, GUARDIAN AD LITEM FOR STEFFANIE ANNETTE SNOW, PLAINTIFF v. VIRGINIA MAY NIXON, DEFENDANT AND THIRD PARTY PLAINTIFF v. JANET SNOW, THIRD PARTY DEFENDANT

No. 8017SC444

(Filed 19 May 1981)

Automobiles § 92; Parent and Child § 2.1— child alighting from mother's car—no parent-child immunity

Allegations of defendant third party plaintiff's complaint were sufficient to show that the injury sustained by the minor plaintiff arose out of her mother's operation of a motor vehicle so that the doctrine of parent-child immunity would not bar the defendant third party plaintiff's claim against the child's mother for contribution where defendant third party plaintiff alleged that the mother stopped her vehicle partially off the edge of a busy and dangerous street to enable the minor plaintiff, who was wearing dark clothing, to exit the vehicle; the minor plaintiff ran around the rear of her mother's vehicle prior to darting into the path of defendant's vehicle which was traveling in the opposite direction from the mother's vehicle; and the mother remained at the wheel and in control of her vehicle while waiting for the child to return. G.S. 1-539.21.

APPEAL by defendant and third-party plaintiff from *Riddle, Judge.* Judgment entered 7 February 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 5 November 1980.

The plaintiff, through her mother and guardian ad litem, Janet Snow (hereinafter "Snow"), filed a complaint 2 May 1979 seeking recovery for personal injuries which she allegedly incurred at the age of four when she was negligently struck by the defendant's vehicle.

The defendant answered by generally denying negligence and by alleging unavoidable accident. The defendant's answer also contained a third-party complaint against Snow for contribution in which the defendant alleged that plaintiff's injuries resulted from Snow's negligent protection, control and supervision of plaintiff while Snow was operating a motor vehicle. The defendant and third-party plaintiff further alleged that shortly after 6:00 p.m. on

Halloween night, 31 October 1977, when "the darkness of nightfall existed," Snow had stopped her vehicle, which was headed in a westerly direction on James Street in Dobson, North Carolina, partially in the westbound lane of James Street and partially off the edge of the road; that James Street at that time was a "busy and dangerous street"; that plaintiff, who was wearing dark clothing, had exited the Snow vehicle to "trick or treat" and had run around the rear of that vehicle prior to darting into the path of defendant's vehicle which was in the eastbound lane of James Street traveling east. Defendant also alleged that Snow had remained at the wheel and in control of her vehicle while waiting for the child to return so that Snow could drive her to other "trick or treat" locations.

After the third-party complaint was filed, the minor plaintiff's father was ordered substituted as guardian ad litem.

Snow answered the third-party complaint denying negligence and pleading, alternatively, that if she had been negligent, her negligence was insulated by defendant's later occurring negligence. Snow also moved to dismiss the third-party complaint pursuant to Rule 12(b)(6), N.C. Rules Civ. Proc., for failure to state a claim for relief, pleading, in support of her motion, the doctrine of parent-child immunity to the extent it was not abolished by N.C. Gen. Stat. § 1-539.21.

Defendant and third-party plaintiff appeals from the partial judgment of the trial court granting Snow's motion to dismiss the third-party complaint.

Faw, Folger, Sharpe & White by Thomas M. Faw, T. Richard Pardue, Jr. and Fredrick G. Johnson, for the third-party plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and James M. Stanley, Jr., for the third-party defendant-appellee.

MARTIN (Robert M.), Judge.

The sole issue presented by this appeal is whether the allegations in the third-party complaint are sufficient to show that the injury sustained by Steffanie Annette Snow arose out of her mother's operation of a motor vehicle so as to fall within the scope of N.C. Gen. Stat. § 1-539.21. Taking the allegations in the

third-party complaint as true, if the child's injury arose out of the operation of the motor vehicle, the doctrine of parent-child immunity would not bar the defendant and third-party plaintiff's claim against the child's mother for contribution. If G.S. 1-539.21 is inapplicable, however, the rule that an unemancipated minor child is barred by the doctrine of parent-child immunity from suing her parents for negligent protection, control and supervision would also bar the claim asserted indirectly against the parent in the third-party action for contribution. *Watson v. Nichols*, 270 N.C. 733, 155 S.E. 2d 154 (1967).

G.S. 1-539.21 reads as follows:

> Abolition of parent-child immunity in motor vehicle cases.—The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

This Court upheld the constitutionality of G.S. 1-539.21 in *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E. 2d 862 (1978), *disc. rev. denied*, 296 N.C. 585, 254 S.E. 2d 35 (1979). No North Carolina cases, however, define the scope of the exception to the parent-child immunity doctrine found in G.S. 1-539.21. Therefore in construing the statute in the case *sub judice*, we must rely upon well-established North Carolina case law regarding statutory construction. In *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E. 2d 422 (1972), Judge Britt, now Justice Britt, writing for this Court stated:

> It is settled law that statutes in derogation of the common law . . . must be strictly construed. (Citations omitted.) Strict construction of [a statute] requires that everything be excluded from the operation of the statute which does not come within the scope of the language used, taking the words in their natural and ordinary meaning. (Citation omitted.)

Id. at 518, 190 S.E. 2d at 424.

In order to determine the sufficiency of the third-party complaint, we must consider the language used by the General Assembly in G.S. 1-539.21 in light of the foregoing rules of construction. The key phrase in G.S. 1-539.21 which must be con-

strued on this appeal is "arising out of the operation of a motor vehicle."

The term "arising out of" has acquired a generally accepted meaning in cases pertaining to coverage under standard automobile liability insurance policies. This Court has held that the phrase "arising out of" in a standard liability insurance policy connotes a concept of causation. *Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E. 2d 341, *disc. rev. denied*, 293 N.C. 589, 239 S.E. 2d 263 (1977); *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206 *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977).

Defendant cites *Insurance Co. v. Walker, id.*, in support of her argument that plaintiff's injury in the case *sub judice* arose out of the operation of a motor vehicle. In *Walker*, however, this Court construed a provision in a standard automobile liability insurance policy which provided that the policy's coverage included bodily injury "arising out of the ownership, maintenance or use of the owned automobile. . . ." *Id.* at 16, 234 S.E. 2d at 208. We held in *Walker* that an injury to a person standing outside the insured's truck caused by the discharge of a rifle on a permanently mounted gun rack inside the truck cab arose out of the use of the truck within the meaning of the policy. Our reasoning was that the transportation of guns was one of the regular uses to which the truck had been put and therefore the shooting had a causal connection with the use of the truck. G.S. 1-539.21 does not contain the language "arising out of the use of," but rather, it contains the language "arising out of the operation of." Thus, while *Walker* aids us in construing the term "arising out of" it is of no help in construing the remainder of the phrase used in G.S. 1-539.21, "the operation of a motor vehicle."

The recent case of *Colson v. Shaw*, 301 N.C. 677, 273 S.E. 2d 243 (1981), however, does aid us in construing the term "the operation of a motor vehicle." In *Colson v. Shaw, id.*, the Supreme Court held that the operator of a motor vehicle has a duty to allow his passengers to unload in a safe place. The following language from that opinion, written by Justice Copeland, is relevant to the case at bar:

> It is well settled in North Carolina that the operator of an automobile has a duty to exercise that degree of care which a person of ordinary prudence would exercise under

similar circumstances to prevent injury to the invited occupants of his vehicle. [Citations omitted.] Our research has revealed no North Carolina cases which involve the particular duty that an operator owes to passengers alighting from his vehicle. It is generally established that the operator must at least allow his passengers to unload in a safe place and may not stop his car in a manner likly to create a hazard to those alighting. [Citations omitted.] . . .

Our determination in the case is also influenced by the rule that where the actions of children are at issue, the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself. [Citation omitted.] As stated by Justice Parker (later Chief Justice), speaking for our Court in *Pavone v. Merion*, 242 N.C. 594, 594, 89 S.E. 2d 108, 108 (1955):

> "A motorist must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, that their excursions into a street may reasonably be anticipated, that very young children are innocent and helpless, and that children are entitled to a care in proportion to their incapacity to foresee and avoid peril."

Id. at --- , 273 S.E. 2d at 246.

In our opinion, based on the Supreme Court's decision in *Colson v. Shaw, supra*, the third-party complaint in the case *sub judice* states a cause of action for contribution due to the alleged negligence of Snow "arising out of the operation of a motor vehicle." We hold, therefore, that the trial court erred in dismissing the third-party complaint. The judgment appealed from is reversed.

Reversed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. JOYCE CONSEEN DUGAN

No. 8030SC1052

(Filed 19 May 1981)

Indians § 1— jurisdiction over traffic offense by Cherokee Indian

The courts of this State have jurisdiction to try a Cherokee Indian for an alleged traffic offense which occurred on a highway within the boundaries of the Cherokee Indian Reservation.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 7 October 1980 in Superior Court, SWAIN County. Heard in the Court of Appeals 10 March 1981.

Defendant, who is one-half Cherokee Indian, was charged with driving 56 miles-per-hour in a 45 mile-per-hour zone on U.S. Highway 19 at a point within the boundaries of the Cherokee Indian Reservation. Her motion to dismiss for lack of jurisdiction was denied in both the district court and superior court. She has appealed from a fine imposed after she was convicted in superior court.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Holt, Haire and Bridgers, by Ben Oshel Bridgers, for defendant appellant.

WEBB, Judge.

The defendant contends that the courts of this state do not have jurisdiction to try a Cherokee Indian for an alleged traffic offense which occurred on a highway within the boundaries of the Cherokee Indian Reservation. There have been many cases which have traced the history and defined the legal relationship of the Cherokee Indians to the State of North Carolina. *See Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288, 6 S.Ct. 718, 29 L.Ed. 880 (1886); *Eastern Band of Cherokee Indians v. Lynch,* 632 F. 2d 373 (4th Cir. 1980); *United States v. Wright,* 53 F. 2d 300, *cert. denied,* 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (4th Cir. 1931); *Sasser v. Beck,* 40 N.C. App. 668, 253 S.E. 2d 577 (1979). These cases hold that the Eastern Band of Cherokee Indians is recognized by the federal government as an Indian tribe

and the land in Swain County upon which this traffic offense allegedly occurred, is a reservation for this tribe.

There are several cases which hold courts of the State of North Carolina have jurisdiction for the trial of crimes allegedly committed by Indians on the Cherokee Indian Reservation. *See United States v. Hornbuckle*, 422 F. 2d 391 (4th Cir. 1970); *In re McCoy*, 233 F. Supp. 409 (E.D.N.C. 1964); *State v. Wolf*, 145 N.C. 441, 59 S.E. 40 (1907); *State v. Ta-cha-na-tah*, 64 N.C. 614 (1870). The defendant contends the holdings in these cases are no longer valid in light of *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed. 2d 489 (1978) and *Eastern Band v. Lynch, supra*. *John* dealt with the prosecution of a Choctaw Indian under the Major Crimes Act, 18 U.S.C. § 1153. The Major Crimes Act provides for the prosecution of Indians in federal court for 14 enumerated crimes, not including traffic offenses, committed on Indian reservations. In *John* it was held that the Major Crimes Act gives exclusive jurisdiction to the federal courts for the crime for which John was charged. Unlike the defendant in the case sub judice, John was charged with one of the crimes listed in the Major Crimes Act. We do not believe the Major Crimes Act preempts North Carolina from jurisdiction to try a traffic offense. *Lynch* deals with the imposition of the state income tax and Swain County personal property taxes on Cherokee Indians living on the Cherokee Indian Reservation. The Fourth Circuit Court of Appeals held that Congress had the power to preempt the State of North Carolina and Swain County from imposing these taxes and the state and county had to show that Congress had not preempted them from imposing the taxes before they could be levied. The Court held that the state and county had not shown that Congress had not preempted them from levying these taxes. We believe Congressional intent not to preempt the State of North Carolina from enforcing its traffic laws by trying Cherokee Indians charged with speeding on the reservation is found in Congress's failure to adopt any preemptive legislation in light of the North Carolina and federal court cases holding the state has jurisdiction to try Indians for crimes committed on the reservation.

The defendant argues that North Carolina is preempted from trying her by the Assimilative Crimes Act, 18 U.S.C. § 13 which is made applicable to the states by the General Crimes Act, 18 U.S.C. § 1152, which provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

This section extends, with certain exceptions, the criminal law applying on federally controlled lands, such as military reservations, to Indian reservations. It does not in itself define any type of criminal behavior but the defendant argues that it makes traffic cases triable in federal court because of the Assimilative Crimes Act, 18 U.S.C. § 13, which provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The United States Supreme Court held that the Assimilative Crimes Act is made applicable to Indian reservations through the General Crimes Act. *See Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). The defendant contends that the violation with which she is charged is made a federal crime by the Assimilative Crimes Act as made applicable to the Cherokee Reservation by the General Crimes Act. The defendant contends that since she could be tried for this crime in a federal court, the state is preempted from trying her.

The General Crimes Act does not apply to intra-Indian offenses. The United States Supreme Court has held it does not apply to crimes committed on Indian reservations between non-

Indians. *See Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882). The United States Supreme Court has also held that Indians cannot be tried in federal court for adultery under the General Crimes Act. *See United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1196 (1916); *In re Mayfield*, 141 U.S. 107, 11 S.Ct. 939, 35 L.Ed. 635 (1891). The holdings of these cases were based in part on the determination that adultery is a victimless crime. The speeding offense with which the defendant is charged is also a victimless crime. For this reason, we cannot say that a federal court would have jurisdiction to try the defendant in the case sub judice. For an analysis of this problem, *see* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 529, 530 (1976).

For many years the courts of this state have exercised at least concurrent jurisdiction to try Cherokee Indians for certain crimes committed on the Cherokee Indian Reservation. *See* Clinton, *supra*, n. 248 at 551-552. Congress could have preempted the state of this jurisdiction, and it has not done so. We do not feel we should now hold the District and Superior Courts of Swain County did not have jurisdiction to try the defendant.

No error.

Judges HEDRICK and HILL concur.

ALLEN W. EVERHART v. SIDNEY LEBRUN, TRUSTEE FOR ROYAL VILLA OF GREENSBORO, INC., DEBTOR

No. 8018SC981

(Filed 19 May 1981)

1. Negligence § 57.7— snow and ice in parking lot—negligence and contributory negligence—sufficiency of evidence

In an action to recover for injuries sustained by plaintiff when he fell in defendant's parking lot, evidence was sufficient to require jury determination as to whether defendant failed to maintain its premises in a reasonably safe condition and, if so, whether this failure was a proximate cause of plaintiff's injuries, where the evidence tended to show that ice and snow were scattered all over defendant's parking lot; there was no evidence that defendant had

taken steps to remove any of the accumulated ice and snow; on his way out of defendant's motel, plaintiff stepped into an icy hole which was covered with snow, tripped and fell; and as a result of his fall plaintiff suffered a fractured wrist which, after a period of healing, was permanently deformed. Furthermore, defendant's contention that plaintiff's failure to use a safer alternative route was contributory negligence as a matter of law was without merit, and whether plaintiff acted unreasonably in choosing the north entrance to the motel for his exit, rather than the east entrance through which he entered the motel, was a question of fact for the jury.

2. Negligence § 58.1— fall in motel parking lot—instructions inadequate

In an action to recover damages for injuries sustained by plaintiff when he fell in defendant's parking lot, defendant is entitled to a new trial where the court failed to specify the acts or omissions of defendant which were supported by the evidence from which the jury could find negligence, failed to state the care required of plaintiff and the acts or omissions of plaintiff supported by the evidence from which the jury could find contributory negligence, and failed to recapitulate the evidence relating to damages so that the jury could apply the law to the facts in its determination of plaintiff's monetary remedy.

APPEAL by defendant from *Riddle, Judge.* Judgment entered 22 May 1980, in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 April 1981.

Plaintiff fell while on defendant's premises and seeks damages for injuries sustained thereby.

The following issues were submitted to and answered by the jury as indicated:

1. Was the plaintiff injured and damaged by the negligence of the defendant?

   Answer: Yes.

2. If so, did the plaintiff's conduct amount to negligence which contributed to his own injury and damage?

   Answer: No.

3. What amount, if any, is the plaintiff . . . entitled to recover for his injuries?

   Answer: $35,000 plus medical expenses.

From judgment entered on the verdict, defendant appealed.

Charles M. Ivey, III for plaintiff-appellee.

J. B. Winecoff and Harry Rockwell for defendant-appellant.

WHICHARD, Judge.

[1] Defendant first assigns error to the trial court's denial of his motions for directed verdict and for judgment notwithstanding the verdict. It contends evidence of its negligence was insufficient to go to the jury or, in the alternative, that the evidence established contributory negligence as a matter of law.

Motions for directed verdict pursuant to G.S. 1A-1, Rule 50(a) and for judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b) test the legal sufficiency of the evidence to take the case to the jury and support a verdict for the party opposing the motion. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true; and all the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980). A directed verdict is not properly allowed "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Graham v. Gas Co.*, 231 N.C. 680, 683, 58 S.E. 2d 757, 760 (1950). Under these principles defendant is not entitled to a directed verdict or to judgment notwithstanding the verdict unless plaintiff has failed as a matter of law to establish the elements of actionable negligence or unless the evidence, viewed in the light most favorable to plaintiff, shows contributory negligence as a matter of law.

Plaintiff introduced evidence tending to show the following: On 2 February 1978 approximately 1.5 inches of snow fell in the Greensboro area. On 5 February 1978, after two days of freezing weather with no precipitation, there were further traces of snow. During the evening approximately two hundredths of an inch of snow fell. On that evening, plaintiff, a guest of defendant motel, attended a dance there sponsored by a cosmetology convention. When plaintiff arrived he noticed snow and ice all over the motel parking lot. Although he parked on the northeast side of the motel, he determined that the better way to enter was through the east entrance. Shortly after midnight plaintiff left the motel through the north exit with one of his employees. They had to walk carefully because of the ice and snow at the entrance. Plaintiff then had to return to the motel to get the key to a car owned by another employee. On his second trip out the north exit he

stepped in an icy hole which was covered with snow, and he tripped and fell. Plaintiff testified there was no evidence that defendant had taken steps to remove any of the accumulated ice and snow. As a result of his fall plaintiff suffered a fractured wrist necessitating his wearing a cast for six and a half weeks. The wrist is now permanently deformed.

Viewing this evidence in the light most favorable to plaintiff, we find it sufficient to require jury determination of whether defendant failed to maintain its premises in a reasonably safe condition and, if so, whether this failure was the proximate cause of plaintiff's injuries. Thus, the court properly denied defendant's motions insofar as they related to the issue of its negligence.

Defendant's second contention in support of these motions is that plaintiff's failure to use a safer alternative route was contributory negligence as a matter of law. "This issue, too, 'necessitates an appraisal of [the] evidence in the light most favorable to [plaintiff].' " *Hunt*, 49 N.C. App. at 642, 272 S.E. 2d at 361. While a plaintiff may be contributorily negligent by pursuing a dangerous route when a less dangerous one is available, when conflicting contentions are both supported by permissible inferences from the evidence the inferences are for the jury, not for the court. *Broadway v. King-Hunter, Inc.*, 236 N.C. 673, 73 S.E. 2d 861 (1953). The evidence here on contributory negligence was in conflict. While plaintiff testified that upon arrival he selected the east entrance because it appeared safer at that time, there is no evidence that it was, in fact, safer, then or later. Before his fall plaintiff and one of his employees had used the northeast entrance, the one closer to his automobile, without mishap. Further, there was evidence that snow and ice were scattered throughout defendant's parking areas. Plaintiff testified that he was attempting to select his steps carefully and that the place he stepped off "was the safest place [he] could see." Viewing the evidence in the light most favorable to plaintiff, whether plaintiff acted unreasonably in choosing the north entrance was a question of fact for the jury. Defendant's first assignment of error is overruled.

[2] Defendant next assigns error to the failure of the trial court to recapitulate the evidence to the extent necessary to explain the law arising thereon as required by G.S. 1A-1, Rule 51(a). After

summarizing the evidence the court gave the following instructions concerning the issue of negligence:

> As to the first issue: "Was the plaintiff injured and damaged by the negligence of the defendant," on this issue, . . . the burden of proof is on the plaintiff. This means that the plaintiff must prove by the greater weight of the evidence that he suffered personal injury as a proximate cause of the negligence of the defendant.
>
> Negligence is the lack of ordinary care. It is a failure to do what a reasonably careful and prudent person would have done, or the doing of something which a reasonably careful and prudent person would not have done, considering all the circumstances existing on the occasion in question.
>
> Proximate cause is a real cause, a cause without which the damage or injury would not have occurred. Furthermore, it is a cause that a reasonably prudent person in the exercise of due care would have reasonably foreseen the results of his conduct [sic].
>
> In determining whether a lack of ordinary care existed, you are instructed that a motel operated by and through its employees is required by law to exercise ordinary care to maintain in a reasonably safe condition those portions of its premises which the motel expects to be used by its guests, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision. A failure to exercise this care is negligence, and if such negligence was the proximate cause or a proximate cause of the injury to the plaintiff, the defendant would be liable.
>
> Now, where unsafe conditions are created by a third party or independent agency, the defendant would not be negligent unless it is shown by the plaintiff by the greater weight of the evidence that such a condition has existed for a length of time that the motel knew, or by the exercise of reasonable care should have known of its existence in time to remove the danger, or give a warning of its presence, if a warning alone would be what a reasonable, careful and prudent person would have done, considering all the circumstances existing on the occasion in question.

A motel is not required to warn of obvious dangers or conditions, nor is a motel required to warn of dangerous conditions about which a guest of the motel has equal or superior knowledge. However, where a motel properly refrains from giving any warning, it can still be found to be negligent if the other actions or inactions of the motel represent a failure to do what was reasonable and prudent, considering all the circumstances existing on the occasion in question.

Under G.S. 1A-1, Rule 51(a), as interpreted by our appellate courts, the trial court must relate to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. *See e.g., Griffin v. Watkins*, 269 N.C. 650, 153 S.E. 2d 356 (1967); *Hunt v. Mongomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980). A mere recitation of the law in general terms is not sufficient. *Redding v. Woolworth Co.*, 14 N.C. App. 12, 187 S.E. 2d 445 (1972).

The court here failed to specify the acts or omissions of defendant which were supported by the evidence from which the jury could find negligence. "It failed to relate the contentions of negligence supported by the evidence. *See* N.C.P.I.—Civil 805.55." *Hunt*, 49 N.C. App. at 645, 272 S.E. 2d at 363. It also failed to state the care required of plaintiff and the acts or omissions of plaintiff supported by the evidence from which the jury could find contributory negligence. Finally, it failed to recapitulate the evidence relating to damages so that the jury could apply the law to the facts in its determination of plaintiff's monetary remedy. These failures are inherently prejudicial and entitle defendant to a new trial. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972).

Defendant's remaining assignments of error relate to evidentiary rulings and to portions of the court's instructions to the jury. We have examined the contentions presented in these assignments, and we find no prejudicial error.

New trial.

Judges MARTIN (Robert M.) and BECTON concur.

BERTHA J. EARP v. ROY L. EARP

No. 8010DC873

(Filed 19 May 1981)

1. **Divorce and Alimony § 4— condonation as conditional forgiveness**

Plaintiff's particularized allegations of indignities and abandonment between 17 and 27 November 1979 operated to revive her complaint as to defendant's acts of cruelty, indignities, and abandonment prior to 15 November 1979, and the trial court erred in ruling that plaintiff, by resuming the marital relationship with defendant on 15, 16, and 17 November 1979 had condoned and forgiven defendant's previous misconduct.

2. **Divorce and Alimony § 4— condonation—failure to plead**

Where plaintiff alleged the resumption of cohabitation by the parties in both her complaint and reply, the trial judge properly considered the question of plaintiff's condonation of defendant's prior conduct even though defendant failed to allege the defense of condonation in his pleadings.

APPEAL by plaintiff from *Greene, Judge.* Judgment entered 25 April 1980 in District Court, WAKE County. Heard in the Court of Appeals 31 March 1981.

Plaintiff wife brought this action seeking reasonable subsistence and alimony without divorce and possession of the parties' home from defendant husband. In her verified complaint, plaintiff alleged that without provocation by plaintiff, defendant abandoned, maliciously turned out of doors, and offered indignities and cruel and barbarous treatment to the person of plaintiff, and that defendant had committed adultery and used alcohol excessively. Plaintiff detailed, in her complaint, numerous instances beginning in June 1976 of defendant's mistreatment of plaintiff, including defendant's excessive drinking, and defendant physically striking plaintiff. Plaintiff alleged that on a number of such occasions of mistreatment she was forced to leave the residence where she lived with defendant. Plaintiff alleged that she was forced to leave the residence on 2 December 1978 and that defendant ordered her to stay away from the residence. Plaintiff further alleged on 15 November 1979, upon defendant's urging and defendant's representation to her that he wanted to resume living together with plaintiff as husband and wife, plaintiff returned to the residence and remained there with defendant until 17 November 1979. During this time, she shared the same bedroom with defendant, specifically on the nights of 15 and 16

November. On the morning of 17 November, despite plaintiff's request that defendant stay, defendant left the home stating that he was going to the beach. Defendant returned briefly on 19 November but again left despite plaintiff's requests that he stay. On the evening of 26 November 1979 defendant returned once more, accompanied by another woman. Defendant ordered plaintiff to leave the house and defendant and the woman remained in the house. On 27 November 1979 when plaintiff returned to the house, defendant moved certain items of personal property from the house and informed plaintiff that he was having the utilities disconnected. Plaintiff alleged that defendant's acts from 15 to 27 November constituted abandonment of plaintiff by defendant and the offering of such indignities to plaintiff's person so as to render plaintiff's condition intolerable and life burdensome.

Defendant answered, denying the essential allegations of plaintiff's complaint, and counterclaiming for a divorce from bed and board based on indignities offered by plaintiff to defendant which rendered defendant's condition intolerable and life burdensome. Defendant detailed these indignities covering the years 1977 to 1979. Defendant did not allege that plaintiff had condoned the alleged mistreatment of plaintiff by defendant.

In her reply to defendant's counterclaim, plaintiff stated the following as a bar to defendant's claim:

> At various times over the past approximately four-year period and on or about November 15, 1979, plaintiff and defendant have resumed living together as man and wife; that, upon such resumption of living together, defendant has condoned any and all such alleged conduct of plaintiff; and defendant cannot now rely on any such alleged conduct as a defense to plaintiff's claim or as a basis for his counterclaim.

When the case was called for trial, defendant moved to dismiss plaintiff's claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. At the hearing on this motion, defendant's attorney stated that defendant admitted plaintiff's allegation that on 15 November 1979, the plaintiff and defendant resumed living together as husband and wife, and argued that such a resumption of the relationship constituted, as a matter of law, condonation by each party of any and all misconduct of the other party prior to that date. In response to this motion, the trial judge ruled that

there was condonation by both parties as a result of the conduct of both parties on November 15, 16, and 17, 1979; and that all conduct as between the plaintiff and defendant, prior to these dates, was forgiven by each of the parties respectively; and that the marital relationship was resumed.

At trial both parties presented evidence of the events subsequent to 15 November 1979. After deliberation, the jury answered the issues presented to them as follows: "Did the defendant abandon the plaintiff in November 1979 as alleged in the complaint? No; Did the defendant offer such indignities to the person of the plaintiff as to render her condition burdensome and life intolerable [*sic*]? No." Plaintiff has appealed.

Emanuel & Thompson, by W. Hugh Thompson, for plaintiff appellant.

Boyce, Mitchell, Burns & Smith, by Eugene Boyce and Greg L. Hinshaw, for defendant appellee.

WELLS, Judge.

[1] In her first assignment of error, plaintiff contends that the trial court committed prejudicial error by its pretrial determination, based on the pleadings, that there was condonation by both plaintiff and defendant as a result of the events of 15, 16, and 17 November 1979. As is made clear by the language of his pretrial order, Judge Greene ruled that plaintiff, by resuming the marital relationship on 15, 16, and 17 of November 1979 had condoned *and forgiven* defendant's previous offenses.

The determinative aspect of this issue, however, is whether condonation operates to *forever* forgive previous indignities or acts of cruelty. Since the early case of *Gordon v. Gordon*, 88 N.C. 45 (1883), our appellate courts have consistently adhered to the rule that condonation is a conditional forgiveness. We quote in pertinent part from *Gordon:*

> Condonation . . . is strictly a technical word. It had its origin in the ecclesiastical court of England and means "forgiveness with condition." The condition is, that the original offense is forgiven, if the delinquent will abstain from the commission of a like offense afterwards, and moreover, treat the forgiving party in all respects with conjugal kindness (cited author-

> ity omitted). Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation, and operates as a reviver of the former acts (cited authority omitted).

88 N.C. at 50-51.

For restatement of the rule in subsequent cases, *see, Lassiter v. Lassiter,* 92 N.C. 129, 136 (1885); *Page v. Page,* 167 N.C. 346, 348, 83 S.E. 625, 626 (1914); *Eggleston v. Eggleston,* 228 N.C. 668, 679, 47 S.E. 2d 243, 250 (1948); *Cushing v. Cushing,* 263 N.C. 181, 187-88, 139 S.E. 2d 217, 222-23 (1964); *Malloy v. Malloy,* 33 N.C. App. 56, 60, 234 S.E. 2d 199, 202 (1977). *See also,* 1 Lee, N.C. Family Law § 87, at 404-10 (1979).

We hold that plaintiff's particularized allegations of indignities and abandonment between 17 and 27 November 1979 operated to revive her complaint as to defendant's acts of cruelty, indignities, and abandonment prior to 15 November 1979 and that the trial court erred in dismissing those prior offenses from her claim for relief. *Compare, Cushing v. Cushing, supra. Compare also, Privette v. Privette,* 30 N.C. App. 305, 227 S.E. 2d 137 (1976), where there was no separation, but continued acts of cruelty and indignities *during continued cohabitation.* This Court held the complaining spouse did not condone the continued offenses against her *by continuing to cohabitate* until she sought relief in her G.S. 50-16 action.

[2] Plaintiff also asserts that the issue of whether plaintiff condoned defendant's prior conduct was not properly before the trial judge at the hearing on defendant's motion, because defendant failed to affirmatively allege the defense of condonation in his pleadings. Ordinarily, as an affirmative defense, condonation must be alleged in defendant's pleadings. *Hudson v. Hudson,* 21 N.C. App. 412, 415, 204 S.E. 2d 697, 699 (1974); *compare, Malloy v. Malloy, supra,* at 59, 234 S.E. 2d at 201. Our Supreme Court has held, however, that when plaintiff's pleadings allege cohabitation subsequent to defendant's misconduct, plaintiff's claim is properly demurrable for condonation even absent such allegations in defendant's pleadings. *Cushing v. Cushing, supra,* at 188, 139 S.E. 2d at 223. Because plaintiff, in both her complaint and reply, alleged

the resumption of cohabitation by the parties, we hold that the trial judge properly considered the question of plaintiff's condonation of defendant's prior conduct in ruling on defendant's motion to dismiss. *Cushing v. Cushing, supra.*

As plaintiff's other asserted errors in the trial are not likely to recur on retrial, we elect not to discuss them in this appeal.

For reasons stated, there must be a

New Trial.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. RENEE MAKERSON

No. 8029SC1005

(Filed 19 May 1981)

1. **Criminal Law § 35— offense committed by another—evidence properly excluded**

The trial court did not err in refusing to admit into evidence testimony presumably showing that a person other than defendant had committed the crime in question, where no evidence had been introduced which linked the third person with the crime in any way; counsel asked a question of defendant's mother in hopes of presenting evidence that the third person had a motive to commit the crime; absent any other evidence that the third person might have committed the crime, the existence or non-existence of his motive was inadmissible; and such an inquiry was too speculative and remote to permit it into evidence.

2. **Criminal Law § 62— polygraph test—voice stress test—willingness of defendant to take—inadmissibility of evidence**

Since the results of a polygraph test and a voice stress test would not be admissible in this case, the fact that defendant took the stress test and was willing to take the polygraph test was not competent evidence and was therefore properly excluded by the trial judge.

APPEAL by defendant from *Collier, Judge.* Judgment entered 31 July 1980 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 3 March 1981.

Defendant was properly indicted on the charge of first degree murder. At the start of trial, the State announced its in-

tention to seek a conviction for second degree murder or manslaughter. The jury returned a verdict of voluntary manslaughter, and the defendant was subsequently sentenced by the judge to a term in prison of not less than ten (10) nor more than fifteen (15) years.

The State's evidence tended to show that the defendant, Renee Makerson, and the deceased, Jobie Miller, had been drinking together from noon until midnight on 4 April 1980. Shortly after midnight, the two returned to Robert Thomas' house where Miller was staying. Thomas was already in bed when they arrived but overheard an argument between Miller and defendant. Defendant wanted three dollars from Miller in order to pay for a ride home, but Miller refused to give her any money. Thomas heard the defendant say to Miller, "If you don't give me $3.00, I'm going to kill you." Defendant then tore Miller's shirt. Miller and defendant left Thomas' house and walked next door to the home of Lula Wilkins. Once at the Wilkins' house, Miller knocked on the door and said, "let me in, Renee [Makerson] stabbed me." Inside the Wilkins' house, Miller lay down on the floor and died from a stab wound in the base of his throat. A subsequent police investigation revealed blood stains of the deceased running from the Thomas house porch, across the yard, to the Wilkins' house. A knife was found in the yard with blood stains matching the deceased's blood.

Defendant's evidence tended to show, however, that she never threatened the deceased; that she waited for Miller outside Thomas' house for about a minute before they began walking over to Wilkins' house; that Miller did not appear stabbed prior to leaving the Thomas house; and that someone ran by them in the dark as they walked from Thomas' house to Wilkins' house. Defendant was not able to identify the person who ran by them in the yard because she did not have on her glasses, and it was dark. Defendant told the police that the stabbing must have occurred as they walked to the Wilkins' house, but that she did not stab the deceased.

Defendant appeals from a verdict of guilty of voluntary manslaughter.

Attorney General Edmisten, by Associate Attorney General William R. Shenton, for the State.

Robert G. Summey for the defendant appellant.

BECTON, Judge.

[1] Defendant makes four assignments of error, but only brings forward two on appeal. First, defendant assigns as error the trial judge's refusal to admit into evidence testimony presumably showing Robert Thomas' guilt, rather than the defendant's guilt. At trial, defendant's attorney attempted to elicit testimony of ill will existing between the deceased and Robert Thomas. On direct examination of defendant's mother, Margaret Makerson, the following transpired:

> Q. Do you know anything else about any problems that Robert Thomas might have had [with Jobie Miller]. . .
>
> Mr. Leonard: Objection.
>
> The Court: Sustained.

The witness' answer to this question was never placed in the record for review on appeal.

As pointed out in a recent decision of this court, "[t]he law of this State with respect to the admissibility of evidence tending to show the guilt of one other than the accused has been described by our Supreme Court as being 'rather unsettled.' *State v. Gaines*, 283 N.C. 33, 41, 194 S.E. 2d 839, 845 (1973)." *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E. 2d 468, 470-71 (1979). For many years, the North Carolina Courts, as a general rule, prohibited a defendant from introducing evidence of another's guilt except in very specialized situations. *See generally State v. White*, 68 N.C. 158 (1873); *State v. Baxter*, 82 N.C. 602 (1880) (evidence must not only implicate another, but also must be completely inconsistent with the guilt of the defendant). This rule has consistently come under harsh criticism, and "the rule has been gradually whittled away so that it may fairly be said that today there is no special rule on the subject." 1 Stansbury § 93 at 302 (Brandis rev. 1973); *see also* Wigmore on Evidence, §§ 139-142 (3d ed. 1940).

The rule of admissibility of evidence that someone other than the defendant committed the crime hinges on relevancy. Considering all the facts and circumstances of the case, "the admissibility

of such evidence [of another's guilt] should depend upon its relevency in the case in which it is offered—whether it logically tends to prove or disprove some material fact at issue in the particular case." *State v. Britt*, 42 N.C. App. at 641, 257 S.E. 2d at 471. *See also State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Couch*, 35 N.C. App. 202, 241 S.E. 2d 105 (1978); 1 Stansbury, *supra*, at § 93. In order to admit evidence of another person's guilt of the crime charged against the defendant, there must be some proof that the person is connected with the crime or proof of some sequence of facts or circumstances tending to implicate someone other than the accused. 1 Wharton's Criminal Evidence § 163 (13th ed. 1974).

Frequently, defendants have attempted to show that another person had either the motive or the opportunity to commit the offense charged as a means of creating doubt in the jurors' minds concerning the defendant's guilt. North Carolina case law is replete, however, with decisions holding that mere evidence that one other than the defendant had a motive *or* the opportunity to commit the crime is not enough to make the evidence admissible. The theory of the courts has been that this evidence alone is too remote to be relevant. *See State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). The courts also have been clear that "[e]vidence which can have no effect except to cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another, . . . is not admissible." 238 N.C. at 537, 78 S.E. 2d at 389; *State v. Jones*, 32 N.C. App. 408, 413, 232 S.E. 2d 475, 478, *cert. denied*, 292 N.C. 643, 235 S.E. 2d 63 (1977).

In the case at bar, no evidence had been introduced which linked Robert Thomas with the murder in any way. Counsel asked the question of defendant's mother in hopes of presenting evidence that Robert Thomas had a motive to commit the murder. However, absent any other evidence that Thomas might have committed the crime, the existence or nonexistence of his motive is inadmissible. 1 Wharton's Criminal Evidence, *supra*, at § 163. In this case, such an inquiry was too speculative and remote to permit it into evidence. The trial judge was therefore correct in sustaining the objection.

[2] The defendant next argues that the trial judge erred in not permitting her to present evidence that she was willing to take a polygraph test and did in fact take a voice stress test. The results of the polygraph test and voice stress tests are not considered by the courts in this State to be reliable, and as such are generally not admissible. *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975) (polygraph test); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975) (polygraph test); *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979) (stress evaluation tests). The results may be admitted if both the district attorney and the defendant agree to their admissibility by way of stipulation. *State v. Jackson, supra; State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). Since the results of the polygraph test and the stress test would not be admissible in this case, the facts that the defendant took a stress test and was willing to take a polygraph are simply not competent evidence and were therefore properly excluded by the trial judge.

Defendant cites a few cases in which this court and the Supreme Court have found that not every reference to a polygraph test results in prejudicial error. *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977); *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971); *State v. Heath*, 25 N.C. App. 71, 212 S.E. 2d 400 (1975). These cases, however, do not suggest that polygraph tests and stress tests are, in any way, reliable. We subscribe to a strict enforcement of the general principle that all references to these tests should be kept from the hearing of the jury. If the results of the test are not competent evidence, then references to the tests are not relevant and should be held inadmissible, as was done in this case. For the foregoing reasons, we find

No Error.

Judge VAUGHN and Judge WELLS concur.

EDNA GASPERSON, EMPLOYEE, PLAINTIFF v. BUNCOMBE COUNTY PUBLIC SCHOOLS, EMPLOYER; PHOENIX ASSURANCE COMPANY OF N.Y., CARRIER; DEFENDANTS

No. 8010IC928

(Filed 19 May 1981)

Master and Servant § 72— workers' compensation—injury to hip as injury to leg—scheduled injury

There was no merit to plaintiff's contention that an injury to her hip could not be considered an injury to the leg, which is a "scheduled injury" under G.S. 97-31, and that she was entitled to compensation for total permanent disability under G.S. 97-29 rather than compensation for a 60% permanent partial disability in light of medical testimony that she "will never be able to perform routine household tasks" and that she will be "unable to work in any job situation."

APPEAL by plaintiff from the Opinion and Award of the Industrial Commission filed 9 July 1980. Heard in the Court of Appeals 7 April 1981.

In this worker's compensation proceeding, plaintiff seeks a determination by the Industrial Commission of the degree of her disability resulting from an injury suffered by plaintiff during the course of her employment with the Buncombe County Public Schools. The Industrial Commission made pertinent findings which, except where quoted, are summarized as follows:

Plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant employer when she fell and fractured her right hip on 26 January 1976. Plaintiff, sixty years old and with an eighth grade education, was employed as a substitute school lunch room worker.

Dr. Turner, a specialist in orthopedic surgery, first saw plaintiff on 26 January 1976 for "intertrochanteric fracture of the right hip." Following "open reduction and internal fixation," plaintiff was discharged 14 February 1976. Dr. Turner continued to follow plaintiff, who "underwent pin removal in July 1976 and head and neck prosthesis placement in October 1976." When Dr. Turner saw plaintiff on 10 November 1977, plaintiff's "hip range of motion was fairly good but not normal and was less than it had been on her last several visits." Dr. Turner is of the opinion that plaintiff "had then reached maximum medical improvement" and on 22

November 1977, he "rated her as having 60% permanent partial disability of the right lower extremity," with that rating based upon "pain, shortening of the leg, deformity, loss of motion and inability to ambulate without a walker." Dr. Turner continued to see plaintiff, and last saw her 21 December 1978 when she "primarily complained of pain in the right hip and right thigh." Dr. Turner's examination at that time revealed no change in plaintiff's condition, and he is "of the opinion that there was essentially no change in her condition since November 22, 1977 and that she remains rated with a 60% permanent partial disability of the right lower extremity." Dr. Turner is further of the opinion that plaintiff is "unable to walk without a walker," that she "cannot perform work involving being on her feet, carrying or lifting," and that "the hip is an integral part of the right lower extremity."

Plaintiff was also evaluated by Dr. Lincoln, a specialist in orthopedics, who saw plaintiff on 29 December 1977. His examination revealed, among other things,

> inability to ambulate without a walker, distinct antalgic gait, a two and a half inch limb length discrepancy on the right, tenderness about the healed hip incision, hip flexion to 75 degrees, full extension, 15 degrees of internal rotation, 15 degrees of external rotation, abduction to 45 degrees with discomfort at attempted motion beyond this and distinct right thigh and calf atrophy.

X-rays showed

> placement of a head and neck prosthesis with marked collapse and penetration of the prosthethic component within the femur, subsequent shortening, prosthesis in apparent satisfactory position with reference to the acetabulum and no apparent tendency towards dislocation.

Dr. Lincoln is of the opinion that plaintiff "has 60% disability of the right lower extremity and in all likelihood she will never be able to perform routine household tasks" nor "work in any job situation."

The Commission then "found" as follows:

> 17. As of November 1978, plaintiff continued to experience right hip pain for which she is on medication. [S]he

is unable to stoop, can bend some and is not able to ambulate well without a walker.

18. As a result of the injury giving rise hereto, plaintiff was temporarily totally disabled from January 27, 1976 to November 10, 1977, at which time she reached maximum medical improvement.

19. As a result of the injury giving rise hereto, plaintiff has 60% permanent partial disability of the right leg due to antalgic gait, inability to ambulate without a walker, limb length discrepancy, tenderness, limited hip motion and thigh and calf atrophy on the right as well as pain in the thigh and hip on the right and x-ray findings. The hip is an integral part of the right lower extremity, which is commonly known as the leg. All of plaintiff's disabilities as a result of the injury giving rise hereto relate to her right leg.

. . .

The Commission determined that "plaintiff has sustained no disability to any portion of the body other than a scheduled injury under G.S. 97-31," and made the following pertinent "conclusions of law":

2. As a result of the injury giving rise hereto, plaintiff was temporarily totally disabled from January 27, 1976 to November 10, 1977, at which time she reached maximum medical improvement. Inasmuch as defendant carrier has paid plaintiff compensation at the rate of $20.00 per week from January 27, 1976 to February 27, 1978, defendants are entitled to a credit of 15 5/7th weeks of compensation payments. G.S. 97-29 and G.S. 97-42.

3. As a result of the injury giving rise hereto, plaintiff retains 60% permanent partial disability of the right leg for which she is entitled to compensation at the rate of $20.00 per week for 120 weeks, less a credit of 15 5/7th weeks of compensation at the rate of $20.00 per week. G.S. 97-31 (15) and (19) and G.S. 97-42.

The Commission then rendered its award providing that "[d]efendants shall pay plaintiff compensation at the rate of $20.00 per week for 104 2/7th weeks beginning November 10, 1977" and

further providing that (1) an attorney's fee of $600 shall be deducted from the compensation awarded to plaintiff and given to plaintiff's counsel; and (2) defendants shall pay all medical expenses incurred as a result of the injury to plaintiff. Plaintiff appealed.

Stephen Barnwell, for the plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon, for the defendants appellees.

HEDRICK, Judge.

Plaintiff assigns error to the "conclusion" of the Commission that "plaintiff retains 60% permanent partial disability of the right leg;" the Commission's "awarding plaintiff compensation for 104 2/7th weeks;" the "conclusion" of the Commission that "plaintiff has sustained no disability to any portion of the body other than a scheduled injury under G.S. 97-31;" and the action of the Commission in "affirming the decision of the Hearing Commissioner." These assignments of error raise only the question of whether the facts found support the conclusions made by the Commission. None of the findings of fact made by the Commission are challenged, nor could they be, since none of the evidence presented at the hearing before the Commission was reproduced in the record before us. Therefore, the findings of fact are presumed to be supported by competent evidence, and the findings are conclusive on appeal. *Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980).

Plaintiff's sole argument on appeal is that an injury to the "hip" cannot be considered an injury to the "leg," which is a "scheduled injury" under G.S. § 97-31, and which would limit plaintiff to compensation under that section. Instead, she contends, the injury to her hip, in light of the medical testimony that she "will never be able to perform routine household tasks" and that she will be "unable to work in any job situation," is such that she would be entitled to compensation for total permanent disability under G.S. § 97-29. We do not agree. While many of the Commission's "findings of fact" are merely a recital of the doctor's opinions, the findings by the Commission that "[t]he hip is an integral part of the right lower extremity, which is commonly known as the leg," and that "plaintiff has 60% permanent par-

tial disability of the right leg" vitiates this contention. The findings of fact made by the Commission support its conclusion, which in turn support its Opinion and Award filed 9 July 1980.

Affirmed.

Judges ARNOLD and WEBB concur.

JAMES LAWRENCE SMITH v. R. R. KING, JR., T/D/B/A KING LEAVITT INSURANCE AGENCY AND SHELBY MUTUAL INSURANCE COMPANY

No. 8028SC852

(Filed 19 May 1981)

1. **Bailment § 3.3; Contracts § 14.1— motorcycle stolen from bailee's possession—bailor as third party beneficiary of insurance contract**

Where plaintiff left his motorcycle with a repair shop for servicing, during the time it was in the possession of the bailee it was stolen, and plaintiff brought this action to recover under an insurance policy which purportedly covered the loss of any customer who had a motorcycle stolen from the keeping of the bailee, the trial court erred in granting judgment on the pleadings for defendant insurer, though plaintiff's failure to plead a prior judgment against the bailee would preclude recovery against the bailee's insurance company under a liability insurance policy, since nothing in the pleadings in this case established that the contract of insurance was one against liability; rather, plaintiff's allegation was to the effect that the policy covered any loss to the bailee's customer, not just those for which the bailee was liable.

2. **Unfair Competition § 1— motorcycle stolen from bailee—insurer's refusal to pay claim—no unfair competition**

In plaintiff's action to recover against the insurer of a bailee from whom plaintiff's motorcycle was stolen, the trial court's judgment on the pleadings in favor of defendant was proper to the extent that it overruled plaintiff's claim for unfair trade practices, where plaintiff based his claim on G.S. 58-54.4(11), but plaintiff, by his own characterization, was a third party beneficiary, while the statute applied only to first party claims; and plaintiff alleged a single refusal by defendant to settle a claim, while the statute required failure to settle "with such frequency as to indicate a general business practice."

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 20 May 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 March 1981.

In October 1979, the plaintiff left his 1979 Harley-Davidson motorcycle with Bynum McRary, d/b/a McRary Harley-Davidson, for a 1250-mile warranty servicing. While the motorcycle was in the possession of Bynum McRary, it was stolen. McRary Harley-Davidson was insured at that time by the defendant Shelby Mutual Insurance Company, and the policy had been procured by Mr. McRary on the assurances of the defendant, R. R. King, Jr., t/d/b/a King-Leavitt Insurance Agency, that the policy would cover the loss of any customer who had a motorcycle stolen from the keeping of McRary Harley-Davidson. Plaintiff alleges that he is a third-party beneficiary of this policy. After the theft, the defendant refused to settle the claim of the plaintiff against McRary Harley-Davidson. Alleging that this refusal to settle following the theft constituted unfair and deceptive acts in violation of G.S. 58-54.4(11), plaintiff brings suit for treble damages under G.S. 75-16.

Defendants' answer included a motion for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. At a hearing on 20 May 1980, the trial court granted defendants' motion, entering judgment on the pleadings in favor of the defendants.

J. Lawrence Smith by Stephen D. Kaylor for plaintiff appellant.

Harrell & Leake by Larry Leake for defendant appellees.

CLARK, Judge.

[1] In North Carolina, "[i]t has long been established that a third party, for whose benefit a contract has been made, may maintain an action for breach of that contract." *Equipment Co. v. Smith*, 292 N.C. 592, 595, 234 S.E. 2d 599, 601 (1977). Several cases have approved application of a third-party beneficiary analysis to allow action by a bailor against a bailee's insurance company. *See Distributing Co. v. Insurance Co.*, 214 N.C. 596, 200 S.E. 411 (1939); *Ingram v. Insurance Co.*, 258 N.C. 632, 129 S.E. 2d 222 (1963); Annot., 64 A.L.R. 3d 1207 (1975). The North Carolina cases uniformly hold that before a third-party beneficiary may recover directly under his bailee's liability insurance contract, he must first obtain a valid judgment against his bailee establishing the legal liability of the bailee. *Distributing Co. v. Insurance Co.*,

supra. Defendant argues that plaintiff's failure to plead a prior judgment against McRary Harley-Davidson precludes recovery against McRary's insurance company. While we agree that this would be the case under a liability insurance policy, *Distributing Co. v. Insurance Co., supra; Hall v. Casualty Co.*, 233 N.C. 339, 64 S.E. 2d 160 (1951); *Ingram v. Insurance Co., supra,* we fail to see how the judgment on the pleadings could properly have been granted on such basis, when nothing in the pleadings established the contract of insurance as one against *liability.*

The complaint alleges the existence of a policy and, further:

> "7. That Bynum McRary d/b/a McRary Harley-Davidson procured said policy of insurance on the assurances of R. R. King t/d/b/a King-Leavitt Insurance Agency and Shelby Mutual Insurance Company, that said policy would cover the loss to any customer of the insured who suffered loss due to the theft of the customer's motorcycle from the insured's place of business."

This statement constitutes sufficient allegation that plaintiff's loss fell within the coverage of the policy. The allegation is to the effect that the policy covered *any loss* to McRary's customers, not just those for which McRary was liable. Since there was no basis upon which to assume that recovery for plaintiff's loss was contingent on the liability of his bailee, judgment on the pleadings was improper. When the policy is actually produced, we assume during discovery, summary judgment would be appropriate if the contract appears to be one based on the insured's liability. We see no reason, however, to dismiss this action until the actual language of the policy has been examined and construed.

[2] Plaintiff's claim for treble damages is unwarranted, and judgment on the pleadings was proper to the extent it overruled plaintiff's claim for unfair trade practices. Plaintiff bases this claim on G.S. 58-54.4(11) which designates as "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" the following:

> "(11) In connection with first-party claims, committing or performing with such frequency as to indicate a general business practice any of the following:
>
> . . . .

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear . . . ."

Without extended discussion we note two obvious reasons plaintiff has failed to state an unfair practice under G.S. 58-54.4(11) and therefore is not entitled to treble damages under G.S. 75-16. First, plaintiff, by his own characterization, is a third-party beneficiary, whereas the statute applies only to "first-party claims"; and second, plaintiff alleges a single refusal by defendant to settle a claim, whereas the statute requires failure to settle "with such frequency as to indicate a general business practice." Neither of these conditions appearing, we believe plaintiff's claim for unfair trade practices was improper.

Judgment on the pleadings is reversed as to plaintiff's primary claim; judgment on the pleadings is affirmed as to plaintiff's claim for treble damages.

Judges ARNOLD and MARTIN (Harry C.) concur.

JOHN B. HARRIS v. ROBERT R. DePENCIER, DIAMONDHEAD REALTY, INC., AND PINEHURST, INC.

No. 8020SC946

(Filed 19 May 1981)

Appeal and Error § 6.6— dismissal of complaint against two of three defendants—no right of appeal

An order dismissing the complaint against two of the three defendants for failure to state a claim for relief against those two defendants was not immediately appealable, since the trial judge did not certify the order for appeal pursuant to G.S. 1A-1, Rule 54(b) by including a finding of no just reason for delay, and since the denial of an immediate appeal will not affect a substantial right of appellant within the purview of G.S. 1-277.

APPEAL by plaintiff from *Lane, Judge.* Order entered 26 August 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 7 April 1981.

Plaintiff, the purchaser of a tract of land in Pinehurst, brought this action against the seller of the tract, defendant DePencier, and the two corporate defendants, seeking money damages and rescission of the purchase agreement. Plaintiff alleged that defendants breached an implied warranty of suitability for a particular purpose in that defendants knew or should have known that plaintiff intended to construct a private home on the property and that the soil conditions of the subject property rendered it unsuitable for such residential purposes. Plaintiff further alleged: that defendant DePencier and agents of defendant Diamondhead Realty, Inc. induced plaintiff to purchase the property by representing to plaintiff that the property was suitable for residential purposes; that defendant Pinehurst, Inc. was the owner of the property prior to defendant DePencier; and, that DePencier was the employee and agent of defendant Pinehurst, Inc.

Defendants answered, and the two corporate defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The trial judge granted the motion and dismissed plaintiff's action as to defendants Diamondhead Realty, Inc. and Pinehurst, Inc. Plaintiff has appealed from this order.

Pollock, Fullenwider, Cunningham & Pittman, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellant.

Van Camp, Gill & Crumpler, P.A., by D. T. Scarborough III, for defendant appellees.

WELLS, Judge.

The threshold question we must consider is whether an immediate appeal lies from Judge Lane's order. *See, Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E. 2d 431, 433 (1980). Judge Lane's order did not adjudicate all the claims or the rights and liabilities of all the parties joined in plaintiff's action. It finally adjudicated only the rights and liabilities of two of the parties, the two corporate defendants. Under G.S. 1A-1, Rule 54 of the Rules of Civil Procedure, such a final determination of the rights and liabilities of one or more but less than all of the parties in a multiple party action, is immediately appealable only if the trial judge specifies in the order that "there is no just reason for delay." *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974); *see*

also, Pasour v. Pierce, 46 N.C. App. 636, 265 S.E. 2d 652 (1980); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92, --- S.E. 2d --- (1980). Judge Lane did not, however, certify this order for appeal pursuant to Rule 54(b) by including the finding of no just reason for delay.

Actions by the trial court, if not final or if final but not properly certified by the trial judge pursuant to Rule 54(b), are nonetheless immediately appealable if the denial of an immediate appeal would affect a substantial right and work an injury to the appellant. G.S. 1-277 (Cum. supp. 1979); *Bailey v. Gooding, supra; Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *see also, Veazey v. Durham*, 231 N.C. 354, 57 S.E. 2d 377 (1950). In the case *sub judice*, if denied an immediate appeal plaintiff can preserve his right to judicial review of Judge Lane's order by preserving his exception to the order granting the motion to dismiss. Upon appropriate exception, such orders or judgments are reviewable on an appeal from the final judgment adjudicating all claims, rights and liabilities in the cause. *Bailey v. Gooding, supra*, at 209, 270 S.E. 2d at 434, *quoting with approval Veazey v. Durham, supra*, at 362, 57 S.E. 2d at 381-82; *Green v. Duke Power Co.*, 50 N.C. App. 646, 648, 274 S.E. 2d 889, 891 (1981). Although plaintiff may suffer the necessity of a separate trial on his claims against the corporate defendants, the avoidance of a separate trial on those claims is not a "substantial right" entitling plaintiff to immediate appeal. *See, Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491-93, 251 S.E. 2d 443, 447-48 (1979); *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 344 (1978); *Green v. Duke Power Co., supra; see, Pasour v. Pierce, supra; but cf., Oestreicher v. Stores, supra* (a substantial right of plaintiff would be affected if plaintiff's claim for punitive damages was not heard before the same judge and jury as heard the claim for compensatory damages). This appeal is therefore premature and must be dismissed. Plaintiff's exception to Judge Lane's order will be preserved.

Appeal dismissed.

Judges VAUGHN and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MAY 1981

CHURCH v. G.G. PARSONS TRUCKING No. 8010IC1035	Industrial Commission H-0801	Dismissed
COOK v. YANCOVICH No. 8025DC931	Caldwell (79CVD94)	Affirmed
CROWELL v. CHAPMAN No. 8026SC1100	Mecklenburg (78CVS5145)	No Error
DUMONT v. DUMONT No. 8028DC718	Buncombe (79CVD1831)	Affirmed
FEW v. N.C. DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD No. 8018SC866	Guilford (78CVS4430)	New Trial
FOOTHILLS FINANCIAL SERVICES v. WILKINS No. 8029DC1099	Rutherford (79CVD514)	Appeal Dismissed
HAMPTON v. FRANKLIN REAL ESTATE No. 8023SC1053	Alleghany (79CVS146)	Affirmed
IN RE COOK No. 8017DC1078	Surry (79CVD734)	Appeal Dismissed
O'NEAL v. WATKINS No. 8026SC932	Mecklenburg (80CVS666)	As to denial of motion to dismiss, Appeal Dismissed; As to denial of motion to change venue, Affirmed
PAGE v. PAGE No. 8026DC927	Mecklenburg (79CVD11959)	Affirmed
PARDUE v. PARDUE No. 807DC1046	Nash (79CVD1022)	Affirmed
STATE v. COTTEN No. 8010SC994	Wake (79CR46818)	No Error
STATE v. CULBREATH No. 8120SC11	Richmond (80CRS1791) (80CRS1796)	No Error
STATE v. DAMON No. 815SC69	New Hanover (80CRS11192) (80CRS11193)	No Error

STATE v. DAVENPORT No. 8125SC54	Caldwell (80CRS6269)	No Error
STATE v. DAVIS No. 8016SC1160	Robeson (80CRS3517)	No Error
STATE v. FENNELL No. 814SC62	Samspon (80CRS3264)	No Error
STATE v. GORE & GAUSE No. 8013SC1108	Brunswick (80CRS2087) (80CRS1820)	No Error
STATE v. HARRIS No. 813SC70	Craven (79CRS15136) (79CRS15137)	No Error
STATE v. HINES No. 8111SC59	Johnston (80CRS7781)	No Error
STATE v. KIRK No. 815SC20	New Hanover (80CRS4454)	No Error
STATE v. MILLER No. 8112SC36	Cumberland (80CRS10537)	No Error
STATE v. SIMMONS No. 8012SC1068	Cumberland (79CRS45826)	No Error
STATE v. WACTOR No. 8012SC1210	Hoke (80CRS545)	No Error

STATE OF NORTH CAROLINA v. BARRY DARNELL WRIGHT

No. 8010SC1156

(Filed 2 June 1981)

1. Jury § 7.9— preconceived opinion—no challenge for cause

The trial court did not err in denying defendant's challenge for cause of a prospective juror who variously stated that she had formed an opinion, had formed "sort of" an opinion, and had not formed an opinion as to the guilt or innocence of defendant, since the trial judge, by clarifying the juror's answers, properly exercised his duty to insure that she would base her findings upon the evidence presented at trial and not upon preconceived opinions, and G.S. 15A-1212(6) requires that a juror be excused only when he is, in the trial judge's opinion, unable to render a fair and impartial verdict because of preconceived opinions as to defendant's guilt or innocence.

2. Automobiles § 112; Criminal Law § 45— school bus accident—test of brakes—admissibility of evidence

In a prosecution of defendant for involuntary manslaughter arising from an accident between the school bus he was driving and another vehicle, the trial court did not err in admitting testimony by a mechanic at the school bus garage concerning tests performed on the brakes of the bus subsequent to the accident, though the tests were not conducted under conditions similar to those existing when the accident occurred, since it would not have been reasonable or possible to test the bus under precisely the same conditions existing when the collision occurred; the dissimilarities were clearly pointed out to the jury on cross-examination and there could have been no confusion as to the differences in conditions; the witness testified that he was familiar with the bus and its brake system, described how the brakes operated, testified regarding his examination and tests of them at the accident site, and indicated that they appeared to be in working condition at that time.

3. Criminal Law § 50.1— testimony by non-expert—opinion evidence admissible

In a prosecution for involuntary manslaughter arising from an accident between a school bus driven by defendant and another vehicle, the trial court did not err in admitting opinion testimony by a witness who as not offered or qualified as an expert where the witness was allowed to testify that, in his opinion, if certain parts of the bus were damaged they would have a continuing rather than a one time effect on the brakes, since the witness testified that he had received high school and on the job training as a mechanic and had been employed in such capacity at the school bus garage for over six years; the witness was examined regarding his knowledge of and familiarity with the brake systems of school buses in general and with the particular bus involved; and he therefore was better qualified to form an opinion on the subject than was the jury, despite the fact that he was never formally qualified as an expert.

4. Automobiles § 112— school bus accident—defective brakes—hypothetical question proper

In a prosecution for involuntary manslaughter arising from an accident between a school bus driven by defendant and another vehicle where defendant contended that the brakes on the bus faded, the trial court did not err in allowing the State to ask defendant's expert witness a hypothetical question concerning brake fade if the vehicle did not stop but merely slowed at points, though there was no direct testimony that the bus had not stopped during the time after it left school until the collision, since there was testimony from which the jury could infer that defendant had made few or no stops during the trip, which would support the facts in the hypothetical question.

5. Criminal Law § 86.5— defendant's school bus driving record—cross-examination proper

In a prosecution for involuntary manslaughter arising from an accident between a school bus driven by defendant and another vehicle, the trial court did not err in allowing the State to cross-examine defendant regarding complaints made against him about his bus driving record and his suspension as a school bus driver, since, once defendant offered testimony tending to show his exemplary school bus driving record, it was proper for the State to elicit further details in hope of presenting a complete picture less unfavorable to the State's case.

6. Criminal Law § 85.2— character evidence—proper foundation for State's rebuttal evidence

There was no merit to defendant's contention that the trial court erred in admitting rebuttal character evidence of defendant's poor character without proper foundation, where defendant called three character witnesses, all of whom testified that he had an outstanding reputation in the community in which he lived; the State's character witness testified that he was familiar with defendant's character and reputation in the community; upon voir dire it was established that the witness's daughter was a student who rode the school bus defendant drove, and the witness had spoken with her, other children, and parents of children on the bus route; the witness testified that he did not talk with anyone whose opinion of defendant's reputation was contrary to his own; he indicated that his opinion was the consensus and that it was not based solely on incidents involving bus driving performance; and he delineated the community as that in which defendant worked.

7. Automobiles § 114— intersection accident involving school bus—instructions proper

In a prosecution of defendant for failure to stop at a red light and for involuntary manslaughter arising from an accident involving the school bus which defendant was driving and another vehicle, there was no merit to defendant's contention that the trial court misstated the evidence and expressed an opinion in recounting the State's evidence, summarizing defendant's evidence, instructing the jury as to the allegations of the State and what the State must prove in order to obtain a verdict of guilty on the stop light charge, referring to the wrong intersection when listing the elements the State must prove, instructing the jury upon the standard of care involved in the charge on the red light violation, instructing the jury on the red light violation by stating that "defendant may not be found guilty of this charge

merely because he may have run the red light at another intersection . . . if you find that he did so," indicating that defendant could be found guilty of violating the statute regarding the red light if he entered the intersection when the signal was emitting a steady red light and he "could or should have stopped," and instructing on proximate cause and explaining the relevance of defendant's contention that the brakes on the bus failed to take hold.

APPEAL by defendant from *Herring, Judge.* Judgment entered 14 July 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1981.

Defendant was indicted for involuntary manslaughter and for failure to stop at a red light, a violation of N.C.G.S. 20-158. He pleaded not guilty to each charge.

The charges arose from a traffic accident at an intersection in Raleigh, North Carolina, on 12 May 1980. Defendant was driving a school bus that was involved in a collision with a grey Toyota automobile driven by Tracy Lea Calhoun. Ms. Calhoun died as a result of injuries she sustained in the accident.

Evidence for the state tends to show that defendant was driving the bus west on East Lenoir Street. As he approached the intersection with South Blount Street the traffic light turned red, and he proceeded into the intersection. The bus collided with the Calhoun automobile and then flipped over. A student riding on the bus testified that defendant did not stop for a red light at the previous intersection.

Mechanics for the Wake County school bus garage testified regarding inspections and tests performed on the brake system of the bus prior to and after the accident.

At the close of the state's evidence, the trial court denied defendant's motion for nonsuit.

Defendant presented evidence that tends to show the light was green as he approached the intersection. It turned yellow as he proceeded into the intersection. He saw a grey image in front of him and pumped the brakes, but the bus would not stop.

Defendant had reported brake problems to the school mechanics on three previous occasions. The mechanics were unable to find anything wrong with the brakes. Before the collision, defendant had driven six-tenths of a mile in heavy traffic, which had caused him to start and stop constantly and to ride the

brakes. An expert witness testified that under these circumstances brakes could fade. After a cooling period, the brakes could regain their original capabilities.

Character witnesses for defendant testified that his general character and reputation in the community were outstanding. After a voir dire hearing, a state's rebuttal witness testified, over defendant's objection, that defendant's reputation was poor.

At the close of all the evidence, the court denied defendant's renewed motion to dismiss the charges.

Additional facts necessary to the decision are set out below.

The jury returned verdicts of guilty on both charges. The trial court arrested judgment as to the red light violation. From a judgment imposing a split sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Adam Stein and C. H. Thigpen, Jr. for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant first contends that the trial court erred in denying his challenge for cause of a prospective juror. Although the record does not contain a transcript of the jury voir dire, it does show that the following proceeding took place in the judge's chambers:

> COURT: Okay. Take this, that during voir dire of the jury by the defendant, the defendant having exercised six preemptory [*sic*] challenges, juror no. 4 responded to the following question—now, can you state what that question was, Mr. Thigpen?
>
> MR. THIGPEN: Whether the juror had formed an opinion as to the guilt or innocence of the defendant.
>
> COURT: The response was that she had formed an opinion; and upon further inquiry, juror no. 4 stated that she had formed, quote, sort of an opinion, end quote. And it was at this point that she was challenged for cause, wasn't it?
>
> MR. THIGPEN: No. I think that it seems to me, Judge, that I questioned her again.

COURT: That there were other questions put to the juror which cannot be recounted at this time; that subsequently, the Court inquired of the prospective juror no. 4 as to whether or not regardless of any opinion formed she could base her finding upon evidence presented during the trial, irrespective of any such opinion; to which she responded that she could;

That counsel for the defendant subsequently was allowed to pursue the line of questioning further; the Court having denied defendant's challenge for cause; that again, in response to a question put to the prospective juror, she reiterated that she had formed an opinion sort of, but that her mind could be changed; that again the prospective juror stated that she could base her finding of fact upon evidence presented during trial and could set aside or disregard whatever opinion might have been formed based upon what she had heard, read or seen in the newspaper, radio or television;

That thereafter, in response to further questions by the State, as well as the Court, but primarily in response to questions put by the district attorney, the prospective juror stated that she had no opinion and had formed no opinion as to the guilt or innocence of the defendant as to the present charge of involuntary manslaughter and running a red light; and, further, that she was not even aware that these charges had been brought until very recently when she read of the same in the newspaper.

The trial judge must determine all challenges to the jury panel and all questions concerning the competency of jurors. N.C. Gen. Stat. 15A-1211(b) and 9-14. These determinations are within the trial court's discretion and its decision is not subject to appellate review unless an error of law is imputed. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death penalty vacated*, 428 U.S. 902 (1976).

Defendant contends that the trial judge was required to dismiss the juror under N.C.G.S. 15A-1212(6). The statute provides:

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

. . . .

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

N.C. Gen. Stat. 15A-1212. Defendant would have us interpret this statute to require dismissal of any juror who has ever formed an opinion as to the guilt or innocence of a defendant. We do not agree. This interpretation would remove all discretion from the trial judge in determining whether the juror could render a fair, impartial, and unbiased judgment. *See State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978).

In *State v. Spence*, 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968), our Supreme Court noted that, according to federal court decisions, the function of a challenge for cause

> ". . . is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." The purpose of challenge should be to guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held." [Citations omitted.]

Although this provision has not been construed previously by the appellate courts, it appears that N.C.G.S. 15A-1212(6) was intended to codify the above-stated principle. This statute expressly overrules older case law that allowed challenge for cause only by the party against whom the opinion was formed or expressed. *See, e.g., State v. DeGraffenreid*, 224 N.C. 517, 31 S.E. 2d 523 (1944); *State v. Benton*, 19 N.C. 196 (1836).

The official commentary to N.C.G.S. 15A-1212 contains the following: "To the extent possible the Commission has attempted to *restate* in this Article the rules governing selecting and impaneling the jury in a criminal case. This section incorporates the disqualifications set out in G.S. 9-3 and adds a number of additional grounds for challenge for cause." (Emphasis ours.)

Thus, N.C.G.S. 15A-1212(6) apparently is a codification of the case law which requires that a juror be excused when he is, in the trial judge's opinion, unable to render a fair and impartial verdict

because of preconceived opinions as to defendant's guilt or innocence. This interpretation is consistent with subsection (9), which permits a challenge to be made on the grounds that a juror "[f]or any other cause is unable to render a fair and impartial verdict." N.C. Gen. Stat. 15A-1212(9). It seems unlikely that anyone who read or heard about a criminal case through the media would not form some sort of notion regarding an accused's guilt or innocence. To demand dismissal of every prospective juror who had prior knowledge of a case because he kept himself informed of current affairs arguably would "require our courts to exclude from service those best qualified to hear and deal with evidence and to understand instructions upon the law." *State v. Hunt*, 37 N.C. App. 315, 320, 246 S.E. 2d 159, 162, *disc. rev. denied*, 295 N.C. 736 (1978). *Accord, State v. Bailey*, 179 N.C. 724, 102 S.E. 406 (1920).

The record here indicates that the prospective juror variously stated that she had formed an opinion, had formed "sort of" an opinion, and had not formed an opinion as to the guilt or innocence of the defendant. By clarifying the juror's answers, the trial judge properly exercised his duty to ensure that she would base her findings upon the evidence presented at trial. *See State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975), *death penalty vacated*, 428 U.S. 903 (1976). A juror's answers need not be completely unequivocal or unambiguous for the judge to make his determination. *Id.* N.C.G.S. 15A-1212(6) does not mandate automatic disqualification of a juror who states she has "sort of" an opinion regarding defendant's guilt or innocence. It provides the *basis* for making a challenge for cause, and the voir dire examination serves to ascertain whether that cause in fact exists. *See State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death penalty vacated*, 428 U.S. 903 (1976). Judge Herring was satisfied it did not.

We find no abuse of discretion in the trial court's ruling that this juror was competent to sit. Additionally, as we do not have before us the transcript of the voir dire, defendant has not demonstrated that he was prejudiced by the denial of his challenge for cause. *See id.* The assignment of error is overruled.

[2] Defendant's next exceptions deal with the admission of certain evidence. He argues that the trial court erred in overruling

his objections to the testimony of Gordon Edwards, a mechanic at the school bus garage, as to tests performed on the brakes of the bus subsequent to the accident. Edwards testified that at least one-half hour after the accident the bus was inoperable, was hooked up behind a wrecker, and was towed at approximately five to ten miles per hour. When the brakes were applied, the bus stopped. Defendant contends that the test was not conducted under conditions that were sufficiently similar to those existing when the accident occured, at which time defendant had driven the bus, loaded with thirty-five students, for some time through traffic, frequently using the brake pedal.

In *Hall v. Railroad Co.*, 44 N.C. App. 295, 298, 260 S.E. 2d 798, 800 (1979), *disc. rev. denied*, 299 N.C. 544 (1980), this Court stated:

> Normally, however, to be admissible, an experiment must satisfy two requirements: (1) it must be under conditions substantially similar to those prevailing at the time of the occurrence involved in the action, and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence.

Whether an experiment was conducted under substantially similar conditions is a question of law, and is reviewable by the appellate courts. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975). In *Jones*, the Supreme Court of North Carolina reviewed the law concerning experimental evidence and held there had been no error in allowing evidence of experiments conducted to determine if the pistol that had inflicted a fatal wound would fire when dropped from various heights. The Court explained that experiments need not have been performed under *precisely* similar circumstances, as long as the results would shed light on the problem at hand. It quoted with approval from *Love v. State*, 457 P. 2d 622 (Alaska):

> [I]f the differences of condition can be explained, so that the effect of those differences upon the experiment can be evaluated rationally, the judge may exercise his discretion and admit the evidence, for it can be helpful to the jury. . . .
>
> In applying the test of substantial similarity, the trial court should be guided by the following principles: Are the

> dissimilarities likely to distort the results of the experiment to the degree that the evidence is not relevant? Can the dissimilarities be adjusted for or explained so that their effect on the results of the experiment can be understood by the jury? In this connection the court must consider the purpose of the experiment and the degree to which the matter under experiment is a subject of precise science. Absolute certainty is not required if the experiment would be considered valid by persons skilled or knowledgeable in the field which the experiment concerns.

287 N.C. at 97-98, 214 S.E. 2d at 33-34. Our Supreme Court concluded, "Precise reproduction of circumstances is not required, and the effect of the differences which existed was explainable by the State's expert witness." 287 N.C. at 99, 214 S.E. 2d at 34.

Discrepancies in conditions do not necessarily affect the admission of the evidence, but, rather, go to its weight with the jury. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870 (1972).

Here, the witness testified that he was familiar with the bus and its brake system. He described how the brakes operate, testified regarding his examination and tests of them at the accident site, and indicated that they appeared to be in working condition at that time. The evidence had probative value in tending to show the normal braking capacity of the vehicle. It would not have been reasonable nor possible to test the bus under precisely the same conditions existing when the collision occurred. The dissimilarities were clearly pointed out to the jury on cross-examination, and there could have been no confusion as to the differences in conditions.

Furthermore, defendant was not prejudiced by the admission of the experimental evidence. Defendant offered a theory that the brakes had "faded." On cross-examination of the state's witness Henry Gibbs, another bus garage mechanic, the following explanation of brake fade was elicited:

> Fading is a condition that occurs when you constantly use your brakes trying to slow down, linings get hot and your drums get hot. It is not just normal starting and stopping. And most times it is hard stops. What happens is that

> the brakes heat up. And you lose friction when the brakes are applied. Then once the brakes cool down and you test them then it would be as if you have a full pedal. If you check the brake system you would not be able to find out whether fading had occurred. It is there while the lining and drums are hot. And when it is cooled off you have good brakes. And if the fading has occurred there is no way that you can test for it unless the brakes have been hot enough it's occurred several times and long enough to crystallize the linings.

Evidence was admitted without objection that there were no mechanical defects or crystallization in the brake system. The objected-to testimony was consistent with defendant's theory of brake fade and evidence presented by defendant's expert witness and cross-examination of the state's witnesses. *See* 4 Strong's N.C. Index 3d Criminal Law § 169.3 (1976).

[3] Defendant excepts to the admission of opinion testimony of Gordon Edwards without his being offered or qualified as an expert. Edwards was allowed to testify that, in his opinion, if certain parts of the bus were damaged they would have a continuing, rather than a one-time, effect on the brakes.

Generally, opinion evidence of a non-expert witness is not admissible because it invades the province of the jury. *State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980). The basic question in determining the admissibility of opinion testimony, however, is whether the witness is better qualified, through his training, skills, and knowledge, than the jury to form an opinion as to the particular issue. *Id.;* 1 Stansbury's N.C. Evidence §§ 132, 133 (Brandis rev. 1973). Edwards had testified that he had received high school and on-the-job training as a mechanic and had been employed in such capacity at the school bus garage for over six years. He was examined regarding his knowledge of and familiarity with the brake systems of school buses in general and with the particular bus involved. He therefore was better qualified to form an opinion on the subject than was the jury, despite the fact that he was never formally qualified as an expert. *See* 1 Stansbury, *supra*, § 133; *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967). Additionally, defendant made only a general objection to the question calling for the witness's opinion, and has thus waived his objection. *Strickland v. Jackson*, 23 N.C. App. 603, 209 S.E. 2d

859 (1974); *Hedden v. Hall*, 23 N.C. App. 453, 209 S.E. 2d 358, *cert. denied*, 286 N.C. 334 (1974).

[4] Defendant argues that it was error to allow the state to propound the following question to defendant's expert witness Dr. Zorowski:

> Q. Let's further assume that at that point after that 15 minute cooling time, under normal conditions, that the vehicle proceeds to travel over a six-tenths of a mile distance, didn't stop at any intersections, merely slowing at points during that period of time for other vehicles and never travels over 23 to 25 miles per hour, are those the kind of conditions, sir, that you are talking about which would produce brake fade.
>
> . . . .
>
> A. Specific kind of conditions that you indicate there would not in my mind bring about severe brake fade, no.

Defendant contends that there was no evidence that the vehicle did not stop, but merely slowed at points. A hypothetical question must include only facts already in evidence or those which logically may be inferred from the evidence. *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966). While it is true that there was no direct testimony that the bus had not stopped during the time after it left the school until the collision, there was no testimony from the state's witnesses Sylvia Poole and Debbie Stephenson, passengers on the bus, that it had made any stops. Rather, Ms. Poole testified that defendant did not slow or stop at the previous intersection at Person and Lenoir streets, nor did he slow or stop at Blount and Lenoir streets. The jury, not unreasonably, could infer that defendant had made few or no stops during the trip, which would support the facts in the hypothetical question. *See Taylor v. Boger*, 289 N.C. 560, 223 S.E. 2d 350 (1976).

In any event, Dr. Zorowski had previously testified to the conditions under which brake failure might occur. He noted factors which would be more or less likely to cause the occurrence of brake fade, many of which were not in evidence. It was established that brake fade would generally not occur under the circumstances described in the hypothetical question. Dr. Zorowski

testified that it was possible that brake fade could have resulted under the circumstances alleged by defendant. The state was entitled to test the knowledge of defendant's expert. *See* 1 Stansbury, *supra*, § 136. We find no prejudice requiring a new trial. *See State v. Taylor, supra.*

[5] Defendant contends that the trial court erred in allowing the state to cross-examine defendant regarding complaints made against him about his bus driving record and his suspension as a school bus driver. On direct examination defendant testified:

> [I] received a bus driver award for my bus driving in June of my 11th grade year, which was for completing a year of safe driving for 1979. . . .
>
> . . . .
>
> I have not been convicted of anything; no traffic offenses; never received a citation. The certificate that I received for Bus Driver of the Year was for completing the year successfully not having any major problems driving a bus.

On cross-examination he stated: "I got the Bus Driver of the Year award. Other people received the same award. I don't think that that was necessarily the Bus Driver of the Year. I remember what it said on the award, outstanding driver, outstanding service, something to that effect." Defendant's counsel later objected to the following line of questioning:

> I have not been driving Bus No. 41 the entire time since October. It was until about November and then again about January. The reason for that is that in November 1979 I was suspended from driving a bus because of the complaints that had been received about my driving. . . .
>
> Q. And isn't it true, Barry, that one of the complaints that had been lodged against you was that you had been racing another school bus side-by-side down the road?
>
> . . . .
>
> A. No, sir. I was never made aware that a complaint like that had been filed against me.
>
> . . . .

Q. Isn't it a fact, sir, that one of the reasons that you were suspended was for failing to stop at a railroad crossing as is required?

. . . .

A. Not to my knowledge. I was never told anything about that.

Q. Do you remember doing just that back in October?

A. No, sir, I do not.

Q. Barry, have you in fact indicated that you were not given any of these complaints when you were suspended back in November of 1979?

. . . .

A. I haven't heard, not to my knowledge anything of the sort that you have just asked me about; other than my lawyers.

. . . .

I don't recall anyone telling me formally I was suspended. It started out as a couple of days and I got the run around about it and I finally got the message that I wasn't going to drive any more.

. . . .

Q. Did Mr. Myers give you a reason why he was suspending you, Barry?

A. Yes, sir, he did.

Q. What was the reason he gave you?

. . . .

The only complaint that he gave me was something about accused of asking a little girl for a Playboy book. I did not do that.

The trial court has wide discretion in controlling the scope of cross-examination and its rulings should not be disturbed unless prejudicial error is clearly demonstrated. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973); *State v. Ross*, 275 N.C. 550, 169 S.E.

2d 875 (1969), *cert. denied*, 397 U.S. 1050 (1970). It is true, as defendant argues in his brief, that for purposes of impeachment a defendant may be questioned regarding prior convictions, but not about arrests or criminal offenses unrelated to the present case. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). It is permissible, for impeachment purposes, to cross-examine a defendant about specific criminal or reprehensible acts, so long as the questions are asked in good faith. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Elliott*, 25 N.C. App. 381, 213 S.E. 2d 365 (1975). However, when a defendant, on direct examination, raises specific issues, the state may further investigate these subjects on cross-examination. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). "On cross-examination much latitude is given counsel in testing for consistency and plausibility matters related by a witness on direct examination." *Maddox v. Brown*, 233 N.C. 519, 524, 64 S.E. 2d 864, 867 (1951). *Accord*, 1 Stansbury, *supra*, § 35.

In *Small*, *supra*, the defendant testified regarding a polygraph examination in such a way as to leave the false impression that the state had refused his offer to take a polygraph test. The Supreme Court held it was not error to allow the state to show that the test had in fact been given, and to go still further, allowing questions about whether the results showed deception.

Likewise, in the case sub judice, we hold that once defendant offered testimony tending to show his exemplary school bus driving record, it was proper for the state to elicit further details in hope of presenting a complete picture less unfavorable to the state's case. 1 Stansbury, *supra*, § 35.

[6] Defendant next contends that the trial court erred in admitting rebuttal character evidence of defendant's poor character without proper foundation. Defendant did not properly bring forward the assignment of error in his brief, but instead bases this argument on assignments of error referring to his motions for dismissal and the court's instructions to the jury recounting the rebuttal character evidence. This assignment of error is thus deemed abandoned. Rule 28(a), N.C.R. App. Proc. Nevertheless, we shall review defendant's argument on its merits.

Defendant called three character witnesses, all of whom testified that he had an outstanding reputation in the community

in which he lived. When a defendant so puts his character in issue, the state is permitted to offer evidence of his bad character, for both substantive and credibility purposes. *State v. Nance*, 195 N.C. 47, 141 S.E. 468 (1928); *State v. Adams*, 11 N.C. App. 420, 181 S.E. 2d 194 (1971); 1 Stansbury, *supra*, §§ 104, 108.

The state's witness Edward Dement testified he was familiar with defendant's character and reputation in the community. Upon voir dire, it was established that Dement's daughter was a student who rode the school bus defendant drove, and Dement had spoken with her, other children, and parents of children on the bus route. The trial court concluded that Dement's testimony was based upon an adequate foundation and allowed the witness to testify, without further objection, that defendant's reputation was poor.

The standard method of proving character is by reputation in the community, which means more than mere rumor and gossip, or a divided opinion, or the opinion among part of a community or a particular group. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). *See also State v. Ellis*, 243 N.C. 142, 90 S.E. 2d 225 (1955); *State v. Kiziah*, 217 N.C. 399, 8 S.E. 2d 474 (1940). Hearing a majority of people speak of the person is one way by which knowledge of reputation may be acquired. 1 Stansbury, *supra*, § 110.

The former rule that "community reputation" means the community in which the person resides has been modified.

> [I]nquiry into reputation should not be necessarily confined to the residence . . . but should be extended to any community or society in which the person has a well-known or established reputation. Such reputation must be his general reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion. Of course, the testifying witness must have sufficient contact with that community or society to qualify him. . . .

State v. McEachern, 283 N.C. 57, 67, 194 S.E. 2d 787, 793-94 (1973) (emphasis in original).

Dement testified on voir dire that he did not talk with anyone whose opinion of defendant's reputation was contrary to his own. He indicated that his opinion was the consensus and that

it was not based solely on incidents involving defendant's bus driving performance. He delineated the community as that in which defendant worked, stretching "from the Lake Ann subdivision to the Washington school, which is half of Wake County." We hold this was sufficient.

The assignments of error regarding the evidence are overruled.

[7] The remainder of defendant's assignments of error deal with the court's charge to the jury.

Defendant sets out five instances in which he contends the trial court misstated the evidence and expressed opinion. The first occurred when Judge Herring recounted the state's evidence, stating that the brakes of the bus had been tested "shortly" before and after the collision. As Henry Gibbs had testified that he had checked the brakes on the Friday before the accident on Monday, we find this statement is supported by the evidence and does not constitute an expression of opinion.

Defendant excepts to the following portion of the court's summary of defendant's evidence: "That as he approached the intersection he saw the light was green and that he was in the right-hand lane; [that on looking again, the light was yellow and just before entering the intersection he saw a gray image, the Toyota automobile] . . . " Defendant had testified:

> As I arrived, I checked my light. The light was green. I proceeded into the intersection. I looked up and checked my light again. The light was yellow, and when I looked back down I saw a grey image in front of me and my first reaction was to stomp the brakes, which I did, twice at least. I stomped the brakes and immediately I turned the steering wheel as quickly as I could to the right . . ..

Defendant's witness Lynwood Martin, a passenger on the bus, had testified:

> [W]e got closer and closer up here to this curb stand, about right up in there, the light turned yellow and he was going into the intersection. He got right about up in there and then a little grey Toyota was coming in and then he held out, he said "Oh, my God" and then he grabbed the steering wheel

and started pumping on the brakes. We were getting further and further into the intersection and then he turned and that is all that I remember.

This testimony could be interpreted to mean that as defendant approached the intersection, the light was green, but as he proceeded into the intersection he looked up and found it had turned yellow. The record does not indicate that defendant made any objections to the charge before the jury retired. At the end of the charge, Judge Herring asked counsel if there was any further matter, and they indicated there was not. If objections to the charge in the review of the evidence and the statement of the contentions of the parties are not brought to the trial court's attention in order to allow for correction during trial, generally later challenge is waived. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). Only when an instruction contains a statement of a material fact not in evidence will such statement be considered prejudicial without its being called to the trial court's attention. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978); *State v. Foster*, 27 N.C. App. 409, 219 S.E. 2d 265 (1975). As the above-quoted statement arguably was supported by inferences from the evidence, we do not find it constituted a material discrepancy likely to confuse or mislead the jury. As the Court stated in *State v. Willard*, 293 N.C. 394, 407, 238 S.E. 2d 509, 517 (1977), "If the defendant deemed such variance as appears in the record to have been prejudicial to him, he should have directed this to the attention of the court in time for a correction prior to the verdict." Furthermore, Judge Herring thoroughly and carefully instructed the jury, both after the summary of the evidence and during his final mandate, that they were the sole judges of the facts and that they should rely on their own recollection of the evidence if it differed from that of the court. He advised them that nothing he said should be construed to be an opinion of the court.

The same analysis applies to defendant's exception to an additional portion of the summary of his evidence, set out, in pertinent part, as follows: "[T]hat the defendant did not enter the intersection when the light was red; that the light was yellow; that when he saw the light turn red and the gray or green image is when he applied his brakes . . ." Although it is true that defendant did not testify that he saw the light turn red, we cannot

hold this misstatement to be material enough to constitute reversible error in the absence of a request for correction. Defendant further insists that it exhibited an opinion by the judge that the light was not green as defendant entered the intersection. In light of the above discussion, and the fact that the judge expressly stated "defendant *did not* enter the intersection when the light was red" (emphasis ours), we do not agree. The exceptions are overruled.

The next exception pertains to a portion of the charge in which Judge Herring instructed the jury as to the allegations of the state and what the state must prove in order to obtain a verdict of guilty on the stoplight charge. He continued by telling the jury that defendant had pleaded not guilty to the charge and was presumed to be innocent until proven guilty beyond a reasonable doubt. The instructions must be taken in context. Isolated portions will not be considered error. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). We find that the statement is accurate when viewed in context and does not constitute an expression of opinion by the court. Defendant's exception thereto is without merit.

Defendant further complains that Judge Herring erred in referring to the wrong intersection when listing the elements the state must prove. The judge correctly designated the streets in the summary of the state's evidence and the parties' stipulations, in the instructions on the red light violation, and in the final mandate. We cannot conclude that the jury would have become confused or misled by this inadvertent reference. In the absence of defendant's bringing the error to the court's attention during trial, we do not find it to constitute a material, prejudicial misstatement sufficient to require a new trial.

Defendant next contends that in three instances the court erronously instructed the jury upon the standard of care involved in the charge on the red light violation. All three instances occurred during the explanation of the law concerning that violation. In the first excepted-to portion, Judge Herring read the statute.[1] In two other instances, the court paraphrased and interpreted the

1. Although the trial court read the text of N.C. G.S. 20-158 as it appeared before the 1979 amendment, the meaning is substantially the same and did not prejudice defendant.

statute, describing the standard of care applicable only to the safety violation.

Defendant appears to be arguing that the jury could have mistakenly applied the standard necessary for the red light violation to the manslaughter charge, citing *State v. Weston*, 273 N.C. 275, 159 S.E. 2d 883 (1968). In *Weston*, the defendant was charged with the statutory violation of passing a stopped school bus and with manslaughter. The trial court instructed the jury that the defendant could be found guilty of involuntary manslaughter if they found that he failed to keep a reasonable lookout. The Supreme Court distinguished ordinary negligence from culpable negligence and ordered a new trial because the trial court had applied a civil liability test to a criminal action.

We find no such error in the instant case. The court applied the proper standard of care to the traffic violation charge, which requires only that the jury find defendant entered an intersection which was emitting a steady red signal, under circumstances where he could and should have stopped. N.C.G.S. 20-158 does not require a specific intent. On the manslaughter charge, the state must not only show that defendant violated a safety statute, but that he did so in a criminally negligent manner. *State v. Gainey*, 292 N.C. 627, 234 S.E. 2d 610 (1977). The court thoroughly and appropriately instructed the jury on this issue, defining culpable negligence to be a violation which was committed willfully or recklessly, with "heedless indifference to the rights of others."

Nor do we find the court erred in instructing the jury on the red light violation by stating that "defendant may not be found guilty of this charge merely because he may have run the red light at another intersection . . . if you find that he did so." Defendant does not except in the record to the testimony of Sylvia Poole to the effect that defendant had run the previous red light. Judge Herring was correct in instructing the jury that this evidence has no bearing on whether defendant was guilty of violating the traffic statute at the accident site. He later instructed the jury that this evidence was one of the factors they could consider to infer defendant's state of mind in determining whether he was culpably negligent regarding the manslaughter charge. We hold the law was properly applied to this evidence.

Defendant further contends the trial court erred, in one portion of the charge regarding the red light violation, by indicating that defendant could be found guilty of violating the statute if he entered the intersection when the signal was emitting a steady red light and he "could *or* should have stopped," (emphasis ours) rather than could *and* should have stopped. It is apparent from an examination of the entire charge that this was a *lapsus linguae.* In numerous other portions of the charge the correct wordage was used and each element of the offense was delineated. We cannot conclude that this misstatement was likely to confuse or mislead the jury. *See State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158 (1971); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied,* 386 U.S. 911 (1967).

Last, defendant argues that the court erred in its instructions on proximate cause by failing to explain the relevance of defendant's contention that the brakes failed to take hold.

Judge Herring instructed the jury on the law and defendant's contentions as follows:

> [I]f the defendant made an effort to stop in obedience to the red light, but entered the intersection on a red light, due to a brake failure which he had no reasonable cause to believe would occur, he would not be guilty of violating this statute requiring one to stop in obedience to a red traffic signal light.
>
> . . . .
>
> . . . [D]efendant says and contends that . . . even if you do find that he entered the intersection on red, then you ought to find that he was unable to stop the vehicle by reason of brake fade or some other form of brake failure which prohibited and prevented him from stopping the vehicle and thus entered the intersection beyond his control; and he says that you ought to find him not guilty.

The judge further defined proximate cause in a proper manner, and defendant made no exception to this definition, nor did he specifically request additional instructions on this issue. We find the assignments of error based on the trial court's charge to the jury to be without merit.

Defendant received a trial free from prejudicial error.

No error.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. CHARLES EDSOL THOMAS, JR.

STATE OF NORTH CAROLINA v. DANIEL WAYNE CHRISTMAS

STATE OF NORTH CAROLINA v. MARK ASHLEY KING

No. 8015SC900

(Filed 2 June 1981)

1. **Burglary and Unlawful Breakings § 7— first degree burglary—police officers as occupants of dwelling—failure to submit second degree burglary**

In this prosecution of three defendants for first degree burglary, the trial court did not err in failing to submit to the jury the lesser included offense of second degree burglary where all the evidence showed that at the time of the breaking and entering four sheriff's deputies were present in the victim's dwelling with his knowledge and consent, since the deputies were persons in actual occupation of the dwelling at the time of the breaking and entering within the meaning of G.S. 14-51.

2. **Burglary and Unlawful Breakings § 7— first degree burglary—failure to submit misdemeanor breaking and entering**

In this prosecution of three defendants for first degree burglary, the trial court erred in failing to submit to the jury the issue of one defendant's guilt of the lesser included offense of misdemeanor breaking and entering where such defendant presented evidence tending to show that he believed that the break-in was being committed at the home of the parents of a State's witness in order for the witness to remove his personal belongings and that he had no knowledge of any plans to commit larceny in the home. However, the trial court did not err in failing to submit misdemeanor breaking and entering issues as to the other two defendants where there was evidence that those two defendants planned to commit the felony of larceny at the home and there was no evidence that defendants broke and entered the home for some other reason.

3. **Burglary and Unlawful Breakings §§ 5, 5.5— first degree burglary—aiding and abetting in first degree burglary—sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of one defendant's guilt of first degree burglary of a dwelling occupied by four law officers. Furthermore, the State's evidence was sufficient to be submitted to the

jury on the issue of a second defendant's guilt of first degree burglary as an aider and abettor where it tended to show that such defendant transported other defendants to the scene of the crime, let them out of his van in a location designed to avoid detection, left the scene so as not to attract attention, and intended to return at a predesignated time and place to assist the other defendants in their escape.

4. Bills of Discovery § 6— discovery in criminal case—witness who was no longer codefendant—testimony by such witness

The trial court did not err in failing to compel the district attorney, pursuant to G.S. 15A-903(b), to furnish defendants with copies of any written, recorded or oral statements made by a State's witness where charges against the witness had been dismissed and the witness was therefore not a codefendant at the time defendants filed their motions for discovery.

5. Criminal Law § 91.6— denial of continuance—discovery motion still pending—absence of prejudice

Defendants were not denied a reasonable time and opportunity to investigate and produce competent evidence in their defense by the denial of their motions for continuance while their motions for discovery of a witness's statement were still pending where the record disclosed that the trial court again denied defendants' motion for a continuance after it denied their discovery motions; almost four months elapsed between the time counsel was appointed for defendants and the time of their trial; and defendants failed to show how their cases would have been better prepared had the continuance been granted.

6. Criminal Law § 21— time of hearing pretrial motions

The trial court did not err in denying one defendant's motion that hearings on pretrial motions filed in his behalf be set prior to the date of trial. G.S. 15A-952(f).

7. Criminal Law § 128.2— statement by prospective juror—failure to declare mistrial

The trial court did not err in refusing to grant a mistrial when one prospective juror during jury selection stated, in the presence of the entire jury panel, that he believed a defendant was guilty until proven innocent and that if a police officer apprehended a subject the suspect would be guilty where the court immediately excused the juror and re-instructed the jury panel on the presumption of innocence and repeatedly instructed the jury on the presumption of innocence in the charge.

8. Criminal Law §§ 7.1, 121— insufficient evidence of entrapment

The trial court in a first degree burglary case did not err in failing to instruct the jury on the defense of entrapment where a State's witness advised the victim of a plan to burglarize the victim's home on a certain date; the victim, in turn, notified the sheriff; officers were inside the victim's home waiting for the burglars when the crime occurred; the witness had arranged to let the police know if he found out for sure that the victim's home was to be broken into; and there was no evidence from which the jury could infer that the witness was acting as an agent of the police.

State v. Thomas and State v. Christmas and State v. King

APPEAL by defendants from *Brewer, Judge.* Judgments entered 29 April 1980 in Superior Court, CHATHAM County. Heard in the Court of Appeals 5 February 1981.

Defendants were indicted for first degree burglary. The cases were consolidated for trial. State's evidence tended to show that Ned Battle Diggs, Jr. [hereafter "Ned Diggs" or "Diggs"] advised G. R. Farrell on 24 January 1980 of a plan to burglarize Farrell's home on 25 January. Mr. Farrell, in turn, notified Jack Elkins, Sheriff of Chatham County. Mr. Farrell had four children, including a son who played basketball. The entire family usually attended the basketball games, leaving the house unoccupied. A basketball game was scheduled for Friday night, 25 January 1980.

Ned Diggs testified that at the time of the offense, he was living with his brother, Charles Diggs, at his brother's home. He further testified that on the evening of 25 January, 1980, he and the defendants met at his brother's house and left together on defendant Thomas' van. After riding around for a time, they rode to Mr. Farrell's house. Defendant Christmas was driving the van at this time. Defendant Christmas let Diggs and defendants Thomas and King out of the van 600 feet from the Farrell house and was told by them to return in fifteen minutes and pick them up at a spot to be marked on the shoulder of the road by a log. Diggs and defendants Thomas and King walked across an open field to the back porch of the Farrell house. Defendant Thomas removed the screen from a window and opened the window. King crawled through the window, unlocked the back door, admitted defendant Thomas and the two proceeded into the home.

The State's evidence further tended to show that at that point, officers stationed inside the house ordered the defendants to halt. Defendant King was captured in the house. Defendant Thomas ran out of the house, breaking the back door in the process, and escaped. Defendant King admitted to Mr. Farrell that he had intended to steal a microwave oven from the Farrell home. Ned Diggs testified that King had said that he was going to use the money realized from the break-in for a downpayment on a motorcycle. Defendant Christmas was apprehended in the van owned by defendant Thomas at Farrell's nearby store.

Defendant Thomas presented no evidence. Defendant Christmas did not testify but presented the testimony of Tim Long, who was with defendant Christmas during the day of 25 January. Mr. Long testified that at about 7:00 p.m. on that day he took defendant Christmas to Charles Diggs' house. He heard no discussion of any burglary or break-in plans while he was there.

Defendant King testified in his own behalf. He testified that while they were at Charles Diggs' house, Ned Diggs told him that he wanted to remove some personal belongings from his parents' house and that he would give the defendants a bottle of liquor if they would take him to the house. The defendants rode around in defendant Thomas' van that evening, during which time defendant King was lying in the back of the van drinking wine. He heard no conversations during this time. At one point, defendant Christmas began driving the van. Defendants King and Thomas and Ned Diggs left the van and walked up to a house which defendant King believed belonged to Diggs' parents. They accompanied Diggs to the house because Diggs anticipated taking more things than one person could carry. Defendant King heard defendant Thomas tell Diggs "[i]t's your house, you go up there," and to go in and get what he needed and to come back. He then heard Diggs respond by saying "[w]ell, I'll be back in a minute." He and defendant Thomas waited in the yard three or four minutes while Diggs went up on the porch, and then followed him onto the porch. Defendant Thomas removed the screen from a window and opened the window. Defendant King crawled through the window and opened the back door of the house. He was then apprehended by the police officers. Defendant King also testified that when they were standing in the kitchen, Mr. Farrell asked him why he had come into the house. He responded by pointing to a cabinet where he thought the liquor would have been. A microwave oven had been sitting on that cabinet. Defendant King testified, "[w]hen we arrived at the Farrell house, I assumed we were at the home of Ned's parents. I found out differently when someone said '[h]alt, freeze.'" Defendant King also offered four character witnesses.

The jury found all three defendants guilty of first degree burglary as charged. From judgments sentencing them to active terms of imprisonment, defendants appeal.

Attorney General Edmisten by Assistant Attorney General George W. Lennon, Assistant Attorney General Tiare B. Smiley and Assistant Attorney General Henry T. Rosser, for the State.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave by Martin J. Bernholz and Gunn and Messick by Robert L. Gunn, for the defendant-appellant Charles Edsol Thomas, Jr.

J. Samuel Williams, for the defendant-appellant Daniel Wayne Christmas.

Dark & Paschal by L. T. Dark, Jr., for the defendant-appellant Mark Ashley King.

MARTIN (Robert M.), Judge.

We first note that defendant Thomas failed to set out and discuss his eighth assignment of error in his appellate brief; defendant King failed to set out and discuss his third, fourth, eighth, sixteenth and seventeenth assignments of error in his appellate brief; and defendant Christmas failed to set out and discuss his fourth, sixth, sixteenth, eighteenth and twenty-first assignments of error in his appellate brief, thereby abandoning them. Rule 28(a), N.C. Rules App. Proc. In addition, defendant King failed to set forth any argument or authority for his fifth assignment of error in his appellate brief, therefore it is also deemed abandoned. *Id.* "App. R. 28(a) requires that a question be presented *and argued* in the brief in order to obtain appellate review." *Love v. Pressley*, 34 N.C. App. 503, 514, 239 S.E. 2d 574, 581 (1977), *rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

Defendant Christmas, by his fifteenth, nineteenth and twentieth assignments of error, defendant Thomas, by his fifth and seventh assignments of error and defendant King, by his twelfth, thirteenth, fourteenth and fifteenth assignments of error, present the question of whether the trial court erred in failing to submit to the jury as possible alternative verdicts the lesser included offenses of second degree burglary and misdemeanor breaking and entering. N.C. Gen. Stat. § 15-170 provides that upon the trial of any indictment, the defendant may be convicted of the crime charged therein or of a lesser degree of the same crime. However, the necessity of charging on a crime of a lesser degree arises only when there is evidence from which the jury could find that a crime of lesser degree was committed. *State v. Jolly*, 297 N.C.

121, 254 S.E. 2d 1 (1979); *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738 (1970). With this fundamental principle in mind, we will discuss the two proposed lesser included offenses separately.

[1] With regard to second degree burglary, the defendants contend that the law enforcement officials were not occupants of the Farrell home at the time of the breaking and entering within the meaning of N.C. Gen. Stat. § 14-51. That statute divides the common law crime of burglary into two degrees, first and second degree burglary, the sole distinction being the element of occupancy. *State v. Jolly, supra.*

> N.C. Gen. Stat. § 14-51 states, in pertinent part:
>
> If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and *any person is in the actual occupation* of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. (Emphasis added.)

In *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967), Justice Lake, speaking for the Court, held: "If the burglary occurred—*i.e.*, the breaking and entry occurred—while the dwelling house was actually occupied, that is, *while some person other than the intruder* was in the house, the crime is burglary in the first degree." (Emphasis supplied.) *Id.* at 595, 155 S.E. 2d at 274.

In the present case, all of the evidence showed that at the time of the breaking and entering four sheriff's deputies were present in the Farrell house with the knowledge and consent of the owner. Their occupancy of the house at the owner's request was rightful as against the burglar. Each of them was "some person other than the intruder." *Id.* We hold that the police officers were persons in actual occupation of the dwelling house at the time of the commission of the crime within the meaning of N.C. Gen. Stat. § 14-51. The appellate courts of this State have repeatedly held that where there is no evidence that the dwelling house was unoccupied at the time of the breaking and entry, the trial court may not instruct the jury that it may return a verdict of burglary in the second degree. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929 (1980); *State v.*

Tippett, supra; State v. McAfee, 247 N.C. 98, 100 S.E. 2d 249 (1957). Thus, the trial judge in the present case correctly refused to submit second degree burglary to the jury as a possible verdict and the defendants' assignments of error regarding this issue are overruled.

[2] With regard to the lesser included offense of misdemeanor breaking and entering, the same fundamental rules applies, *i.e.*, the trial judge must submit the misdemeanor to the jury as a possible verdict only if there is evidence from which the jury could find that the lesser included offense was committed. *State v. Jolly, supra; State v. Davis, supra; State v. Murry, supra.* In the case *sub judice*, if there is any evidence from which the jury could find that the defendants broke and entered the Farrell residence without the intent to commit larceny therein, the trial judge erred in failing to charge the jury on the misdemeanor. The presence of such evidence is the test.

Defendant King testified that at all times before the officers in the Farrell house shouted "halt," he believed that he, Ned Diggs and defendant Thomas were breaking into Diggs' parents' house in order for Diggs to remove some of his personal belongings. Defendant King's testimony, that he had no knowledge of any plans to burglarize the Farrell residence was supported by the testimony of Sheriff Elkins that Ned Diggs had furnished him with two suspects' names prior to the break-in and that defendant King's name was not one of the two. If the jury had believed defendant King's testimony, it could have found him guilty only of misdemeanor breaking and entering, as his testimony tended to negate the element of intent to commit larceny in the house he was breaking and entering. Where there is evidence that a crime of a lesser degree was committed, the trial court must submit the lesser crime to the jury for its consideration. *State v. Davis, supra.* There was plenary evidence in this case that defendant King was guilty only of misdemeanor breaking and entering, if the jury believed it. The trial court's failure to submit for the jury's consideration and decision whether defendant King was guilty of the misdemeanor was prejudicial error. Error in this respect is not cured by a verdict convicting defendant King of the felony. *State v. Worthey*, 270 N.C. 444, 154 S.E. 2d 515 (1967); *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). We hold, therefore, that defendant King is entitled to a new trial. Because

of our holding, we will not address defendant King's remaining assignments of error.

The case against defendant Christmas was submitted to the jury upon the theory of aiding and abetting defendants Thomas and King in committing first degree burglary. To prove its case against defendant Christmas, the State had to prove that *either* defendant Thomas *or* defendant King was guilty of first degree burglary, *see State v. Austin*, 31 N.C. App. 20, 228 S.E. 2d 507 (1976), and also had to prove that defendant Christmas aided or abetted one of them in the burglary. *See State v. Spencer*, 27 N.C. App. 301, 219 S.E. 2d 231 (1975). It follows that prejudicial error in the trial of defendant King alone does not constitute error prejudicial to defendant Christmas.

Defendants Thomas and Christmas argue that there was evidence from which the jury could infer that they also believed that they were aiding Ned Diggs in removing his personal belongings from his father's house. Defendants Thomas and Christmas, however, derive no benefit from defendant King's testimony because that testimony related only to defendant King's understanding and general impressions. King did not testify that Diggs made any representations regarding the house to defendants Thomas or Christmas. Defendant King could not testify as to what the other defendants thought or believed. Defendants Thomas and Christmas did not testify. The record contains no direct evidence as to what defendants Christmas and Thomas believed or knew about the breaking and entering.

Thus, we must determine whether the record contains any evidence from which the jury could find that defendants Christmas and Thomas committed the lesser included offense of misdemeanor breaking and entering. Defendants contend that because there was no evidence that any property was taken from the Farrell home, the evidence regarding defendants' intent to commit larceny therein was merely circumstantial and did not point unerringly to an intent to commit the felony, therefore, the trial court erred by not submitting the misdemeanor to the jury. We disagree with defendants' analysis in this case.

Defendants cite four cases holding that a trial court erred by failing to submit the lesser included offense of misdemeanor breaking and entering as a possible verdict in support of their

contention. In *State v. Worthey*, 270 N.C. 444, 154 S.E. 2d 515 (1967), the defendant was charged with feloniously breaking and entering a building where personal property was kept with the intent to steal and carry away personal property in violation of N.C. Gen. Stat. § 14-54. The evidence tended to show only that the defendant was apprehended in the building and that screens had been torn off two windows in the building. In *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965), the defendants were charged with feloniously breaking and entering a building wherein personal property was kept with the intent to steal, take and carry away the personal property. The State's evidence tended to show that the defendants broke windows in the building and entered the building. The defendants fled after being confronted by someone in the building. There was no evidence that any property in the building was stolen or disturbed. In *State v. Biggs*, 3 N.C. App. 589, 165 S.E. 2d 560 (1969), the defendant was charged with felonious breaking and entering with the intent to steal. The State's evidence tended to show that the defendant and another man broke a window in a store and entered the building. The State's evidence also tended to show that no property was taken from the store. The defendant offered no evidence. Finally, in *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968), the defendant was charged with first degree burglary, *i.e.*, breaking and entering an occupied dwelling house at nighttime with the intent to commit rape therein. The State's evidence tended to show that the female occupant of the house woke up to see the defendant standing in her room. When the witness spoke, the defendant fled. The State's evidence also tended to show that on three prior occasions on the same day, the defendant, who was mentally retarded, had made improper proposals to three other women and that each time his advances were rejected, the defendant had abandoned them without the slightest show of force. The Supreme Court held that the trial court erred by failing to submit the lesser included offense of non-felonious breaking and entering to the jury, as there was evidence from which the jury could infer that defendant broke and entered "with the non-felonious intent of stopping short of the use of force." *Id.* at 464, 164 S.E. 2d at 176.

The briefs filed on the State's behalf cite two cases in support of its contention that the trial court did not err in refusing to submit the lesser-included offense of misdemeanor breaking and entering to the jury. In *State v. Faircloth*, 297 N.C. 388, 255

S.E. 2d 366 (1979), the defendant was charged with first degree burglary, *i.e.*, feloniously breaking and entering the dwelling house of another at nighttime with the intent to commit rape therein. The State's evidence in that case tended to show that the defendant had removed a window screen and entered the occupied dwelling of the victim in the nighttime; that the victim began screaming when she awoke suddenly and saw the defendant standing at the foot of her bed; that the defendant pulled the sheets off the victim's bed, jumped on top of her, attempted to kiss her and struck her on her head; and that the defendant fled the scene after the victim shot at him twice. The defendant's evidence in that case was to the effect that he had entered the victim's home at her invitation. The Supreme Court held that there was no evidence of a non-felonious breaking or entering in that case, thus the trial court did not err by refusing to submit that possible verdict to the jury.

In *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972), the defendant was charged with first degree burglary and rape. The State's evidence tended to show that the defendant broke and entered an occupied dwelling house at nighttime and committed the felony of rape therein. Defendant's evidence tended to show that he had been invited into the house and that he had not raped the victim. The Supreme Court held that there was no evidence of any lesser included offense and that the trial court did not err by failing to instruct the jury on any lesser included offenses.

In two other cases, this Court held that the trial judge did not err in failing to submit misdemeanor breaking and entering to the jury as a possible verdict. In *State v. Johnson*, 1 N.C. App. 15, 159 S.E. 2d 249 (1968), the defendant was charged with felonious breaking and entering with the intent to commit larceny and with larceny. The defendant denied being present in the building. This Court stated:

> All the evidence tends to show that the breaking or entering of Mr. Shore's building on November 4, 1967, was done with the intent to commit the crime of larceny of merchandise therein, and larceny under such circumstances is a felony. G.S. 14-72. The evidence shows that approximately $500 of the merchandise belonging to Mr. Shore was stolen from this building on this date, and included in the merchandise in the

> building were buns or cookies such as the one the defendant had on his person when approached. *This distinguishes this case from State v. Jones, 264 N.C. 134, 141 S.E. 2d 27, in which there was no evidence of any property having been stolen.* (Emphasis added.)

Id. at 19-20, 159 S.E. 2d at 252.

In *State v. Martin*, 2 N.C. App. 148, 162 S.E. 2d 667, *cert. denied* 274 N.C. 379 (1968), the defendants were charged with breaking and entering a house with the intent to commit a felony therein. The State's evidence tended to show that the defendants were surprised in a home which they had broken and entered by the returning homeowners. The defendants fled, leaving furnishings and other property in the home in disarray. This Court held that the trial court did not err by failing to submit the lesser included offense of misdemeanor breaking and entering as a possible verdict to the jury because

> the evidence points unerringly to an intent to commit a felony and differentiates this case from *State v. Jones, supra* [264 N.C. 134, 141 S.E. 2d 27], and *State v. Worthey, supra.* The evidence leaves no doubt but that defendants were interrupted in their mission, and the fact that they were unsuccessful does not entitle them to a charge on the lesser degree of the crime charged.

State v. Martin, supra at 151-2, 162 S.E. 2d at 670.

Thus, it seems clear, from a close analysis of the above-discussed cases, that where the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property, the appellate courts of this State have consistently and correctly held that the trial judge must submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. *State v. Thorpe, supra; State v. Worthey, supra; State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965); *State v. Biggs, supra.* However, where there is some additional evidence of the defendant's intent to commit the felony named in the indictment in the building or dwelling, such as evidence that the felony was committed, *State v. Davis, supra; State v. Johnson, supra,* or evidence that the felony was attempted, *State v. Faircloth, supra; State v. Martin, supra,* or, as in the

case *sub judice*, evidence that the felony was planned, and there is no evidence that the defendant broke and entered for some other reason, then the trial court does not err by failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. We hold therefore that the trial judge did not err in failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict as to defendants Thomas and Christmas.

Defendant Christmas, by his eleventh assignment of error, contends the trial court erred by denying his motion to dismiss at the close of the State's evidence. By introducing evidence in his defense, defendant Christmas waived his right to except on appeal to the denial of his motion to dismiss at the close of the State's evidence. N.C. Gen. Stat. § 15-173; *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978).

[3] Defendant Thomas, by his third assignment of error, and defendant Christmas, by his twelfth assignment of error, contend the trial court erred by denying their motions to dismiss at the close of all the evidence. When ruling on a defendant's motion to dismiss, the question for the court is whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. In deciding this question, the trial court must consider the evidence in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. McNeil*, 46 N.C. App. 533, 265 S.E. 2d 416, *cert. denied*, 300 N.C. 560, 270 S.E. 2d 114 (1980).

The elements of burglary in the first degree are: (1) breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or room used as a sleeping apartment in any house or sleeping apartment (6) which is actually occupied at the time of the offense. N.C. Gen. Stat. § 14-51; *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970). As stated in *State v. Accor*, *id.*,

> [n]umerous cases . . . hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory, in the absence of evidence of other intent or explanation for breaking and

> entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft.

Id. at 73-4, 175 S.E. 2d at 589. It is clear that the evidence, viewed in the light most favorable to the State, was sufficient to submit the case against defendant Thomas to the jury on the charge of first degree burglary.

The case against defendant Christmas was submitted to the jury upon the theory that he aided and abetted defendants Thomas and King in committing first degree burglary. We hold the evidence, viewed in the light most favorable to the State, was sufficient to submit the case against defendant Christmas to the jury upon the theory of aiding and abetting defendant Thomas in committing first degree burglary. There was substantial evidence that defendant Thomas was guilty of first degree burglary, *see State v. Austin*, 31 N.C. App. 20, 228 S.E. 2d 507 (1976), and that defendant Christmas aided or abetted him in the burglary. *See State v. Spencer*, 27 N.C. App. 301, 219 S.E. 2d 231 (1975). An aider and abettor is one who was present, either actually or constructively, at the scene of the crime with the intent to aid the perpetrators, if necessary, and who communicated, in some manner, his intent to render assistance to the actual perpetrators. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Glaze*, 37 N.C. App. 155, 245 S.E. 2d 575 (1978). "In order to determine whether a defendant is present, the court must determine whether 'he is near enough to render assistance if need be and to encourage the actual perpetration of the felony.' " *State v. Lyles*, 19 N.C. App. 632, 635, 199 S.E. 2d 699, 701, *appeal dismissed*, 284 N.C. 426, 200 S.E. 2d 662 (1973).

Viewed in the light most favorable to the State, the evidence showed that defendant Christmas transported the defendants to the scene of the crime, let them out of the van in a location designed to avoid detection, left the scene so as not to attract attention, and intended to return at a predesignated time and place to assist in the escape. Without the defendant Christmas' assistance as a driver, the burglary could not have been committed.

> One who . . . accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding

> and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225.

State v. Price, 280 N.C. 154, 158, 184 S.E. 2d 866, 869 (1971).

Defendant Christmas, by his second assignment of error, and defendant Thomas, by his first assignment of error, contend that the court erred in denying their pre-trial motions for discovery. We do not agree.

[4] Defendants contend the court erred by failing to compel the district attorney, pursuant to N.C. Gen. Stat. § 15A-903(b), to furnish them with copies of any written, recorded or oral statements made by Ned Diggs.

G.S. 15A-903(b) provides:

> Upon motion of a defendant, the court must order the prosecutor:
>
> (1) To permit the defendant to inspect and copy or photograph any written or recorded statement *of a codefendant* which the State intends to offer in evidence at their joint trial; and
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made *by a codefendant* which the State intends to offer in evidence at their joint trial. (Emphasis added.)

Ned Diggs was originally charged, along with the defendants, with the burglary of the Farrell residence. The district attorney dismissed the charges against Diggs on 25 March 1980. Defendant Thomas filed his motion for discovery on 18 April 1980 and defendant Christmas filed his motions for discovery 3 April 1980. On those dates, Diggs was not a codefendant. In *State v. Hardy,* 293 N.C. 105, 235 S.E. 2d 828 (1977) the Supreme Court held that G.S. 15A-904 does not require production of statements made by witnesses or prospective witnesses for the State. There has been no showing that the district attorney failed to disclose any evidence material or favorable to the defendants and no showing

how effective assistance of counsel has been impaired. Therefore, by statute, defendants were not entitled to pre-trial discovery of the statement of Diggs, nor have their constitutional rights been violated. These assignments of error are therefore overruled.

Defendant Christmas, by his third assignment of error, contends that the trial court erred by failing to suppress the testimony of Ned Diggs as it related to defendant Christmas. Prior to trial, this defendant's counsel wrote a letter dated 14 March 1980 to the district attorney, pursuant to Article 48 of N.C. Gen. Stat. Ch. 15A, requesting that the prosecution furnish copies or inspection of written or recorded statements by codefendants and divulge the substance of any oral statements by codefendants which the State intended to use or offer at the trial. The assistant district attorney responded to that request on 25 March 1980, stating that there were no statements of codefendants which the State intended to introduce at their joint trial. As previously pointed out, the district attorney dismissed the charges against Diggs on 25 March 1980. This assignment of error is overruled.

Defendants Thomas and Christmas contend by their first assignments of error the court erred by failing to grant their motions for a continuance. As a general rule, a motion for a continuance is addressed to the sound discretion of the trial judge whose ruling thereon is subject to review only in case of manifest abuse of discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968); *State v. Penley*, 6 N.C. App. 455, 170 S.E. 2d 632 (1969), *cert. denied*, 276 N.C. 85 (1970). Where, however, a motion for continuance in a criminal case is based upon a right guaranteed by the federal or state constitutions, the question is one of law, and the ruling of the court is one of law and not of discretion and is reviewable on appeal. *State v. Brower, supra; State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death penalty vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211, 96 S.Ct. 3212 (1976); *State v. Moore*, 39 N.C. App. 643, 251 S.E. 2d 647, *appeal dismissed*, 297 N.C. 178, 254 S.E. 2d 39 (1979).

[5] Defendants Thomas and Christmas argue that by denying their motions to continue, the trial court deprived them of their constitutional right to due process of law in that they were not allowed a reasonable time and opportunity to investigate and produce competent evidence in their defense. The record discloses that almost four months elapsed from the time counsel was ap-

pointed for defendants Thomas and Christmas and the time of their trial. Defendants contend, nevertheless, that because their motions for discovery of Ned Diggs' statement were still pending, they were entitled to a continuance. The record discloses that the trial court again denied defendants' motions for a continuance after it denied their discovery motions. We hold that the defendants have failed to show how their cases would have been been better prepared had the continuance been granted or that they were prejudiced by the denial of the motions. *See State v. Huffman*, 38 N.C. App. 584, 248 S.E. 2d 407 (1978). These assignments of error are therefore overruled.

[6] By his fifth assignment of error, defendant Christmas contends the trial court erred by denying defendant's motion requesting that hearings on pretrial motions filed in his behalf be set prior to the date of trial. This assignment of error is completely without merit. N.C. Gen. Stat. § 15A-952(f) provides "[w]hen a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial." Defendant Christmas has failed to argue or show any abuse of discretion by the trial court. This assignment of error is overruled.

[7] Defendant Thomas, by his ninth assignment of error, and defendant Christmas, by his twenty-fourth assignment of error, contend the trial court erred in denying their motions for mistrial. During jury selection, one prospective juror stated, in the presence of the entire jury panel, that he believed a defendant was guilty until proven innocent and that if a police officer apprehended a subject the suspect would be guilty. The trial court immediately excused the juror and re-instructed the jury panel on the presumption of innocence. The trial court also repeatedly and specificially instructed the jury on the presumption of innocence at the close of the evidence.

A motion for mistrial should be granted when an occurrence during the trial results "in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061. The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be

disturbed on appeal. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 (1978), *rev. denied*, 296 N.C. 588, 254 S.E. 2d 33 (1979). In *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977), the Supreme Court held that the trial court did not err by denying the defendant's motion for a mistrial on the basis of a statement by a prospective juror that he had formed an opinion that the defendant was guilty.

The defendants have failed to persuade us that Judge Brewer abused his discretion by denying their motions for a mistrial. In light of the judge's prompt and repeated instructions on the presumption of innocence, we fail to see how defendants were prejudiced by this incident. These assignments of error are overruled.

Defendant Thomas, by his second assignment of error and defendant Christmas, by his seventh, eighth, ninth and tenth assignments of error question the admissibility of certain testimony by G. R. Farrell, Sheriff Elkins, Craig Farrell and Ned Diggs. We have carefully examined the questioned testimony and find no error in its admission.

[8] Defendant Thomas, by his fourth assignment of error, and defendant Christmas, by his thirteenth assignment of error, contend that the trial court erred by failing to instruct the jury on the defense of entrapment. "Entrapment is 'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.' (Citations omitted.)" *State v. Stanley*, 288 N.C. 19, 27, 215 S.E. 2d 589, 594 (1975).

> Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law. (Citations omitted.)

State v. Burnette, 242 N.C. 164, 173, 87 S.E. 2d 191, 197, 52 A.L.R. 2d 1181, 1190 (1955).

North Carolina follows the majority rule that entrapment is a defense only when the entraper is an officer or agent of the

government. *State v. Whisnant*, 36 N.C. App. 252, 243 S.E. 2d 395 (1978). We find no evidence from which the jury could infer that Ned Diggs was acting as an agent of the police. The full extent of the arrangement between the police and Diggs appears to be Diggs' indication that he would let the police know if he found out for sure that the Farrell house was to be broken into. We find no credible evidence tending to support the defendants' contention that they were victims of entrapment, as that term is known to the law. *State v. Burnette, supra.* These assignments of error are overruled.

Defendant Thomas' sixth assignment of error and defendant Christmas' fourteenth and seventeenth assignments of error are also directed to certain instructions of the trial court to the jury. We are of the opinion that the instructions pertinent to defendants Thomas and Christmas, when construed contextually as a whole, are fair and free from prejudicial error.

In defendant Christmas' appeal — no error.

In defendant Thomas' appeal — no error.

In defendant King's appeal — new trial.

Judges CLARK and MARTIN (Harry C.) concur.

MARY COOPER FALLS v. RALPH L. FALLS, JR.

No. 8010DC502

(Filed 2 June 1981)

1. Divorce and Alimony § 25.12— visitation rights—consent of children—no error

There was no merit to the contention of defendant husband that the trial court failed to make a positive determination of the visitation rights of defendant and that the trial court's order left defendant's visitation rights in the hands of the children themselves and was therefore improper, since the trial court's order granted defendant husband liberal visitation rights and allowed him, in effect, to visit the children at any time as long as it did not conflict with the family's routine, cause chaos, or was against the children's wishes; the restrictions on defendant's visitation rights were warranted in light of the evidence that there had been considerable physical violence between plaintiff

and defendant which one or more of the children had witnessed or had participated in, and there was evidence of physical and mental abuse by defendant toward the children causing the children to be afraid of defendant; and the children in this case, who were seventeen, fourteen, and eleven, were all of sufficient age to exercise discretion in choosing a custodian.

2. Divorce and Alimony § 24.1— child support—husband's ability to pay

There was no merit to defendant husband's contention that the trial court failed to make findings and conclusions about his living expenses, net income, and ability to provide child support where the trial court's findings sufficiently detailed the husband's needs, fixed expenses, gross and net spendable income, debt and loan payments, and what the court termed his lavish expenditures on himself and his children to support the trial court's order of child support.

3. Divorce and Alimony § 24.2— separation agreement—alimony provision not intended as child support

The trial court in a proceeding for child support did not err in excluding evidence offered by defendant husband tending to show that a provision in a separation agreement executed by the parties allowing for $1,000 per month as alimony was actually meant as child support.

4. Divorce and Alimony § 24.1— child support—amount of award supported by evidence

In a proceeding for child support there was no merit to defendant husband's argument that the monthly awards for each child exceeded anything proved by the evidence, since the trial court's award was based on the plaintiff wife's detailed affidavit which set forth expenses for each of the three children and upon plaintiff's answers to questions on cross-examination that the actual expenses were taken from her check book, check stubs, and receipts for expenditures on behalf of the children during the four months immediately preceding the trial; however, the trial court erred in ordering defendant husband to pay "tutor costs if needed, private school tuition costs and fees if private school becomes a necessity for any child," since the record was totally devoid of any evidence that any of the children needed private school education or tutors, and at the time of trial none of the children were attending private school and there was no intent to enroll a child in private school.

5. Divorce and Alimony § 24.5— child support—automatic increase based on cost of living index

The trial court erred in awarding annual increases in child support based on the U.S. Consumer Cost of Living Index, since there was nothing in the record to establish the general reliability of the particular index used, and since the cost of living escalator in this case focused exclusively on circumstances of the children and a cost of living index while ignoring the changing or unchanging ability of the parents to pay. G.S. 50-13.4(c).

6. Divorce and Alimony § 27— attorney's fees—no evidence of nature and reasonable worth

The trial court in a child custody and support proceeding erred in awarding attorney's fees to plaintiff wife where there was no evidence in the record as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent, and the trial court's sole finding and conclusion that the attorney's services had "reasonable value in excess of $2,000" was insufficient to support an award.

APPEAL by defendant from *Parker, Judge.* Judgment entered 31 January 1980 in District Court, WAKE County. Heard in the Court of Appeals 22 January 1981.

This action, seeking temporary and permanent child custody and support, and counsel fees, was filed by the plaintiff wife against the defendant husband on 21 November 1979. The case was heard during the 2 January 1980 civil domestic session of Wake County District Court. From a 2 February 1980 Order awarding the wife attorney's fees and child support, and also conditioning the husband's custody and visitation privilege, the husband appealed. On appeal, the husband challenges several portions of the Order, including:

1. The findings and conclusions which, although awarding joint custody to the parties, condition the husband's custody and visitation on the consent of each child;
2. The alleged failure of the court to include sufficient findings and conclusions concerning the husband's expenses and his ability to provide support;
3. The court's exclusion of evidence offered by the husband tending to show that the $1,000 per month alimony provision in the Separation Agreement was actually meant as child support;
4. The findings and conclusions requiring the husband to pay child support in an amount allegedly not supported by evidence;
5. The findings and conclusions in which the amount of child support automatically increases each September based on the cost of living index and is contingent on the needs of the children likewise increasing;
6. The findings and conclusions awarding the wife $2,000 attorney's fees.

THE PARTIES

Mary Cooper Falls and Ralph Lane Falls, Jr. were married to each other on 29 July 1962, and three children were born of the marriage: Mary Cooper Falls (Cooper); Louise Lane Falls (Lulu); and Ralph Lane Falls, III (Ralph). The parties separated on 23 December 1978 and executed written separation agreements which were dated 7 April 1979 and 13 April 1979. Prior to their separation on 23 December 1978, the parties lived at 1103 Cowper

Drive, in a 3,500 square foot, four-bedroom house which was valued at $200,000 at the time of trial. Pursuant to the terms of the 13 April 1979 Separation Agreement, the wife sold her equity in the home to the husband and received $40,000 cash and a $10,000 "Note" from the husband. The wife later used a large portion of the cash to purchase and renovate a three-bedroom home. The Separation Agreement specified that the children were to live with the wife, and the wife was to receive $1,000 per month alimony and a total of $500 per month for the support of the children.

During the marriage, the wife's role was primarily that of mother and homemaker. She was not employed at the time of trial and had a separate income for the 1979 calendar year of $474. At the time of trial, the wife had $9,000 in a savings account, had invested $15,000 in Treasury Bills, owned stock worth $6,500, and owned the $10,000 Note of the husband due in 1981. The wife also had an equity of $13,000 in the three-bedroom house she purchased following the separation. The wife testified that the estimated monthly living expenses for the children were as follows: Cooper, $680; Lulu, $770; and Ralph, $600.

The husband, during the marriage, was primarily responsible for earning an income for the family. At the time of trial, the husband was president and sole stock-holder in Roane-Barker, Inc., a medical supply company. He had a gross taxable income in 1978 of $134,370 and maintained $800,000 worth of life insurance. The life insurance had a cash value of $20,000. The husband had use of a company car and owned three other cars which he had restored or was restoring. From 1974 through 1976 the husband was in the real estate business and had no earned income after business expenses. Thereafter, he acquired Roane-Barker, Inc. In order to buy into that business, he sold all of his significant assets other than his home and borrowed $185,000 from his father and $150,000 from a bank. His father, in connection with his loan, has certain rights to convert part of it to Roane-Barker stock. The husband is also a personal guarantor of a $450,000 bank loan to Roane-Barker, and the bank holds a security interest in all accounts receivable of Roane-Barker. The house at 1103 Cowper in which the husband resides is subject to three mortgages, including one to the bank as security for the Roane-Barker loans. In addition to the $1,500 per month payments to the wife and children under the Separation Agreement, the husband has house

payments of $1,148 per month and other debt payments of $3,933 per month.

THE ORDER

In its Order filed on 2 February 1980 the trial court awarded the parties "joint custody," specifying that the children were to live with the wife and awarding visitation to the husband on the first and third weekends of each month, one weekday evening per week, four weeks in the summer and alternate holidays. All of the outlined periods of visitation were subject to the consent of the children. With respect to child support, the defendant was ordered to pay the following: $550 per month for each daughter and $500 per month for his son; all medical (including psychiatric counseling), dental and hospital bills; all educational expenses, including costs for tutors if needed, and costs of tuition for private school "if [it] become necessary for any child;" and "maintenance, repair and upkeep costs on [the wife's] automobile for the use and benefit of the children." The trial judge specified in the Order that the monthly child support payments "shall be increased annually as the cost of living (and the attendant expenses for said children) increases, provided that the needs of the children at the time said increase goes into effect meet or exceed the total amount of child support plus increase." The increases were to be based on the percentage increase of the September 1981 consumer price index over the September 1980 consumer price index. Finally, the husband was ordered to pay the wife's attorney fees of $2,000.

Hunter, Wharton & Howell, by John V. Hunter, III for defendant appellant.

Kimzey, McMillan & Smith, by James M. Kimzey for plaintiff appellee.

BECTON, Judge.

CUSTODY AND VISITATION

[1] The husband assigns as error the trial court's failure to make "a positive determination of the visitation rights of the [husband]," and the court's failure to include "positive provisions to assure that visitation would occur." The husband argues that the portion of the trial court's Order which leaves his visita-

tion rights "in the hands of the children themselves. . . , is incongruous" with the court's conclusion "that both the [wife] and [husband] are fit and proper persons to have joint custody of the children."

The trial court made a positive determination of the husband's visitation rights. Conclusion of Law Number 1, which we find to be based upon proper findings of fact, is dispositive of this issue.

> Both the [wife] and the [husband] are fit and proper persons to have joint custody of the minor children subject to the following *conditions and restrictions;* but the children's best welfare will be served by the [wife] having the ultimate right to control and supervise the children including first authority as to their physical presence at her home and final authority as to major decisions concerning their physical, mental, educational and social welfare and well being. The [husband] is to be consulted on all major decisions concerning the children's well being as well as have the physical presence of the children as is hereafter set forth upon the consent and willingness of the children to be with the [husband] . . . . (Emphasis added.)

The "conditions and restrictions" which are set forth in subparts (a) and (b) of Conclusion of Law Number 1, actually grant the husband liberal visitation rights—he has custody of the children during the first and third weekends of each month, one afternoon each week, four consecutive weeks during the summer, Easter vacation in odd-numbered years, every other Thanksgiving and Christmas, and any other time as agreed to by the parties. The husband can, in effect, visit the children at any time as long as it does not conflict with the family's routine, cause chaos, or is against the children's wishes. The Record on Appeal indicates that two of the children, Cooper and Ralph, were visiting the husband at and during the time of the trial. The husband's contention that he has been denied visitation, and his characterization of the "joint custody" provision as "sole custody" is without merit. The husband has not been denied custody or access to the children, although restrictions have been placed on his right of visitation.

When severe restrictions are placed on the right of visitation, G.S. 50-13.5(i) requires the trial judge to make findings of

fact supported by competent evidence which warrant the restrictions. *In re McCraw Children*, 3 N.C. App. 390, 165 S.E. 2d 1 (1969). Specifically, the statute provides:

> [I]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

G.S. 50-13.5(i).

No one questions the existence, nor for that matter the soundness, of the well-recognized principle of law that the trial court has broad discretion in matters of child custody and visitation. The general rule is thus stated in *Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E. 2d 417, 420 (1971):

> The guiding principle to be used by the court in a custody hearing is the welfare of the child or children involved. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a 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. (Citation omitted.)

Although there was evidence at trial that both the husband and the wife were competent adults who loved their children, there was also evidence of considerable physical violence between the wife and the husband which one or more of the children witnessed or in which one or more of the children participated. There was also considerable evidence of physical and mental abuse by the husband toward the children. The trial court found from the evidence that the husband had been abusive toward the wife and the children, that the children were afraid of the husband, and consequently conditioned the husband's visitation rights on the consent of the children. In this we find no abuse of discretion.

Moreover, "[t]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between the parents, but is not controlling." *Hinkle v. Hinkle*, 266 N.C. 189, 197, 146 S.E. 2d 73, 79

(1966). This court has previously held that a trial judge could consider the wishes of a ten-year-old child when making a determination of custody. *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). The three children in this case are all of sufficient age to exercise discretion. Cooper is seventeen and is clearly old enough to make intelligent choices. Lulu is fourteen and was described as the smartest of the three. And, Ralph is eleven and was described at trial as being very bright.

On the issue of custody and visitation, the trial court made extensive findings of fact based on competent evidence, and those findings are conclusive on appeal. *Shepperd v. Shepperd*, 38 N.C. App. 712, 248 S.E. 2d 871 (1978), *cert. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979); *Jarmon v. Jarmon*, 14 N.C. App. 531, 188 S.E. 2d 647, *cert. denied*, 281 N.C. 622, 190 S.E. 2d 465 (1972); *Brooks v. Brooks; In re Custody of Stancil; Hinkle v. Hinkle.*

CHILD SUPPORT

(a) The Husband's Ability To Provide Support

[2] The husband argues that the court failed to make findings and conclusions about his living expenses, net income, and ability to provide support. We have reviewed the findings, and they sufficiently detail the husband's needs, fixed expenses and income to support the conclusions reached. Indeed, the trial court made extensive findings of the husband's gross and net spendable income; his debt and loan payment; and what the court termed, his lavish expenditures on himself and his children. By way of example, the court found that the husband paid taxes on an income of $134,370 for the 1978 tax year; that the husband owned, what the court concluded to be an excessive amount of life insurance ($800,000); that the husband spent over $3,000 in acquiring, restoring and repairing his three convertible automobiles, spent over $2,000 during a six-month period on clothes, and spent over $3,000 on decorations and furnishing for his four-bedroom house. By way of further example, the court found that the husband spent "extravagant" sums of money on his children as he saw fit, while paying an inadequate sum to the wife for the children's basic needs. This was evidenced by the fact that he bought a fur coat valued at $977 for his oldest daughter, Cooper; bought rings from Tiffany's in New York valued at $250 each for his daughters, Cooper and Lulu; gave $300 to his son Ralph so he could buy

Cooper and Lulu presents; and took Ralph on a fishing trip valued at $800. The husband presented evidence of his debt payments, and from his testimony the court arrived at, and found as a fact that the husband had, a $4,500 per month net spendable income. The findings and conclusions detailing the husband's expenses, net income, and ability to provide support to his children are sufficient and binding on us on appeal.

(b) Whether the $1,000 Alimony Provision In the Separation Agreement Was Intended To Be Child Support

[3] The husband contends that the court's exclusion of evidence offered by him, tending to show that the $1,000 per month alimony provision in the Separation Agreement was actually meant as child support, was error. According to the husband, the trial court not only precluded him from testifying about the parties' intent, but also excluded two letters from the wife's former attorney to the husband's former attorney which clearly demonstrate that the Separation Agreement was signed at a time when the wife was willing to waive all rights to alimony in exchange for child support in the amount of $500 per month, *per child.* (One of the excluded letters was dated a few days before the Separation Agreement and constituted the wife's counter-proposal for settling the parties' differences.)

On this issue, the husband first argues that, because this action for child support was brought less than eight months after the parties had entered into a written separation agreement, the court under *Fuchs v. Fuchs,* 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963) must indulge the presumption that child support payments pursuant to a separation agreement are just and reasonable. The *Fuchs* court actually held that custody and support provisions in a separation agreement are not binding on the court.

> The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Such agreements, . . . with respect to marital rights, however, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

. . .

> However, we hold that where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption *in the absence of evidence to the contrary,* that the amount mutually agreed upon is just and reasonable.

Id. at 639, 133 S.E. 2d at 491. The evidence in this case is sufficient to overcome the *Fuchs* presumption. The wife testified that she signed the Separation Agreement "because I thought it would be the best at the time, to relieve me and the three children—me particularly from a great deal of emotional harassment." She further testified that she instituted this action because "I realized that I could not live on the amount of money that was stipulated in the separation agreement. . . ." The presumption was rebutted in this case; there was "evidence to the contrary" from which the trial court could find that the needs of the children exceeded payments of $166.67 per month, per child. In this case, as in *Williams v. Williams,* 261 N.C. 48, 59, 134 S.E. 2d 227, 235 (1964),

> there is evidence that the amount agreed upon in the deed of separation was inadequate, considering the income of the defendant, the mode of life to which he had accustomed the children prior to the separation, and the station of life of the parties. In view of all the circumstances disclosed by the evidence in this case we cannot say that [the judge] abused his judicial discretion in fixing the amount he did for the support of the defendant's children.

The husband next argues that the Separation Agreement, on its face,

> suggests that the $1,000 per month payments for the wife are child support (even though called 'alimony'), for they have the very unusual feature of surviving the remarriage of the wife or the death of the husband, and they terminate at the approximate time when two of the three children of the parties would have reached the age of eighteen, leaving in effect $500 per month child support for the sole child who will then be a minor.

This argument is not without its counterargument, however. For example, the $1,000 per month payments are to terminate on the

death of the wife. This is a usual characteristic of alimony, not child support.

We are not unmindful of the fact that, for tax reasons, many family-law practitioners use the term alimony to mean payments intended exclusively as child support. *See Soper v. Soper,* 29 N.C. App. 95, 223 S.E. 2d 560 (1976); and *Zuccarello v. Zuccarello,* 13 N.C. App. 531, 186 S.E. 2d 651 (1972). We are also aware of *Pruneau v. Sanders,* 25 N.C. App. 510, 214 S.E. 2d 288, *cert. denied,* 287 N.C. 664, 216 S.E. 2d 911 (1975) in which this court found it was error to follow the literal wording of a separation agreement and not to require the wife to apply alimony payments for child support. However, in *Pruneau,* the separation agreement specifically provided that "alimony" was to be applied to child support. There is no similar provision in the Separation Agreement before us. Indeed, Paragraph 8 of the Separation Agreement, after reciting that the wife is to receive $1,000 per month alimony, states:

> So long as there shall be any living child of the parties under the age of eighteen, the husband shall pay the wife, on the first day of each month beginning June 1, 1979, the total sum of Five Hundred Dollars ($500) for the support of such children or child of the parties under eighteen years of age, as may then be living.

Use of the term "alimony" to mean child support by family-law practitioners is not controlling; *Pruneau* is distinguishable.

The husband proffered extrinsic evidence of prior negotiations to show that "alimony" was really "child support" in the face of two clear provisions in the separation agreement—one saying alimony in the amount of $1,000 per month, and the other saying child support in the amount of $500 per month.[1] The

1. The wife's attorney objected to the proffered testimony and letters stating: "settlement negotiations are privileged." While it is true that certain types of conduct "might well be considered as implied admissions, [and] are excluded from evidence on grounds of policy [footnote omitted] [and while it is further true that] . . . from the making of an *offer of compromise* one might logically infer a consciousness of liability," 2 Stansbury, N.C. Evidence § 180 at 56 (Brandis Revision 1973), the proffered letters and the proffered testimony of the husband in this case, were not efforts to prove any admission by, or fault of, the wife. Consequently, there were no "grounds of policy" or "privilege" requiring exclusion on the stated grounds. The husband's attorney, evidently aware of this, explained his reason for tendering the evidence objected to: "[o]ne purpose for my offering these is simply

language in this Separation Agreement is not specific as is the language in *Pruneau*, nor can it be reasonably intrepreted to mean that alimony was actually child support. Moreover, as we noted parenthetically before, part of the proffered evidence included a letter dated a few days before the Separation Agreement which set forth the wife's *counter-proposal* for settling the parties' differences. We do not know the terms of the original proposal, nor do we know if the alimony and child support provisions were agreed upon as a result of corresponding adjustments in other provisions (for example, division of property) of the Separation Agreement. The extrinsic evidence arising out of the negotiation process was properly excluded. Negotiations to an agreement are considered merged in the written agreement, and parol evidence is not admissible to add to, take from, or vary the terms of the agreement. *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E. 2d 522 (1965).

(c) The Adequacy Of The Child Support Awards

[4] The husband argues that the "monthly awards for each child exceeds anything proved by the evidence" because the court failed to make specific findings as to what the actual past expenditures for the children were. This argument is without merit. In Finding of Fact Number 41, the trial court found that "the monthly expenses necessary to support the children on an individual basis exceed the following amounts: Mary Cooper Falls, $680.00; Louise Lane Falls, $610.00; and Ralph Lane Falls, III, $600.00." This finding of fact was based not only upon the wife's detailed affidavit which set forth expenses for each of her three children, but also upon her answers to questions on cross examination that the actual expenses were taken from her checkbook, check stubs, and receipts for expenditures on behalf of the children during the four months immediately preceding the trial. (The affidavit was executed on 10 December 1979, but the wife testified that she penciled in corrections so as to make the affidavit current.) Although the wife admitted that the monthly figures in her affidavit include amounts which do not represent actual present expenditures such as summer camp which the children may or may not attend, that testimony does not vitiate the award. Indeed, the

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to show what the parties contemplated when they signed the separation agreement, both as to the house and the child support and her support."

trial court obviously considered this testimony in making its award. The wife, in her affidavit, listed expenses for Cooper in the amount of $683.25, but the court awarded only $550.00 per month; the affidavit listed expenses of $768.49 for Lulu, but the court only awarded $550.00; and the affidavit listed expenses for Ralph in the amount of $600.38, but the court only awarded $500.00. The expenses listed in the affidavit and testified to by the wife seem reasonable to support the children in the mode of living to which they were accustomed. Considering all the circumstances disclosed by the evidence, we cannot say that the trial judge abused his discretion. The Findings and Conclusions were based on competent evidence and are conclusive on appeal.

Before turning to the Cost of Living Adjustment Clause, we hold that the husband *is* entitled to relief from one portion of the child support order to which he specifically took exception. Paragraph 5(f) of the decretal portion of the Order requires the husband to pay "tutor costs if needed, private school tuition costs and fees if private school becomes a necessity for any child." The husband's assignment of error to this portion of the Order is sustained. The record is totally devoid of any evidence that any of the children need private school education or tutors. At the time of trial, none of the children was attending private school, and there was no intent to enroll a child in private school.

(d) Cost-Of-Living Adjustment (COLA)[2]

[5] The trial court, evidently assuming that the United States Consumer Cost of Living Index is a generally accepted and accurate gauge of the cost of living, provided for automatic adjustments of child support payments as the cost of living increased because of inflation. The husband takes exceptions to the trial court's assumption and proviso, and argues that the court had no authority to award annual increases in child support based upon the "Cost of Living Index."

We set forth the decretal portion of the order below.

> 9. The monthly child support of $550.00 for Mary Cooper Falls and Louise Lane Falls and $500 for Ralph Lane Falls,

2. *See In Re Stamp*, 300 N.W. 2d 275 (Iowa 1980), *reh. denied*, --- N.W. 2d --- (Iowa 1981).

III shall be increased annually as the cost of living (and the attendant expenses for said children) increases, provided that the needs of the children at the time said increase goes into effect meet or exceed the total amount of child support plus increase. The amount of the monthly child support payment for each child shall be increased for the succeeding 12 months by such amount, if any, as may be necessary to keep the level of the payments, during those succeeding 12 months at a consistent level by comparison of the United States Consumer Cost of Living Index for the month of September, 1980, for the same month of the year 1981 and each year thereafter. If the Index is revised by changing the base period, this shall be taken into consideration in fixing the amount of payment for child support calculated with respect to the Index based upon the new base, it being the intent of the Court that said payments be increased annually, consistent with the increase of the cost of living, as reflected by the official statistics of the United States with reference to the costs thereof during the month of September, 1980 if at any time the government of the United States ceases to compile and publish the United States Consumer Cost of Living Index, then the obligation of the husband under this ordering paragraph shall be governed by such other statistics, public or private, as are commonly accepted as reflecting with reasonable reliability the information now contained in the United States Consumer Cost of Living Index.

The imposition of a child support COLA formula might be appropriate under certain circumstances. Indeed, inflation-proof child support orders using either "percentage-of-income" formulas for automatically increasing child support, or yearly "automatic cost-of-living adjustments," have gained some measure of notoriety in recent years. *Peterson v. Peterson*, --- N.J. Super. ---, --- A 2d --- (filed: 21 April 1981); *In re Stamp*, 300 N.W. 2d 275 (Iowa 1980), *reh. denied*, --- N.W. 2d --- (Iowa 1981); *Branstad v. Branstad*, 400 N.E. 2d 167 (Ind. App. 1980); *In re Meeker*, 272 N.W. 2d 455 (Iowa 1978); In Interest of J.M. and G.M., 585 S.W. 2d 854, 856-57 (Tex. Civ. App. 1979); *In re Mahalingam*, 21 Wash. App. 228, 584 P 2d 971 (1978); annot., 75 ALR 3d 493 (1977); Note, Inflation-Proof Child Support Decrees: Trajectory to a Polestar, 66 Iowa L.R. 131 (1980).

The COLA concept is not without its attractive features. These "escalation clauses" can "preserve the original determination from the ravages of inflation," reduce the burden imposed on courts by adversary modification proceedings, eliminate the need for the custodial parent to incur substantial attorney's fees and costs, and eliminate the uncertainty such proceedings bring. *In re Stamp*, 300 N.W. 2d at 277. In *Branstad*, which involved a child support escalation clause based on the Consumer Price Index, the court said: the provision

> (1) gives due regard to the actual needs of the child, (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either the custodial parent or the non-custodial parent to petition the court for modification of the decree due to a substantial and continuing change of circumstances.

400 N.E. 2d at 171.

Proponents of these escalation clauses argue that it is common knowledge, which should be judicially noticed, that COLA provisions based on the Consumer Price Index have been "incorporated in collective bargaining agreements, leases, and other private sector agreements in attempts to insulate the contracting parties from inflation's toll." *In re Stamp*, 300 N.W. 2d at 279. Moreover,

> numerous federal statutory provisions use the consumer price index either to determine eligibility or calculate the amount of benefits. Included are determining cost of living increases in social security benefits, 42 U.S.C. § 415, adjusting retirement and retainer pay in the military, 10 U.S.C. § 140la, adjusting cost of living increases in annuities of retired civil service workers, 5 U.S.C. § 8146a, and computing cost of living increases for retired foreign service workers, 22 U.S.C. § 1121. It is used to make changes in appropriations to states for child care food payments, 42 U.S.C. § 1766, school milk programs, 42 U.S.C. § 1772, and summer food programs for children in service institutions, 42 U.S.C. § 1758.

Hunt v. State, 252 N.W. 2d 715, 722 (Iowa 1977).

In spite of their attractiveness however, escalation clauses have uniformly been rejected when the formula *assumes that no*

change will occur in other factors affecting child support. For the reasons set forth below, we reject the attempt by the trial court to set up a self-adjusting, self-perpetuating support order in this case because the court ignored the relevant and changing circumstances surrounding the children *and the parties.* (We note parenthetically that the wife never prayed for an automatic annual increase in child support payments; that there is no indication in the record that this matter was ever mentioned in the trial court; and that no explanation appears why the Index is to be applied yearly in September—the case was tried in January and the Separation Agreement was executed the preceding April.)

In this case, there is absolutely nothing in the record to establish the general reliability of the particular index used. In *In re Stamp,* the wife called as a witness a University of Iowa Professor of Finance who, after tracing the extended period of accelerated inflation that began in 1966, opined, among other things, "that the longer inflation persists the more difficult it is to control" and predicted "with reasonable confidence that the consumer price level next year will be higher than it is now and that fifteen years from now it will be significantly higher." *Id.* at 277. There was no such expert testimony in this case. Moreover, this court cannot take judicial notice that the Consumer Price Index is the most accurate gauge of inflation. The Consumer Price Index is only one of several measures of the cost of living. Unlike other indexes, it does not compensate for shifts in buying practices as prices rise. Indeed, a number of economists believe that its structure tends to overstate the true impact of inflation on Americans since it includes costs of energy and housing. Spouses simply do not buy houses each year. Can we say that the Consumer Price Index is more reliable than the Personal Consumption Expenditure Deflator which is compiled as part of the calculation of the Gross National Product? During 1980, the Personal Consumption Expenditure rose by 10%,[3] compared to 12.4%[4] for the Consumer Price Index.

3. Personal Consumption Expenditure Deflator: United States Commerce Department, *Survey of Current Business* (Dec. 1980)

4. Consumer Price Index: Bureau of Labor Statistics, United States Labor Department, *CPI: Detailed Report* (Dec. 1980)

More importantly, however, the portion of the child support order appealed from is at odds with North Carolina statutory and case law. To put in effect an automatic increase in the future based on one factor, a cost of living index whose reliability is totally unsubstantiated by the record, violates G.S. 50-13.4(c) which states:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, *earnings*, conditions, accustomed standard of living of the child and the parties, *and other facts of the particular case.* (Emphasis added.)

The order ignores the changing or unchanging "earnings . . . and other facts of [this] particular case." Indeed, it allows future changes in support payments without any showing of changed circumstances of the parents. It is not sufficient that there is a proviso that conditions the increase on the children's need at the time the increase goes into effect since the income of the parents is also a relevant factor under G.S. 50-13.4(c).

Some courts blanketly prohibit judgments *in futuro* whose propriety may depend on circumstances materially different from those shown by the evidence and which cannot reasonably be predicted from the evidence. *Picker v. Vollenhover*, 206 Ore. 45, 290 P. 2d 789 (1955). Other courts reject "self-adjusting" portions of child support orders because the needs of the child and the income of the parents cannot be accurately anticipated in advance. *McManus v. McManus*, 38 Ill. App. 3d, 645, 348 N.E. 2d 507 (1976). We find the cost of living escalator in this case to be infirm because it focused exclusively on circumstances of the children and a cost of living index while ignoring the changing or unchanging ability to pay of the parents. We find support in the decisions of other courts. In *DiTolvo v. DiTolva*, 131 N.J. Super. 72, 328 A. 2d 625 (1974); *Breiner v. Breiner*, 195 Neb. 143, 236 N.W. 2d 846 (1975); and *Stanaway v. Stanaway*, 70 Mich. App. 294, 245 N.W. 2d 723 (1976), future percentage clauses based entirely on the husband's income were disallowed because the equally important factor—the reasonable needs of the children—were not considered. *See also In re Meeker*, 272 N.W. 2d 455 (Iowa 1978).

This court's decision in *Goodwin v. Snepp*, 10 N.C. App. 304, 178 S.E. 2d 231 (1971) also provides support for the conclusion

that we reach. In *Goodwin*, which involved the construction of a separation agreement providing for a modification in the monthly alimony payments if the husband's income was substantially reduced, this court held it was error to order "future revisions proportionate to changes in the salary or other income of the defendant, since necessarily such automatic revisions will fail to take into account the circumstances of *both parties* at the time the revisions occur." (Emphasis added.) *Id.* at 309, 178 S.E. 2d at 234.

We think an acceptable annual adjustment formula based on the percentage change in a generally accepted and accurate index of the cost of living should include, at a minimum:

1. Provisions focusing not only on the needs of the child, but also on the relative abilities of the custodial and non-custodial parent to pay;

2. Provisions stating that if the non-custodial parent's income decreases, or increases by a lesser percentage than the percentage change in the index, then the child support payments shall decrease or increase by a like or lesser percentage;

3. Provisions stating that if the parties are unable to determine or stipulate to the correct adjustment, either party may request that the court determine the same; and

4. Provisions allowing either party to petition the court for modification due to a substantial and continuing change of circumstance.

See In re Stamp; Branstad v. Branstad; Peterson v. Peterson.

In this case, the above listed factors are not present. As stated before, there is no evidence of the general accuracy of the "Index," nor of the likelihood that the "Index" will accurately reflect the situation in the area where the children are living from year to year. Additionally, the husband is burdened with heavy periodic debt payments which will continue for the next several years. He is operating his business under loan agreements which forbid any increase in his salary, and all of the stock of his corporation is pledged for the payments of debts. Moreover, the husband, who is already paying $41,000 in taxes each year, will

likely see a sharp increase in taxes in the future because he will lose the benefit of income tax averaging, which was available to him the last two taxable years. (He had no taxable income between 1974 and 1976.)

On the record before us we are unable to sustain the cost of living increases. However, we do not seek to discourage parties who, "with a spirit of fairness and concern for their children, stipulate to a COLA formula for child support [since such a stipulation would seem to minimize] the risks of yearly resistance to increased support, with attendant legal expense and animosity. . . ." *In re Stamp*, 300 N.W. 2d at 279.

ATTORNEY FEES

[6] The husband finally argues that the court impermissibly awarded attorney's fees to the wife when there was no evidence of the nature and reasonable worth of the attorney's services. While we are convinced that the wife's attorney diligently processed her case and spent a considerable amount of time on this case, there is no evidence in the record as to the scope and nature of the legal services rendered, the time and skill required, or any finding or conclusion with regard to those matters. The sole finding and conclusion that the attorney's services have a "reasonable value in excess of $2,000" is not sufficient under *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971), and *Cornelison v. Cornelison*, 47 N.C. App. 91, 266 S.E. 2d 707 (1980). To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent. No such findings could be made in this case because there was no evidence on these vital matters. Moreover, the required statutory findings that the wife is acting in good faith and has insufficient means to defray the expenses of the suit, have not been made. G.S. 50-13.6; *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Under our statute and decisions, the award of attorney's fees cannot stand.

Reversed in part, affirmed in part.

Chief Judge MORRIS and Judge VAUGHN concur.

Utilities Commission v. Intervenor Residents

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT FOR AUTHORITY TO INCREASE RATES FOR WATER AND SEWER UTILITY SERVICE IN BENT CREEK, MT. CARMEL SUBDIVISIONS, BUNCOMBE COUNTY, NORTH CAROLINA v. INTERVENOR RESIDENTS OF BENT CREEK/MT. CARMEL SUBDIVISIONS

No. 8010UC827

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT OF APPROVAL OF SERVICE CONTRACTS v. INTERVENOR RESIDENTS OF BENT CREEK/MT. CARMEL SUBDIVISIONS

No. 8010UC1060

(Filed 2 June 1981)

1. **Utilities Commission § 38 — public utility rates — charges by affiliated companies — contracts not filed with Commission**

G.S. 62-153 does not prohibit the Utilities Commission from considering charges to a public utility for services rendered by affiliated corporations pursuant to contracts not filed with and approved by the Utilities Commission as expenses of the utility for purposes of ratemaking so long as the Commission determines in the ratemaking procedure that the agreements between the utility and affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the utility to an affiliate.

2. **Utilities Commission § 38 — public utility rates — charges by affiliated companies — determination of reasonableness**

The Utilities Commission must determine the reasonableness of charges to a public utility by an affiliated corporation on the basis of either (1) the cost of the same services on the open market; (2) the cost similar utilities pay to their service companies; or (3) the reasonableness of the expenses incurred by the affiliated corporation in generating its services. Therefore, an order by the Utilities Commission granting a rate increase to a water and sewer utility was based in part on expenses which were unsupported by competent, material or substantial evidence as to their reasonableness where the utility presented evidence of the method by which the expenses of affiliated service companies were allocated to the utility but no evidence that the expenses thus allocated represented reasonable expenses for the goods and services so provided.

3. **Utilities Commission § 38 — public utility rates — necessity for examining books of affiliated companies**

An examination by the Utilities Commission of the books and records of companies affiliated with a regulated utility is necessary in a rate case only if

there is no evidence of what the utility would have had to pay non-affiliated companies for the same services or of what similar utilities pay their service companies for similar services.

4. Utilities Commission § 38— public utilities—service contract with affiliated company—approval by Utilities Commission

The Utilities Commission properly approved a service contract between a water and sewer facility and an affiliated corporation where the evidence indicated that the utility was receiving services from the affiliated corporation at the corporation's cost.

APPEALS by intervenor residents from the North Carolina Utilities Commission. Order granting rate increase entered 17 April 1980 (No. 8010UC827). Order approving utilities' contracts with service corporation entered 30 July 1980 (No. 8010UC1060). Cases consolidated for appeal and heard in the Court of Appeals 11 March 1981.

Appellee, Carolina Water Service, Inc. of North Carolina, [hereafter "the Company"], is a North Carolina water and sewer operating company which at the time pertinent to this case operated water facilities in the Pine Knoll Shores Subdivision of Carteret County, and water and sewer facilities in the Bent Creek and Mt. Carmel Acres Subdivisions of Buncombe County. The Company is a wholly-owned subsidiary of Utilities, Inc., a holding company, located in Northbrook, Illinois. Utilities, Inc. also owns approximately 30 other operating water and sewer companies in nine states. Sister or affiliated companies pertinent to the understanding of this case include Carolina Water Service, Inc., [hereinafter CWS] a subsidiary with utility operations in the State of South Carolina, Sugar Mountain Utility, Inc., which operates a subdivision in Avery County, North Carolina, and Water Service Corporation, [hereafter WSC] located in Northbrook, Illinois, which serves as the service corporation for all of the operating subsidiaries of Utilities, Inc. The Company serves approximately 470 households in the Mt. Carmel/Bent Creek area. The Company employs two operating personnel who work in the Bent Creek/Mt. Carmel area maintaining the water and sewer system and providing customer assistance. A full-time secretary employed by Sugar Mountain Utility, Inc., in Sugar Mountain handles service complaints from the customers in the Bent Creek/Mt. Carmel Acres area which she receives by telephone from the customers who reach her via a toll-free number. The offices of the Company in the Bent Creek/Mt. Carmel Acres area

consist of a mobile home which has been adapted for use as a record keeping and basic water testing facility space. Some operating, engineering, and administrative services are rendered to customers of the Bent Creek/Mt. Carmel Acres Subdivision from CWS headquartered in Columbia, South Carolina. The remainder of the management, administrative, engineering, legal, and personnel assistance are rendered through WSC headquartered in Northbrook, Illinois.

Case No. 8010UC827 is an appeal from an order of the Commission granting a rate increase. On 2 July 1979, the Company filed an application for authority to increase its rates for water and sewer service for only the Bent Creek and Mt. Carmel Acres Subdivisions in Buncombe County. The Company proposed an annual increase in gross revenues of $34,370 based upon a test year ending 31 December 1978. The Company's income statement for the year ended 31 December 1978, filed as a part of its application, indicated an actual net operating loss of $31,652 which, after *pro forma* adjustments, decreased to a loss of $7,851. Under the requested increase of $34,370 the *pro forma* net operating income would have become $14,843, providing a rate of return on original cost net investment of approximately 7.66%.

Prior to the hearing of the case which began on 6 November 1979, the Public Staff of the North Carolina Utilities Commission and Appellant/Intervenors, Residents of Bent Creek and Mt. Carmel Acres Subdivisions, filed notice of intervention. Also, accounting and engineering members of the Public Staff conducted audits and investigations into the Company's application, its service area, and its books of account.

During the course of the hearing on this matter, Patrick J. O'Brien, Corporate Treasurer of the Company, testified in support of the application and sponsored the exhibits and schedules which supported the relief requested. Mr. O'Brien testified that the rates under consideration were approved by the Commission on 15 November 1978, but resulted in approximately a $36,000 loss for the company during the test year. Mr. O'Brien testified that those rates were confiscatory in that they were insufficient to allow the company to pay the interest on all of its debt much less provide a rate of return on the equity to the investors. Mr. O'Brien testified to the allocation of operating and maintenance expenses which were allocated to the Company from WSC and

CWS. The total allocated expense from WSC to the Bent Creek and Mt. Carmel Acres Subdivisions was $19,471.

Mr. O'Brien testified that due to the negative rate of return experienced during the test year, the Company made insufficient money to pay back all of the allocated expenses. Even though the service corporation was not paid for all its services rendered, the service company did not cut back on the amount of services provided. During the test year the operating loss prevented the Company from paying interest on its long-term debt capital. The operating expenses allocated from affiliated companies enabled the Company to provide service more cheaply than had the Company operated independently. The allocation procedures were discussed and O'Brien stated that they were reasonable. O'Brien stated that in his opinion a fair rate of return for the Company was approximately 15%. Nevertheless, the Company had sought a much more modest rate of return in order to approach a reasonable rate of return gradually.

Millard B. Shriver, Vice President of CWS, testified as to his duties and functions as far as they related to services rendered to the Company.

Jesse Kent, Accountant for the Public Staff, testified that he had audited the Company's books and analyzed data submitted by the Company. He submitted his findings and, with minor adjustments, accepted the Company's figures.

The Hearing Examiner issued a recommended order on 19 February 1980, and held that while the 7.66% rate of return requested would have been appropriate had the Company provided adequate service, the Company should be penalized 2.02% for inadequate service and should therefore receive only a 5.64% rate of return or an increase of $25,784 in annual revenues.

The Intervenor Residents filed Exceptions to said Recommended Order and orally argued the issues before the North Carolina Utilities Commission. The North Carolina Utilities Commission entered a Final Order Overruling the Exceptions and Affirming the Recommended Order.

* * *

In the course of the hearings on the rate increase, it was discovered that the Company had failed to secure Commission ap-

proval of its service contracts with WSC as required by G.S. 62-153. On 21 January 1980, therefore, the Company filed a petition with the North Carolina Utilities Commission for approval of service contracts between the Company and WSC. In addition, the Company sought approval of the practice whereby services are provided to the Company by CWS. On 18 February 1980, the Intervenors, customers of the Company in the Bent Creek, Lee's Ridge, and Mt. Carmel Acres Subdivisions moved that the contracts as tendered be disapproved and sought permission to intervene in the dockets. On 12 March 1980, the Public Staff of the North Carolina Utilities Commission filed a Notice of Intervention. On 4 March 1980, the Commission, noting that Intervenors had requested a hearing, determined that a hearing should be scheduled in these dockets with respect to the justness and reasonableness of the proposed service contracts and scheduled the matter for hearing. When the hearing took place on 13 March 1980, Intervenors failed to appear.

Patrick J. O'Brien, Corporate Treasurer of the Company, Utilities, Inc., and WSC, testified in support of the Petition. Mr. O'Brien testified that the sole function of Water Service Corporation is to provide management services, operating expertise, and financing for the operating utilities. All of the employees providing service to the Company and other operating facilities of Utilities, Inc., are employees of WSC. Services provided to the operating companies by WSC include executive, maintenance, testing, financial, operating, legal, engineering, organization, and regulatory advice. Additional services include the provision of accounting expertise in the areas of bookkeeping, payroll, tax determination, financial statement preparation, budgets, availability of finance and credit, filing of annual reports, and preparation of rate cases. Mr. O'Brien testified that there are economies of scale available to the Company by service from WSC in that a large number of operating systems are managed through a central management operation with a readily available professional staff with access to facilities such as a computerized billing and accounting system. Mr. O'Brien testified that absent the affiliation with the parent company the Company would have to obtain these services on an independent and more costly basis or do without the services entirely. Mr. O'Brien testified that as a result of the affiliation the ratepayers of the Company receive a

higher degree of service at a lower rate than would otherwise be obtainable.

The costs of service from WSC are recovered from the operating affiliates such as the Company through several methods of assignment or allocation. Operating companies are charged directly for costs incurred exclusively for the company in question. Other costs are allocated on a customer equivalent basis where each customer is treated as one, and costs are allocated to operating affiliates in accordance with the ratio of each company's customers to the total number of customers served by WSC. Another method of allocation is called the adjusted customer equivalent basis. Under this method adjustments are made, among other reasons, because the offices of WSC serve as the headquarters for operating companies in Illinois and Indiana, and costs allocated to companies in other states are reduced for that reason. Finally, costs are allocated on the payroll basis. Charges such as employee benefits, insurance, and payroll taxes are allocated to operating companies on the basis of payroll as opposed to the number of customers. Mr. O'Brien testified that the method WSC uses to allocate its costs incorporates an effort to distribute fairly and equitably the expenses to the appropriate operating companies in a simple and manageable fashion. These services are provided at cost and without profit.

Other services are provided to the Company by other affiliated corporations. For example, Mr. Millard Shriver, overall operating manager of CWS, provides services to the Company. A billing clerk in Sugar Mountain provides services for customers of the Company, in the Asheville area.

Although the fees from the service corporation have always been charged to the Company, the expenses have not always been collected as a result of poor cash flow of the operating companies. However, the service corporation has continued to provide service even when its expenses were not being recovered. The expenses that have been charged to the Company have been scrutinized by the Commission in several general rate proceedings. In all cases, all expenses have been allowed as deducations from revenue for ratemaking purposes.

No evidence was offered in opposition to the Petition. By Recommended Order dated 15 May 1980, the Hearing Examiner

approved the Service Contracts and noted with approval the practice whereby sister or affiliated companies provide service to the Company. Intervenors appealed the Recommended Order to the Full Commission. The Commission overruled the Intervenor Residents' exceptions and upheld the Hearing Examiner's Recommended Order. The appeal of this order constitutes case No. 8010UC1060.

Orr, Payne & Kelley by Robert F. Orr for intervenor residents.

Hunton & Williams by Edward S. Finley, Jr., for applicant appellees, Carolina Water Service, Inc. of North Carolina.

CLARK, Judge.

These two appeals concern the same utility and the same intervenors. It appears from the record that the contract approval case arose out of the rate case. The parties agreed to consolidate the cases for hearing. We elect, therefore, to file one opinion settling both appeals. Although the issues are related, for the sake of clarity, we will treat the appeals separately, beginning with the rate case.

[1] Intervenors' first argument is that the Utilities Commission should not have considered the expenses allocated from CWS and WSC in establishing new rates because they reflected charges for services rendered by affiliated corporations pursuant to contracts not filed with an approved by the Commission as required by G.S. 62-153. Intervenors' position is that failure to file the contracts and seek Commission approval should result in the disallowance of expenses incurred thereunder. We cannot agree.

The statute requiring filing and approval was clearly enacted for the purpose of discovering contracts between affiliated corporations which were "unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility." G.S. 62-153(a). Contracts found to be so are to be avoided and we think expenses incurred under such contracts would have to be disregarded in computing a utility's expenses. The consideration of the Commission under G.S. 62-153(a) is whether the contracts are just and reasonable. If they are, and are not efforts to divert or conceal

profits, they are to be approved. The statutory scheme is directed at *prior* approval.

The testimony at the hearing indicates that the agreements with WSC and CWS were that the affiliates would provide services to the company at costs. The Commission, had it examined the contracts prior to their implementation, could have looked only to the prospective effect of such agreements; the reasonableness and justness of the *scheme* set up thereby, *i.e.*, whether it was just and reasonable to allocate the affiliates' expenses to the company and whether the scheme of allocation was just and reasonable under the circumstances. There was competent, material, and substantial evidence to the effect that the affiliates allocated to the company only their expenses, and there was extensive evidence on the various methods of allocation from which the Commission could conclude that the allocation methods were just and reasonable.

Intervenors' real argument in this appeal is with the reasonableness of the expenses incurred by the affiliates; however, the Commission is not charged under G.S. 62-153 with examining the reasonableness of actual expenditures. It could not, under normal conditions, because the contracts would be executory and the affiliate would not yet have incurred any expenses or provided any services to the utility.

G.S. 62-153(b) prohibits payments to affiliates under contracts not approved by the Commission. The record suggests that because of the poor financial condition of the Company, few payments had been made to the affiliates. Regardless, however, of whether the expenses had been paid, we see no reason to disregard their character as expenses once the Commission found the contracts under which the expenses accrued to be just and reasonable. We hold that G.S. 62-153 does not prohibit the Utilities Commission from considering fees owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of ratemaking so long as the Commission does determine in the ratemaking procedure that the agreements between the utility and the affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate.

Intervenors' second argument is that the order granting the rate increase was based in part on expenses which were unsup-

ported by competent, material, or substantial evidence as to the reasonableness of the expenses. Specifically, intervenors claim that the allocated expenses of WSC and CWS could not properly be included in the Company's operating expenses absent evidence that the affiliates incurred the expenses in a reasonable manner. While the Commission appears to have considered the reasonableness of the method of allocation, it appears to have accepted without question the operating expenses claimed by WSC and CWS.

The Utilities Commission has authority to "make, fix, establish or allow" only those rates which are "just and reasonable." G.S. 62-130. *See also,* G.S. 62-131. G.S. 62-133.1(a) provides: "In fixing rates for any water or sewer utility, the Commission may fix such rates on the ratio of the operating expenses to the operating revenues . . . ." G.S. 62-133(b) (3) establishes that the operating expenses to be used by the Commission are "reasonable operating expenses." This logically follows from the requirement of G.S. 62-133.1(a). For rates to be reasonable, the figures from which they are derived must be reasonable. To uphold its statutory duty to establish reasonable rates then, the Commission must examine each of the components going to make up a utility's expenses for reasonableness.

Two of the components going to make up the total operating expenses of the company in this case were the $19,471.00 share of the operating expenses of WSC which was allocated to the Company and the $8,190 share similarly allocated from CWS to the Company and counted as part of the Company's operating expenses. While there was evidence of record that WSC and CWS actually incurred these expenses and that the amount allocated to the Company was a fair proportion of the whole, there appears in the record no evidence whatsoever that the expenses incurred by WSC and CWS in providing these services were just and reasonable. Our Supreme Court has quoted with approval the following language of the Pennsylvania Supreme Court:

> " 'Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care [citations omitted] and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and *the reasonable cost of rendering*

such services by the servicing companies can be ascertained by the commission, allowance is properly refused. * * *

'Moreover, the record in this case is an illustration of the fact that effective and satisfactory State regulation of utilities is made increasingly difficult by the progressive integration of utility services under holding company domination.

'The desire of public utility management, evidenced by various methods, to secure the highest possible return to the ultimate owners is incompatible with the semi-public nature of the utility business, which the management directs. It therefore follows that the commission should scrutinize carefully charges by affiliates, as *inflated charges to operating companies may be a means to improperly increase the allowable revenue and raise the cost to the consumers of utility service as well as an unwarranted source of profit to the ultimate holding company.*' "

Utilities Comm. v. Telephone Co., 281 N.C. 318, 346, 189 S.E. 2d 705, 723 (1972). (Emphasis added.)

The evidence that WSC and CWS charged the Company with a fair proportion of their costs does not establish that those costs were reasonably incurred. There are any number of ways that an unregulated affiliated corporation's expenses for goods and services could be passed directly on to a regulated utility in such a manner as to result in the diversion of profits away from the regulated utility to an affiliate. For example, the failure of the Commission to look behind the expense figure listed by affiliated corporations would allow a service corporation to purchase goods, materials, or services from a third affiliate at an unreasonably inflated price and then pass that unreasonable price on to the regulated utility as costs. The service company would lose nothing since its costs would be reimbursed. The third affiliate would reap huge profits which presumably would be passed along to a parent holding company. The regulated utility would then show an artificially inflated loss justifying an artificially inflated rate to be borne by in-state consumers. Such a scheme is entirely possible if the Utilities Commission is allowed to base its conclusion of justness and reasonableness on the simple, superficial fact that an affiliated corporation sold goods and services to a regulated utility at its "cost."

[2] The burden was on the utility to show that the price it paid to affiliate corporations was reasonable. *Id.* The utility presented extensive evidence of the method by which the expenses of its affiliates were allocated as expenses of the regulated utility, but no evidence at all that the figure thus allocated represented a reasonable expense for the goods and services so provided. We hold that the Utilities Commission's finding that "charges paid to the service corporation are reasonable" was an error. The utility presented no evidence of what the services would cost the utility on the open market, but only presented the self-serving statements of an officer (Treasurer of the Company, of WSC, of CWS and the parent holding Company) to the effect that services were provided to the Company at cost and that they woiuld have cost the company more if provided in any other manner. This was not enough. We believe that in the case of affiliated corporations the Utilities Commission is obligated to determine the reasonableness of the charges on the basis of either (1) the cost of the same services on the open market; (2) the cost similar utilities pay to their service companies, *see Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 685-86, 208 S.E. 2d 681, 690 (1974); or (3) the reasonableness of the expenses incurred by the affiliated corporation in generating its services. This third method of establishing the reasonableness of a service company's charges is made possible by the provisions of G.S. 62-51 which specifically authorize the Commission to inspect the books and records of corporations affiliated with a regulated utility. The record does not indicate any inquiry by the Commission into what would constitute a reasonable price for the services the Company received, nor does the record reveal any inquiry into whether the expenses incurred by WSC and CWS were in fact reasonable. In light of this failure we conclude that the Commission's order granting the requested rate increase was based in part on expenses which were unsupported by competent, material, or substantial evidence as to their reasonableness.

[3] Intervenors' third argument is that the Commission erred in failing to examine the financial data of the Company's parent and affiliated companies. We believe that examination of the records of affiliated companies under G.S. 62-51 would be necessary in this case only if there were no evidence of what the company would have had to pay non-affiliated companies for the same serv-

ices, or in the alternative, of what similar utilities pay their service companies for similar services. If no evidence is offered on either of these issues, the only remaining evidence upon which the Commission could properly base a conclusion that the Company was reasonable in paying the allocated amounts to WSC and CWS would have to come from an examination of the books of WSC and CWS to determine if their expenses in generating the services were reasonable. If upon hearing on remand the Commission hears evidence which would support a finding of reasonableness of the expenses paid to WSC and CWS without resorting to an examination of each company's records, then that alone will suffice. If, however, no evidence is presented of the fair value of the services on the open market, or of expenses in similar operating company-service company relationships, then the Commission will be faced with a choice between examining the records and denying the rate increase.

* * *

[4] In a separate but related appeal, No. 8010UC1060, intervenors assign error to the Commission's 30 July 1980 Order approving the service contracts of the Company and Sugar Mountain Utility Company (Utilities, Inc.'s other North Carolina subsidiary) with Water Service Corporation. They argue that the contracts were improperly approved because there was a lack of competent, material, and substantial evidence as to their reasonableness and justness. The evidence before the Commission indicated that the Company and Sugar Mountain were receiving the services of WSC at its cost. It would appear that the price of services provided to an affiliated operating company at "the cost (not including profit) thereof" must be just and reasonable.

Intervenors argue that there was no evidence of the reasonableness of the costs incurred by WSC in providing the services. We agree, but as we have previously pointed out, the purpose of G.S. 62-153 is merely to assure that executory contracts between affiliates be just and reasonable on their face. There is nothing unjust about passing on to the Company the costs of services it receives. Approval of the contracts is therefore proper. The possibility that the affiliates might perform under the contracts in such a manner as to inflate the costs beyond a just and reasonable figure will be avoided so long as the

Commission looks past the designation of the figure as "cost" to determine the reasonableness of the figure as we have held it was required to do in case No. 8010UC827.

The order granting the rate increase (No. 8010UC827) is reversed and remanded to the Utilities Commission for further hearing. The order approving the utility's contracts with WSC (No. 8010UC1060) is affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

BONNIE FAYE LOWERY v. WALTER M. NEWTON, JR., M.D. AND PINEHURST SURGICAL CLINIC, P.A.

No. 8016SC962

(Filed 2 June 1981)

1. **Physicians, Surgeons, and Allied Professions § 15.1— medical malpractice—establishing standard of care—technical error in questions**

An expert's testimony establishing the standard of care which would have been exercised by a prudent physician "under the same or similar circumstances" rather than "with similar training and experience" was harmless error. G.S. 90-21.12.

2. **Physicians, Surgeons, and Allied Professions § 20— medical malpractice—proximate cause—burden of proof**

In a malpractice action in which plaintiff contended that defendant plastic surgeon negligently injured nerves in her neck during surgery to remove a tumor and left her permanently paralyzed in her left arm and shoulder, plaintiff was not required to prove that she would never have developed the paralysis from a pre-existing disease which caused tumors to grow on the nerves, spinal cord and brain absent the negligent act of defendant.

3. **Physicians, Surgeons, and Allied Professions § 15.2— action against plastic surgeon—standard of care—testimony by neurosurgeon**

In a medical malpractice action against a plastic surgeon for negligence in the removal of a tumor from plaintiff's neck, a medical expert specializing in the field of neurological surgery was competent to testify regarding the standard of care in surgery on plaintiff since the overriding area of medical care involved in the case was surgery in general rather than plastic surgery or neurological surgery alone, and the expert had prior training and experience as a general surgeon and as a plastic surgeon.

4. Physicians, Surgeons and Allied Professions § 15.1— expert testimony as to cause of injury

The trial court did not err in permitting plaintiff's counsel to ask an expert medical witness to state his opinion as to what actually caused plaintiff's injury rather than questioning the witness as to what could have caused the injury where the witness was stating his opinion on the basis of facts within his personal knowledge.

5. Damages § 13.2; Physicians, Surgeons, and Allied Professions § 15— evidence of loss of earning capacity.

Even if evidence in a medical malpractice case of plaintiff's earnings from employment some six years before the operation in question was too remote as evidence of reduced earnings, it was admissible as evidence of loss of earning capacity.

6. Physicians, Surgeons, and Allied Professions § 17— medical malpractice—instructions—degree of skill required

The trial court in a medical malpractice case did not err in instructing the jury that the liability of defendant plastic surgeon could be based upon a failure of defendant to possess a degree of professional learning, skill, and ability "as others similarly situated" rather than as others "with similar training and experience situated in the same or similar communities" in the language of G.S. 90-21.12, since the words "similarly situated" could easily encompass not only geographic location but also standing within a profession.

7. Physicians, Surgeons, and Allied Professions § 21— medical malpractice—recovery for future damages

In a medical malpractice action based on negligence of defendant plastic surgeon in the removal of a tumor from plaintiff's neck, defendant's contention that the trial court erred in its charge by allowing a recovery for future damages because there was no evidence to support a reasonable apportionment of the future injuries between the effects of a pre-existing condition and the effects of the injuries from the surgery in question was without merit where the surgery resulted in total loss of the use of plaintiff's left arm and partial loss of use of her shoulder, and there was no evidence that the operation aggravated or increased the severity of plaintiff's pre-existing condition.

APPEAL by defendants from *McKinnon, Judge.* Judgment entered 9 May 1980 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 April 1981.

This is a medical malpractice case. Plaintiff alleges that during an operation to remove a large tumor from her neck, defendant Newton negligently damaged nerves in her neck, leaving her permanently paralyzed in her left shoulder. Newton, a plastic surgeon, practiced in Pinehurst at the time the events complained of took place and was employed by defendant Pinehurst Surgical Clinic, P.A.

Plaintiff has suffered since childhood from Von Recklinghausen's disease, a disorder which causes tumors to grow on

the nerves, spinal cord and brain. When a tumor enlarges rapidly, it is often removed because of the danger of malignancy. Plaintiff has undergone surgical procedures for removal of tumors from various parts of her body since childhood.

In 1971, plaintiff was extremely weak. She was a quadraplegic. At that time, she underwent surgery performed by Dr. Keranen, a neurosurgeon, who continued as her physician. In 1972, Dr. Keranen noted that plaintiff's left side was weaker than the right. In 1974, Dr. Keranen referred plaintiff to the defendant, Dr. Newton, a plastic surgeon, to remove a tumor from her neck and her eyelid. Dr. Keranen observed the results of the surgery and found them to be satisfactory. Various other operations were performed and other medical services were rendered by Dr. Keranen thereafter. Dr. Keranen saw plaintiff on 4 March 1976, noticed a drooping of her left eyelid, and prescribed a strong pain reliever.

Near the end of March, 1976, plaintiff consulted Dr. Newton, complaining of pain and the growth of tumors in her neck, over her eye, and on her left arm. Dr. Newton recommended surgery. Plaintiff consented, and Dr. Newton operated on 28 April 1976, removing a tumor from her neck, alternately described as the size of a large orange, a small grapefruit, or a softball. On the following day, plaintiff discovered she could not move her arm or shoulder. Dr. Newton testified that so far as he knew he did not cut, touch, or come in contact with the brachial plexus, the nerve trunk controlling movement of the shoulder and arm.

Over objection, Dr. Keranen testified that the tumor should not have been removed, since it had not changed size at the time of his consultation in March. He further testified that only a neurosurgeon, and not a plastic surgeon, should have performed the surgery. Dr. Keranen stated that in his opinion the surgery performed on plaintiff's neck by Dr. Newton in April, 1976, during which the tumor was removed, constituted a failure to exercise that degree of care which a reasonable and prudent physician would have exercised under the same or similar circumstances in the same or similar community. He further testified that the paralysis in the left arm and shoulder was the result of an injury to the brachial plexus that occurred in the course of surgery, and that the condition of the arm and shoulder was permanent.

Dr. Newton testified that plaintiff gave him a history of rapid change in the tumor and reported that the tumor was painful. Dr.

Newton further testified that he noted plaintiff's difficulty in moving her arm and shoulder the day following the operation. Thereafter, he made an appointment for plaintiff to see an orthopaedic surgeon, but plaintiff did not keep the appointment.

The jury returned a verdict favoring plaintiff in the sum of $100,000. Defendants appeal from entry of judgment and denial of their motion for judgment n.o.v. and alternately for a new trial.

McLeod & Senter, by Joe McLeod and William L. Senter, for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr. and Nigle B. Barrow, Jr., for defendant appellants.

HILL, Judge.

Defendants contend in their first assignment of error that the trial court erred in denying their motion for judgment notwithstanding the verdict.

Plaintiff's complaint alleged negligence arising out of the performance of professional medical services. In order to withstand defendants' motion for a directed verdict, plaintiff must offer evidence which establishes the following elements: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Failure to establish sufficient evidence on any one element entitles the defendant to a directed verdict. *See* Prosser, Law of Torts, § 30. *Also see* G.S. 90-21.12.

[1] Defendants contend that the standard of care in medical malpractice actions is established in part by G.S. 90-21.12 and requires the introduction of expert medical testimony. This statute became law in 1975 and provides as follows:

> § 90-21.12. *Standard of health care.*—In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among

members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Admittedly, the phrasing of the questions to Dr. Keranen to establish the standard of care did not follow the statute verbatim. Dr. Keranen testified that the removal of the tumor under the circumstances was a failure on the part of Dr. Newton to exercise that degree of care, professional skill, and judgment which a reasonable and prudent physician would have exercised under the same or similar circumstances, in the same or similar community. To contend that the substitution of "under the same or similar circumstances" in lieu of "with similar training and experience" is significant, places form over substance. Such technical error is harmless. However, the breach of the standard of care is clearly established by Dr. Keranen's testimony that the best treatment for the tumor was to leave it alone and that if such surgery was required, it should have been done by a neurosurgeon.

[2] Defendants argue in their next assignment of error that plaintiff has failed to establish defendant Newton's negligence as a proximate cause of plaintiff's injuries. Defendants contend that not only is it incumbent upon plaintiff to show that she currently suffers from a condition caused in part by the alleged negligent act of defendant Newton but also to offer evidence that she would never have developed her present condition as a result of the pre-existing condition's having run its natural course of development, absent the intervention of the negligent act of the defendant. We do not agree. An injured person is entitled to recover all damages caused by defendant's negligence. When plaintiff's pre-existing physical or mental condition is aggravated or activated by a subsequent act, defendant Newton is liable to the extent that his wrongful act proximately and naturally aggravated or activated plaintiff's pre-existing condition. *See Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968).

Defendants point out that plaintiff at one time had been a quadraplegic, had eight operations on her neck as a result of the disease process, and that her left side was weaker than her right side. Defendants overlook the real damage plaintiff suffered as a result of the operation—paralysis of her arm and shoulder. We

find nowhere in the record any evidence that prior existing conditions, running a normal course, would have resulted in injuries which plaintiff sustained as a result of damage done by defendant Newton in surgery. Plaintiff has no obligation to negate a remote possibility of loss of use of her arm and shoulder. The cases cited by defendants are all distinguishable. This assignment of error is overruled.

Next, defendants bring forth seventeen assignments of error based upon thirty-eight duly preserved exceptions to the introduction of various portions of the testimony, contending this Court should reverse the judgment of the trial court and remand the case for a new trial. We have considered all of the assignments and discuss below a representative few.

ERRORS IN THE INTRODUCTION OF EXPERT TESTIMONY

[3] Defendants argue that Dr. Keranen was not competent to testify regarding the standard of care established in the defendant Newton's field of practice. Dr. Keranen was tendered as a medical expert, specializing in the field of neurological surgery.

In malpractice cases the applicable standard of care must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice. *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E. 2d 761 (1979). Defendants contend Dr. Keranen could not testify as an expert, but rather that a plastic surgeon should have been used to establish the standard of care in the instant case. We disagree.

There is some overlapping in the various areas of health care. Dr. Keranen testified that he was graduated from Duke Medical School and did a year of surgical internship at Duke Hospital. Thereafter, he did a rotating internship at Duke University where he performed general surgery *and plastic surgery* among other things. Dr. Keranen testified that he rotated from one type of surgery to another. Thereafter, he went to a neurological residency at the University of Vermont. He was tendered as a medical expert, specializing in the field of neurological surgery.

The overriding area of medical care before us is surgery—not plastic surgery alone or neurological surgery alone.

The operation involved some expertise by the surgeon in both areas. The prior experience and training of Dr. Keranen as a general surgeon *and plastic surgeon* is sufficient to qualify him to testify as an expert for the purpose of establishing the standard of care and breach thereof required in the case before us. This assignment of error is overruled.

Next, defendants contend the trial court erred in allowing Dr. Keranen to testify as to his opinion of the failure of Dr. Newton to meet the standard of care, the cause of injury, and his opinion as to the injury's permanence without first revealing the factual basis for his opinion. It is well settled that an expert may not state his opinion based upon facts not within his personal knowledge without first requiring the examiner properly to propound a hypothetical question. *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967). Succinctly stated, the rule is that the expert must base his opinion upon facts within his own knowledge, or upon a hypothesis of the finding by the jury of certain facts recited in the question. *Summerlin v. R.R.*, 133 N.C. 550, 554, 45 S.E. 898 (1903).

We note from the record that Dr. Keranen had been plaintiff's attending physician on a regular basis since 1971 and had seen her during the month immediately preceding the operation by defendant Newton. Dr. Keranen also saw plaintiff during the week after the operation. It is apparent that Dr. Keranen was testifying from his personal knowledge of the physical condition of his patient. Admittedly, some of the questions could have been more aptly stated, but deviation from the norm was harmless error.

[4] At trial, plaintiff's counsel asked Dr. Keranen if he had an opinion as to the cause of the paralysis which he found in plaintiff's left shoulder and arm when he examined her on 10 May 1976. This question was material in order to establish proximate cause. The defendants contend the trial judge erred in allowing plaintiff's counsel to ask Dr. Keranen what actually caused the injury, rather than questioning the witness as to what could have caused the injury. We find no error. When an expert witness testifies as to facts based upon his personal knowledge, he may testify as to his opinion.

"[I]f the expert has a *positive* opinion on the subject, he should be able to express it without the 'could' or 'might'

formula." *Taylor v. Boger*, 289 N.C. 560, 565, 223 S.E. 2d 350 (1976), *citing Mann v. Transportation Co.* and *Tillett v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973).

Defendants next point to several exceptions where the trial court allowed Dr. Keranen to express his opinion on certain matters which the defendants contend were irrelevant and misleading to the jury. Defendants further contend the trial court erred in refusing to strike part of Dr. Keranen's testimony when subsequent testimony revealed the first testimony inadmissible. Defendants also contend the court erred in allowing Dr. Keranen to express his opinion as to failure to meet the degree of care which a reasonable and prudent physician would have exercised and his opinion as to the permanency of plaintiff's condition. We have examined these assignments of error and find them to be without merit.

VARIOUS ERRORS IN THE INTRODUCTION OF EVIDENCE

Defendants argue the court permitted plaintiff's counsel to lead witnesses. It is elementary that leading questions are not allowed on direct examination as a general rule. However, the general conduct of a trial is within the trial judge's discretion. The form of the questions was harmless.

[5] The trial court permitted plaintiff to testify regarding her earnings from employment in 1969 and 1970 and prior to the initial onset of her paralysis. Plaintiff testified that she earned the minimum wage at that time. This was the only evidence that plaintiff ever had any earnings. Defendants contend such evidence was too remote and prejudicial. *See Fox v. Army Store*, 216 N.C. 468, 470, 5 S.E. 2d 436 (1939). There is a distinction between loss of specific wages from a particular job or specific lost profits, and impaired capacity to earn wages in general. *See Johnson v. Lewis*, 251 N.C. 797, 112 S.E. 2d 512 (1960). Therefore, even assuming the evidence of employment of plaintiff some six years before the operation herein was too remote as evidence of reduced earnings, nevertheless, it is admissible as evidence of loss of earning capacity. Plaintiff further testified as to her interest in decoupage as prospective employment. Plaintiff's testimony was proper and admissible.

Upon cross-examination of the plaintiff, the following testimony was elicited:

Q. But until the time he [Keranen] operated on your arm in August of 1976, he never told you that your arm was permanently disabled, did he?

A. He told me Dr. Newton didn't have any business doing it.

Counsel for defendants moved to strike the answer as totally unresponsive, and the motion was denied. The defendants contend the testimony was hearsay and unresponsive. Assuming such testimony was hearsay and unresponsive, it is harmless in view of the fact that the record discloses that similar testimony occurs elsewhere. Defendants lost no substantial right, and no grounds exist for granting a new trial. G.S. 1A-1, Rule 61.

Defendants raise several other questions under the heading set out in this subsection. We have examined them and find them to be without merit.

Defendants argue the trial court erred in stating the evidence and instructing the jury on the issues of liability and damages. Defendants contend in the first section of their brief that there is no competent evidence of the standard of care, any breach of the standard of care, or that any alleged breach was a proximate cause of the alleged injuries. We have heretofore examined these assignments of error and found them to be without merit.

[6] Defendants further argue that the trial court erred in its instructions to the jury that the liability of the defendants could be based upon a failure of the defendants to "possess a degree of professional learning, skill, and ability as others similarly situated . . .." Defendants refer again to the language in G.S. 90-21.12, which phrases the tests as ". . . with similar training and experience situated in the same or similar communities . . .." Defendants argue that since the enactment of this statute in 1975 only a literal interpretation of the wording will suffice. We do not agree. It is the concept expressed by the words of the statute which controls. The words "similarly situated" can easily encompass not only geographic location, but also standing within a profession. No quarrel is present as to any limitations imposed by the geographic location.

The jury had before it evidence of the qualifications—educational and otherwise—of Dr. Newton. The trial judge in his

charge said "remembering that for you to find negligence it must be shown either that the defendant did not possess a degree of professional learning, skill and ability as others *similarly situated*, or that he did not possess or that he did not exercise reasonable care and diligence in the application of his knowledge and skills in the plaintiff's case, or that he did not use his best judgment in the treatment and care of his patient." The charge of the judge was adequate to instruct the jury as to its duty in the case. To conclude otherwise would again place form over substance.

Defendants argue the trial judge erred in his charge by referring to the "field" of surgery of the defendants, when the same was not relevant. The qualifications of both Dr. Keranen and Dr. Newton, including the care offered plaintiff, had been admitted previously. Likewise, throughout the record reference is made to "neurologist" and "plastic surgeon" without objection. Nothing said by the trial judge by referring to the "fields" of practice could have misled the jury.

[7] Defendants further argue that the trial court erred in its charge by allowing a recovery for future damages because there was no evidence to support a reasonable apportionment of the future injuries between the effects of the pre-existing condition and the effects of the surgical injury. Defendants contend the ruling in *Potts v. Howser*, 274 N.C. 49, 54, 161 S.E. 2d 737 (1968), is controlling:

> '[W]here the wrongful act does not cause a diseased condition but only aggravates and increases the severity of a condition existing at the time of the injury, the injured person may recover only for such increased or augmented sufferings as are the natural and proximate result of the wrongful act, or, as otherwise stated, where a pre-existing disease is aggravated by the wrongful act of another person, the victim's recovery in damages is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing disease, running its normal course, would itself have caused if there had been no aggravation by the wrongful injury.'

The case before this Court is distinguishable. Here, the surgery resulted in total loss of use of the arm and partial loss of

use of the shoulder. There is no evidence before the court that the operation aggravated or increased the severity of the pre-existing condition.

Defendants have gleaned the record and brought forth 24 assignments of error. We have examined all of them. Some we have overruled. Some have constituted error; but where error exists, we have determined it to be harmless. In like manner, we have examined the cross-assignments of error brought forward by the plaintiff and find no error exists in the ruling by the trial judge on plaintiff's question. The parties are not entitled to a perfect trial—only a fair trial. Defendants received that.

No Error.

Judge MARTIN (Harry C.) concurs.

Chief Judge MORRIS concurs in the result.

STATE OF NORTH CAROLINA v. ROY GLENN TRIPP

No. 8012SC1130

(Filed 2 June 1981)

1. Criminal Law § 102; Jury § 5.1— closing arguments of counsel—jury selection—recordation improperly denied—no prejudice

The trial court erred in denying defendant's motion that jury selection and opening and closing arguments of counsel be recorded; however, because defendant did not ask the court to reconstruct the matters in question for the record and therefore did not avail himself of an adequate substitute for a full recordation of the jury selection and the argument of counsel, and because defendant did not argue on appeal any error in the unrecorded proceedings or show in any way how these proceedings prejudiced him, defendant failed to sustain the burden of showing prejudice by the trial court's denial of his motion. G.S. 15A-1241; G.S. 15A-1443.

2. Searches and Seizures § 41— holding of persons in trailer—search pursuant to warrant

In a prosecution for breaking or entering and larceny the trial court did not err in denying defendant's motion to suppress certain physical evidence where officers responded to a burglar alarm at a business; one of the officers went to the back of the building and noticed a subject in front of a trailer nearby; the officers observed a trail of cigarettes and chewing gum leading to

the trailer; the officers knocked on the trailer door, talked with an occupant therein, and then walked away from the trailer and conferred; the officers then knocked on the trailer door again and asked if they could come in; the occupant of the trailer said yes; defendant and others were inside the trailer; the officers noticed packs of cigarettes and chewing gum and a power saw in the room; one of the officers asked permission to search the trailer, which was denied; he thereupon left to obtain a search warrant while the second officer remained in the trailer; the officer who remained at no time conducted a search of the trailer and was at all times polite; the other officer returned in about an hour with a search warrant, read it to the occupants, and then undertook to search the trailer; the search revealed several stolen items; the officers originally had a legal right to be in the trailer, as they were invited inside and were at no time asked to leave; and any seizure of persons in the trailer resulting from the officer's remaining at the scene while the search warrant was being obtained was reasonable and permissible.

3. Criminal Law § 75.9— defendant's incriminating statement volunteered

The trial court did not err in admitting an incriminating statement by defendant and there was no merit to defendant's contention that the statement was the product of custodial interrogation without the benefit of a warning as to his constitutional rights, since the evidence tended to show that, during the search of a trailer, a police officer was asked who would be arrested; he answered that probably everyone would be arrested if stolen property was found in the trailer; defendant thereupon made a statement to the effect that he had committed the crimes in question and that the others should not be bothered; and all of the testimony clearly indicated that this statement was volunteered by defendant.

4. Criminal Law § 113.7— acting in concert—instructions proper

In a prosecution of defendant for felonious breaking or entering and larceny, evidence was sufficient to justify the trial court's instruction on the theory of acting in concert, and the instruction was in accord with applicable law.

5. Criminal Law § 113.1— failure to summarize evidence favorable to defendant—evidence unnecessary to explanation of applicable law

There was no merit to defendant's contention that the trial court erred by summarizing the evidence favorable to the State while failing to summarize at all evidence favorable to defendant, since defendant presented no witnesses of his own, and none of the State's evidence favorable to defendant or evidence elicited by defendant on cross-examination would exculpate defendant even if believed; none of the evidence tended to establish a substantive defense for defendant; and the court was able to apply the law to the evidence without mentioning the evidence cited by defendant.

APPEAL by defendant from *Preston, Judge.* Judgments entered 10 July 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 1 April 1981.

Defendant was convicted of two counts of felonious breaking or entering and two counts of felonious larceny. Evidence for

the State tended to show that officers responded to a burglar alarm at the Carolina Pawn Shop in Fayetteville shortly after 5:00 a.m. on 19 March 1980. Deputy J. W. Grimsley went to the back of the building and noticed a subject, whom he could not identify, in front of a trailer at nearby Dogwood Trailer Park. Investigation revealed that a hole one cinder block wide had been opened in the rear wall of the building. The Luv-A-Sub Restaurant next door also had been entered. Cigarettes, chewing gum, a power saw, a power sander, drop cords, and other items were missing from the restaurant and from the Midway Auction Furniture Company, a business located in the back of the Carolina Pawn Shop building. The power sander was found by a fence at the rear of the building.

Beyond this fence a trail of cigarettes and chewing gum led to the trailer near which Deputy Grimsley had seen a subject. Grimsley and Detective George Daskal knocked on the trailer door. Ricky Lee answered. He was fully clothed, although the lights in the trailer were off, and he had what appeared to be a recent abrasion on his hand. The officers asked a question and then walked away from the trailer and conferred. They then knocked on the trailer door again and asked if they could come in. Ricky Lee told them they could.

Jerry Lee and defendant were inside. They also were dressed. The officers noticed packs of cigarettes and chewing gum and a power saw in the room. Detective Daskal asked for consent to search the trailer, which was denied. He thereupon left to obtain a search warrant while Deputy Grimsley remained in the trailer. He returned in about an hour and read the search warrant to Catherine Gisclair, the mother of Ricky Lee and Jerry Lee, who was the person "in charge of the trailer." A search was then undertaken. One of the subjects asked who was going to be arrested, and an officer answered that probably everyone would. Defendant then stated that he had done the job himself and that no one else was involved.

The search revealed several stolen items—cigarettes, chewing gum, the power saw, silver flatware, a sleeping bag, and drop cords. The three subjects were arrested. At the Law Enforcement Center defendant was advised of his *Miranda* rights, but he refused to give a written statement. He said that he had done it and that he would "tell it to the judge." He also made a comment to

the effect that "when you get to swinging that sledge hammer, it'll sure give you a workout." The officers had found a sledge hammer on the floor inside the hole which had been opened in the rear wall of the building.

Defendant presented no evidence. From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Gregory A. Weeks for defendant appellant.

WHICHARD, Judge.

[1] Before trial defendant moved that jury selection and opening and closing arguments of counsel be recorded. The court denied the motion. Defendant assigns error, arguing that G.S. 15A-1241(b) required that his motion be allowed.

G.S. 15A-1241 provides in pertinent parts as follows:

> § 15A-1241. Record of proceedings.—(a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> (b) Upon motion of any party or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded. The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

This statute clearly provides that jury selection and argument of counsel must be recorded upon motion of any party. The trial court thus erred by denying defendant's motion. Defendant must,

however, show prejudice consequent upon such error to be entitled to a new trial, G.S. 15A-1443; and we find no showing of prejudice.

G.S. 15A-1241(c) provides, "When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made." In *State v. Soloman*, 40 N.C. App. 600, 253 S.E. 2d 270 (1979), this Court awarded a new trial upon concluding that the trial court's failure to reconstruct certain allegedly improper jury arguments had denied the defendant meaningful appellate review.

The record indicates that objections were sustained to certain questions posed by defense counsel during selection of the jury, but that defense counsel did not ask the court to reconstruct the matter for the record pursuant to G.S. 15A-1241(c). It further indicates that objection was sustained to a statement made by defense counsel during his closing argument to the jury, but this matter has not been sufficiently reconstructed in the record to permit appellate review. Neither of these incidents is argued as error in defendant's brief. Because defendant did not avail himself of an adequate substitute for a full recordation of the jury selection and the argument of counsel, and because defendant has not argued on appeal any error in the unrecorded proceedings or shown in any way how these proceedings prejudiced him, we find that defendant has failed to sustain the burden of showing prejudice imposed on him by G.S. 15A-1443.

Defendant also contends, analogizing from *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), that the court violated his constitutional rights of due process and equal protection by denying his motion for recordation of jury voir dire and arguments solely because he stated that he could not pay the expense of recordation. *Griffin* held that the states must provide equal access to appellate review; and that if meaningful appellate review requires a transcript of trial proceedings, the state must provide such transcripts for indigent defendants. 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585. The *Griffin* Court recognized, however, that states could discharge their duty to provide equal access to appellate review by means other than provision of full

stenographic transcripts. 351 U.S. at 20, 100 L.Ed. at 899, 76 S.Ct. at 591. The method of recordation provided for in G.S. 15A-1241(c) would lead to less than a "full stenographic transcript." Had defendant availed himself of the G.S. 15A-1241(c) provision for reconstruction of matters objected to, *Griffin* might well have required the state to provide him with a transcript of the reconstruction. Defendant did not request reconstruction, however, and thus did not take the steps necessary to protect any rights guaranteed by *Griffin.* Defendant's first assignment of error is overruled.

[2] Defendant next challenges denial of his pre-trial motion to suppress certain physical evidence and incriminating statements. A voir dire hearing was held on the motion at which both the State and the defense presented witnesses. At the conclusion of the hearing, the trial court made findings of fact and conclusions of law.

Upon a voir dire hearing pursuant to a motion to suppress evidence, the trial court's findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. The conclusions of law drawn from the facts found are, however, reviewable. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975) *death penalty vacated* 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). Defendant does not dispute the sufficiency of the evidence to support any particular finding of fact. Rather, he challenges the legal conclusions that flow from the evidence and the findings, arguing that an unreasonable seizure of the persons and property in the trailer occurred when Deputy Grimsley remained inside the trailer while the search warrant as being obtained.

Initially, defendant denies that the officers had any right to approach the trailer the second time, contending they should instead have watched the trailer from the outside while obtaining a search or arrest warrant. We disagree. Deputy Grimsley testified that he and Detective Daskal decided "if we were going to talk to these people about possibly being suspects, we better do it then." Law enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions. *State v. Prevette,* 43 N.C. App. 450, 455, 259 S.E. 2d 595, 599-600 (1979), *disc. review denied,* 299 N.C. 124, 261 S.E. 2d 925, *cert. denied,* 447 U.S. 906, 64 L.Ed. 2d 855, 100 S.Ct. 2988

(1980). Although the testimony at the voir dire hearing was in conflict, the trial court specifically found that the officers "were invited in"; and this finding, because it is supported by competent evidence,[1] is conclusive on appeal. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). "[T]he circumstances here were not so inherently coercive as to negate a finding of consent to entry as a question of law." *United States v. DiGregorio*, 605 F. 2d 1184, 1188 (1st Cir.), *cert. denied*, 444 U.S. 937, 62 L.Ed. 2d 197, 100 S.Ct. 287 and 444 U.S. 983, 62 L.Ed. 2d 411, 100 S.Ct. 489 (1979).

Once inside, the officers observed cigarettes, chewing gum and a power saw. Mere observation of these items in plain view by officers who were at a place where they had a legal right to be did not constitute an impermissible search. *See State v. Legette*, 292 N.C. 44, 55, 231 S.E. 2d 896, 903 (1977). The officers neither seized these items nor undertook to search other rooms of the trailer. They asked for consent to search; and when consent was denied, Detective Daskal left to obtain a search warrant.

Deputy Grimsley testified at trial that he remained at the scene "to prevent the subjects and the evidence from leaving the trailer." Several jurisdictions have upheld the legality of "securing" premises pending issuance of a search warrant when probable cause and exigent circumstances exist. *E.g., United States v. Korman*, 614 F. 2d 541 (6th Cir.), *cert. denied*, 446 U.S. 952, 64 L.Ed. 2d 808, 100 S.Ct. 2918 (1980); *United States v. DiGregorio*, 605 F. 2d 1184, 1188 (1st Cir.), *cert. denied*, 444 U.S. 937, 62 L.Ed. 2d 197, 100 S.Ct. 287 and 444 U.S. 983, 62 L.Ed. 2d 411, 100 S.Ct. 489 (1979); *United States v. McLaughlin*, 525 F. 2d 517 (9th Cir. 1975), *cert. denied*, 427 U.S. 904, 49 L.Ed. 2d 1198, 96 S.Ct. 3190 (1976); *State v. Galvin*, 161 N.J. Super. 524, 391 A. 2d 1275 (1978); *Ferdin v. Superior Court*, 36 Cal. App. 3d 774, 112 Cal. Rptr. 66 (1974). *But see State v. Dorson*, 62 Hawaii Adv. St. 6256, 615 P. 2d 740 (1980); *State v. Matsen*, 287 Or. 581, 601 P. 2d 784 (1979). *See generally* 2 LaFave, Search and Seizure § 6.5(c) (1978). As stated in *DiGregorio*, 605 F. 2d at 1188,

> So long as no general warrantless search is undertaken, when there is probable cause to believe that evidence is located in

1. Detective Daskal testified: "[W]e were given permission to enter the trailer." Deputy Grimsley testified that "the younger Lee brother answered the door" and that "[h]e said, 'Come on in.' "

> a house and a likelihood that the occupants will remove or destroy it pending issuance of a warrant (i.e., exigency), it is permissible for an officer already legitimately on the premises to secure the area against removal of property pending issuance of a warrant. *United States v. Picariello*, 568 F. 2d 222 (1st Cir. 1978).

Although the United States Supreme Court has not decided the legality of temporarily detaining persons at the scene of a suspected crime to obtain a search warrant, *see Rawlings v. Kentucky*, --- U.S. --- , 65 L.Ed. 2d 633, 100 S.Ct. 2556 (1980), it has written, in the context of other facts, as follows:

> The reasonableness of seizures that are less intrusive than a traditional arrest [citations omitted] depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." [Citations omitted]. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Brown v. Texas, 443 U.S. 47, 50-51, 61 L.Ed. 2d 357, 361-362, 99 S.Ct. 2637, 2640 (1979).

Here the officers were lawfully on the premises. The trial court found that they were invited into the trailer and "that no credible evidence exists from which to reasonably conclude that Deputy Grimsley was at any time asked to leave the trailer." These findings are supported by competent evidence and thus are conclusive on appeal. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). Deputy Grimsley's conduct was relatively non-intrusive. He conducted no search. Both he and Catherine Gisclair testified that he was polite during the wait. At one point he walked out of the trailer and returned. The defendant was allowed to change clothes while he was there. Detective Daskal returned with the search warrant in about an hour. The officers' investigation had given them probable cause for issuance of the search warrant, and nothing said or done during the deputy's wait was used to support issuance of the warrant. The exigent circumstances facing the officers included knowledge by the occupants of the trailer that the police desired to search it and the relatively easy destructibility of some, though admittedly not all,

of the stolem items. In light of the above, we conclude that any seizure of persons in the trailer resulting from Deputy Grimsley's remaining at the scene while the search warrant was being obtained was reasonable and permissible. No constitutional rights of the trailer's occupants were violated thereby.

The search and seizure of physical evidence, as opposed to any seizure of persons, was pursuant to the search warrant. The evidence and the findings of fact support the trial court's conclusion that there was probable cause for issuance of the warrant and that the warrant contained a description of the premises to be searched and the items to be seized sufficiently limited to prevent a general search of the premises. The court thus properly admitted the physical evidence.

[3] As to the admission of defendant's incriminating statements, he first contends that they were tainted by the illegal seizure of his person. Our conclusion that any such seizure was reasonable and lawful deprives this contention of viability. Defendant next contends that his first statement was the product of custodial interrogation without the benefit of a warning as to his *Miranda* rights. The voir dire testimony of both Sergeant Goggio and defendant tended to show that during the search at the trailer the sergeant was asked who would be arrested. He answered that probably everyone would be arrested if stolen property was found in the trailer. Defendant thereupon made a statement to the effect that he had done it and the others should not be bothered. All of the testimony clearly indicates that this statement was volunteered by defendant. It was not the product of any custodial interrogation so as to invoke the *Miranda* decision. *See State v. Setzer*, 42 N.C. App. 98, 256 S.E. 2d 485, *disc. review denied*, 298 N.C. 571, 261 S.E. 2d 127 (1979); *State v. Kessack*, 32 N.C. App. 536, 232 S.E. 2d 859 (1977). Defendant further argues that the court failed to find specifically that his statements had been knowingly and voluntarily made. Although the court did not use these precise terms in its findings and conclusions, it found facts as to the making of defendant's statements and concluded that the statements were not the result "of any subtle compulsion or improper conduct by any of the law enforcement officers . . . or the result of any impermissible search." There was no evidence that defendant's statements were involuntary or were unconstitu-

tionally obtained. The court's order is sufficient, and the assignment of error is overruled.

[4] In the jury instructions, the trial court stated,

> For a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of breaking and entering, each of them is held responsible for the act . . . of the others done in the commission of said crime.

Defendant argues the instruction was inappropriate, because the evidence tended to show that one of the Lee brothers committed the crimes and that defendant only participated in a "coverup" afterwards in order to protect the "true criminal." This argument is inconsistent with defendant's statement to the officers that he alone was responsible. Despite defendant's claim of sole responsibility, however, the other evidence was sufficient to justify the court's instruction on the theory of acting in concert; and the instruction was in accord with the applicable law. *See State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979); *State v. Ferrell* and *State v. Workman*, 46 N.C. App. 52, 264 S.E. 2d 134 (1980).

[5] Finally, defendant argues the court erred by summarizing the evidence favorable to the State while failing to summarize at all evidence favorable to the defendant. Although defendant presented no witnesses of his own, he contends that substantial evidence was developed through cross-examination of the State's witnesses to support his theory that one of the Lee brothers committed the crimes. Examples cited by defendant include the evidence that the hole in the pawn shop wall was small and Jerry Lee was of a small build, though strong enough to wield a sledgehammer; evidence that Jerry Lee had worked at the pawn shop previously; evidence that Jerry Lee was warming his hands when the officers entered the trailer, allegedly suggesting that he had recently been outside; and evidence that Ricky Lee had abrasions on his hands. Defendant relies upon *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979). The Supreme Court recently elaborated on the *Sanders* opinion in *State v. Moore*, 301 N.C 262, 271 S.E. 2d 242 (1980), stating:

> The language of [G.S. 15A-1232] and our prior decisions interpreting it require the court to summarize the evidence of

> both parties only *to the extent necessary to explain the application of the law thereto.* In *Sanders,* the evidence elicited on cross-examination and presented in the State's case which was favorable to defendant was substantive evidence which tended to exculpate defendant, including a statement made by defendant to police officers which was directly in conflict to the evidence presented by the State. The trial judge could not have adequately explained the application of the law in the case without mentioning this evidence. In the present case, the evidence which defendant claims is favorable to her . . . is all testimony which tends to impeach or show bias in the State's witnesses. It is not substantive in nature and would not clearly exculpate defendant if believed. The capable trial judge was thus able to adequately relate the application of the law to the evidence without mentioning this testimony. We hold that G.S. 15A-1232 and our opinion in *Sanders* do not require the trial judge to summarize evidence favorable to defendant under the circumstances present in this case where the evidence is not necessary to an explanation of the applicable law.

Id. at 277-278, 271 S.E. 2d at 251-252. *Accord, State v. McDowell,* 301 N.C. 279, 271 S.E. 2d 286 (1980). Here the evidence cited by the defendant would not exculpate him even if believed. All of the evidence tended to establish that defendant acted, either alone or in concert, to commit the offenses charged. The evidence which he cites thus did not tend to establish a substantive defense for defendant, and the court was able to apply the law to the evidence without mentioning it. Defendant's assignment of error is overruled.

No error.

Judges MARTIN (Robert M.) and BECTON concur.

JOAN CABANISS SMITHERS v. W. J. COLLINS, M.D.

No. 8027SC666

(Filed 2 June 1981)

Physicians, Surgeons, and Allied Professions § 17.2— medical malpractice—negligence in post-operative care—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in a medical malpractice action based on the failure of defendant obstetrician-gynecologist to discover an intestinal blockage which developed following surgery performed by defendant on plaintiff and which necessitated a second operation where it tended to show that plaintiff had every symptom of an intestinal obstruction and so advised defendant; defendant failed, in contravention of good medical practice, to give plaintiff a pelvic examination or to check for high-pitched bowel sounds with a stethoscope but gave her pain pills and told her that her problem was her nerves; the intestinal blockage was present when defendant examined plaintiff approximately a month after the surgery; the blockage was discovered by another physician some five weeks after defendant performed surgery on plaintiff; and an earlier diagnosis of bowel blockage and insertion of a bowel tube at that time could have obviated surgery to remove the blockage.

APPEAL by plaintiff from *Lewis, Judge*. Judgment entered 14 February 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 4 February 1981.

This is a medical malpractice action in which plaintiff appeals from a court order granting a directed verdict in favor of defendant physician, W. J. Collins. Plaintiff alleged in her complaint that defendant was negligent in performing a complete hysterectomy upon her[1] and in caring for her following the operation, by failing to discover an intestinal blockage which developed post-operatively and which necessitated a second operation. Defendant, Dr. Collins, in his answer denied the allegations of negligence. He admitted, however, that following his 17 March 1975 abdominal hysterectomy on plaintiff, plaintiff was hospitalized on 21 April 1975 and "referred to Dr. Rowell Cloninger, who later operated on her by reason of a diagnosis that she had an obstruction of the small [distal] bowel." The evidence at trial is summarized below.

1. Although the plaintiff alleged that the defendant did not exercise due care during the operation, there was no evidence to support this allegation. Plaintiff's appeal concerns only the defendant's post-operative care of her.

Plaintiff called defendant, Dr. Collins, as a witness, and the parties stipulated that he was a medical expert in obstetrics and gynecology. Dr. Collins testified that plaintiff first came to him in February, 1975 with various complaints, and he diagnosed dysmenorrhea, a menopause syndrome, and adenomyosis, a benign condition in which "the uterus is basically worn and torn and tired out and congested, painful, tender, slightly enlarged and irregular." Because plaintiff had had a uterine suspension operation in 1974 and was sterilized, Dr. Collins recommended a hysterectomy. During the surgery on 17 March 1975, Dr. Collins discovered that, as a result of the previous surgery (the uterine suspension operation), plaintiff had developed adhesions—tissue bands which form during the healing process following surgery—involving the uterus, the space behind the uterus, and the tubes and ovaries on each side. During his operation, Dr. Collins severed the adhesions which he found and cleaned them up in an effort to prevent them from re-forming. Dr. Collins testified that adhesions develop in the first several days following surgery as a normal part of the healing process and that adhesions that do not disappear spontaneously develop into stronger fibrous adhesions within five to ten days. These fibrous adhesions sometimes "bind down the organ that's involved in the area" of the surgery. The distal small bowel, or ileum, is often the organ involved, and its normal function may be affected, though many people live a full and normal life with a partial bowel obstruction following surgery.

Plaintiff remained in the hospital from 17 March 1975 to 25 March 1975 when she was discharged. Hospital notes on the plaintiff indicated that her progress during the eight days she remained hospitalized following surgery was good; that she was ambulatory; and that her bladder, blood count, and temperature were normal.

Plaintiff testified that while in the hospital, she informed Dr. Collins that she was not having spontaneous bowel movements and that she was nauseated, but could not vomit because of stomach soreness. Dr. Collins responded by telling her it was her nerves and by giving her nerve pills. (No hospital notes were made concerning bowel movements, but plaintiff was given enemas on 20, 21 and 22 March while hospitalized.) Dr. Collins testified: "Constipation, however, is a very, very common finding

after surgery, and probably fifty percent of patients do not have bowel movement on their own by the time they leave the hospital."

Following plaintiff's discharge from the hospital, she informed Dr. Collins that her condition had not changed. Specifically, she testified:

> After I got home, I did not have a bowel movement. I continued to have no bowel movement, so I called Dr. Collins about every day.
>
> . . .
>
> At that time, I was still sick on my stomach, two or three times a morning, night—anytime I eat food, I throw it back up. I advised Dr. Collins of this and he said he thought it was my nerves. From the time I was discharged from the hospital until I went back into the emergency room, [21 April 1975] I called him a number of times, about every day, and saw him once.

On the question of Dr. Collins' post-operative treatment of her, plaintiff testified:

> I only saw Dr. Collins one time from the time I left the hospital when Dr. Collins operated on me until I went into the hospital the time Dr. Cloninger operated on me. Relative to a pelvic examination, Dr. Collins only gave me some pills and told me he had to leave to go to the hospital for an emergency. He did not make any examination of me. He did not put a stethoscope on my stomach. He did not give me a pelvic examination. I asked to see him approximately every day.

Dr. Collins, testifying from his medical records, indicated that he saw plaintiff on two separate occasions: 1 April 1975, when she "wanted him to check her incision where she had a little area that was draining"; and 14 April 1975 at which time he gave her a pelvic examination to check how she was healing. Dr. Collins also testified that he did not use a stethoscope to check for bowel sounds—high-pitched crescendo sounds that indicate intestinal blockage—because his pelvic examination did not give him a hint that there was any distended bowel suggesting a partial or im-

pending obstruction at that time and because what plaintiff told him did not indicate that there was any trouble.

On 21 April 1975 (seven days after Dr. collins said he examined plaintiff and one day after plaintiff had returned from a trip to Myrtle Beach), plaintiff was admitted to the emergency room with acute abdominal pain. She was also vomiting. She was seen by Dr. Collins' partner, Dr. Binion. Dr. Binion's differential diagnoses included a mild or partial bowel obstruction resulting from adhesions. Plaintiff was subsequently admitted to the hospital and eight days later, on 29 April 1975, Dr. Rowell Cloninger operated on plaintiff to relieve her of a partial obstruction of the lower small bowel. Dr. Cloninger found that a loop of bowel had become attached by "early fibrous adhesions, which would have to mean that the particular area of blockage had been there at least ten days." Dr. Cloninger also found a couple of loops of recent adhesions that were a day or two old.

Dr. Cloninger, who was also called by plaintiff as an expert witness, testified that after he made his diagnosis, he treated plaintiff conservatively—he tried enemas and he put a small bowel tube in plaintiff's nose and throat. Plaintiff swallowed the tube, and the natural waves or contractions in the small bowel carried the tube from the stomach into the intestine, where it was used to remove the liquid contents from the bowel in order to relieve any distention that plaintiff had. Dr. Cloninger decided to operate when subsequent tests showed that the plaintiff "wasn't emptying good." Dr. Cloninger testified that if plaintiff's condition had been diagnosed earlier, he would "absolutely still have tried the conservative treatment rather than the surgery first."

Following plaintiff's evidence—the testimony of Dr. Collins, Dr. Cloninger, and the plaintiff—Dr. Collins moved for a directed verdict. The court granted the motion and plaintiff appealed.

Hamrick & Hamrick, by Nat Hamrick, for the plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by J. G. Golding, for defendant appellee.

BECTON, Judge.

The single question presented by this appeal is whether the trial court erred in granting defendant Collins' motion for a

directed verdict at the close of plaintiff's case. Plaintiff argues that her evidence was sufficient to show prima facie (1) that Dr. Collins did not follow the established standard of care in that he failed to examine her, even though she, as a post-operative patient, complained of distention, nausea and vomiting for two weeks following her discharge from the hospital; (2) that once a patient makes the complaints that she made, good medical practice dictates that a treating physician perform a pelvic examination and listen to the patient's abdomen with a stethoscope; (3) that Dr. Collins did not perform a pelvic examination or listen to her abdomen, but rather, gave her pain pills and told her that her problem was her nerves; and (4) that the chances of relieving adhesions with a bowel tube—and obviating surgery—are better if adhesions are diagnosed early. Plaintiff contends that the testimony from Dr. Collins and Dr. Cloninger established the standard of care in the community and that her evidence showed that Dr. Collins did not follow that standard of care.

Dr. Collins contends, on the other hand, that plaintiff's evidence failed to establish any causal relationship between his care of her, or failure to examine her, and the partial bowel obstruction that she subsequently developed. Since Dr. Cloninger testified that the delay, if any, made no difference in his (Dr. Cloninger's) treatment of her, nor did it affect her need for the operation, Dr. Collins argues that plaintiff's evidence fails to show (1) that she had the intestinal obstruction during the time between her discharge from the hospital and the time she left for Myrtle Beach; (2) that she should have been administered a different treatment by Dr. Collins; and (3) that different treatment would have avoided the need for the bowel obstruction operation.

Although plaintiff's testimony as to the nature and extent of her contacts with Dr. Collins and the examinations and treatments which Dr. Collins gave her post-operatively are confusing,[2] we are required to consider evidence offered on behalf of the plaintiff as true, and to resolve all conflicts of evidence in her favor. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968); *Edwards v. Johnson*, 269 N.C. 30, 152 S.E. 2d 122 (1967); *Harris v. Wright*, 268 N.C. 654, 151 S.E. 2d 563 (1966). Plaintiff is further

2. On direct and re-direct examination, plaintiff testified she only saw Dr. Collins once post-operatively; on cross-examination she suggests that she may have seen him at least two times post-operatively.

"entitled to all reasonable inferences in her favor which properly may be drawn from the evidence." *Wilson v. Hospital*, 232 N.C. 362, 365, 61 S.E. 2d 102, 104 (1950). *See also Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

To the well-established rule giving the plaintiff the benefit of the doubt on a motion for nonsuit, we append another: judicial caution is particularly called for in actions alleging negligence as a basis for recovery. *See Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979); *Willis v. Power Co.*, 42 N.C. App. 582, 590, 257 S.E. 2d 471, 477 (1979); *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 173-74, 249 S.E. 2d 827, 828 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). Because the allocation of liability in negligence actions requires the application of the reasonable, prudent person test, the jury is generally "recognized as being uniquely competent to apply the reasonable man standard." 39 N.C. App. at 174, 249 S.E. 2d at 829. In order for the jury to pass on the reasonableness of a physician's conduct in *many* medical malpractice cases, however, there is a requirement that expert testimony is needed to establish the standard of care, *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493 (1954); *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57 (1951), *rehearing denied*, 235 N.C. 758, 69 S.E. 2d 29 (1952); *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102 (1950), and the proximate cause of the plaintiff's injury, *Jackson v. Sanitarium; Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968). This expert testimony is generally required when the standard of care and proximate cause are matters involving highly specialized knowledge beyond the ken of laymen. It has never been the rule in this State, however, that expert testimony is needed in *all* medical malpractice cases to establish either the standard of care or proximate cause. Indeed, when the jury, based on its common knowledge and experience, is able to understand and judge the action of a physician or surgeon, expert testimony is not needed. We have found no stronger nor clearer statement than that of Justice Barnhill in *Jackson v. Sanitarium*:

> Yet this Court has not and *could not* go so far as to say that in no event may a physician or surgeon be held liable for the results of his negligence unless the causal connection between the negligence and the injury or death be established

by the testimony of a brother member of defendent's profession. . . . [S]uch a rule would erect around the medical profession a protective wall which would set it apart, freed of the legal risks and responsibilities imposed on all others.

It is true it has been said that no verdict affirming malpractice can be rendered in any case without the support of medical opinion. If this doctrine is to be interpreted to mean that in no case can the failure of a physician or surgeon to exercise ordinary care in the treatment of his patient [the standard of care], or proximate cause, be established except by the testimony of expert witnesses, *then it has been expressly rejected in this jurisdiction. Groce v. Myers* [224 N.C. 165, 29 S.E. 2d 553 (1944)]; *Wilson v. Hospital,* [232 N.C. 362, 61 S.E. 2d 102 (1950)]; *Covington v. James*, 214 N.C. 71, 197 S.E. 701; *Gray v. Weinstein*, 227 N.C. 463, 42 S.E. 2d 616.

Rightly interpreted and applied, the doctrine is sound. Opinion evidence must be founded on expert knowledge. *Usually*, what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide. For that reason, in many instances proximate cause can be established only through the medium of expert testimony. *There are others, however, where non-expert jurors of ordinary intelligence may draw their own inferences from the facts and circumstances shown in evidence.* (Citations omitted.) (Emphasis added.)

234 N.C. at 226-27, 67 S.E. 2d at 61-62. And when the standard of care is established either by expert or non-expert testimony, "departure therefrom may, in most cases, be shown by non-expert witnesses." *Id.* at 227, 67 S.E. 2d at 62.

This is not a case "concerning highly specialized knowledge with respect to which a layman can have no reliable information." *Id.* at 227, 67 S.E. 2d at 61. Applying the facts of this case to the law long established by our courts, we conclude, based on the following discussion, that plaintiff has carried her burden on the standard of care issue and on the proximate cause issue.

With regard to the standard of care in diagnosing intestinal obstructions, Dr. Collins testified:

> We know that the average patient, for the first two or three days [after major abdominal surgery] does not have a bowel movement, because their colon is sluggish.
>
> . . .
>
> [W]e try to minimize any possibility of distention if the lack of bowel movement continues and if the patient does not have a spontaneous bowel movement, then we prescribe enemas; . . . Then, if the enemas don't work and the patient has clinical signs of abnormal distention, which means marked distention, we check for bowel sounds. If the bowel sounds, instead of being a normal, intermittent, low, rumbling type [is] a real high-pitched crescendo type, that indicates to us that there may be some blockage; and then we have to go further with maybe stronger enemas and possibly get an x-ray to see if there is what we call a paralytic ileus present, or, indeed, intestinal obstruction.
>
> . . .
>
> If this problem of no bowel movement continues, it is normal to do an x-ray to find out if there is an obstruction. I would do it if enemas did not release or promote normal bowel movements, if the patient had signs that were more than usual for the distention we described . . . then we would order an x-ray to see if, indeed, there were an obstruction.
>
> . . .
>
> I might add, not having bowel movements is a common problem until the patient gets into a normal active phase of life again.
>
> . . .
>
> Usually, you at least have one bowel movement seven or eight days after the operation. In the absence of these bowel movements, the normal treatment or investigation that you would do at that time would be an x-ray. The first x-ray is what they call a KUB, which basically is just an x-ray of the abdomen to see—for gas patterns—and see if you have some

hint that there may be obstructions, small or large bowel. Then you go to the barium. After you've done these two things you know whether or not the bowel is obstructed.

. . .

If the patient tells us they are having a lot of distention and abdominal pain, and if we can see the distention, then we usually check it with the stethoscope. Or, when we do the pelvic exam, we can feel distended bowel inside, and at that time then we go to the stethoscope.

. . .

One of those tests would have indicated whether her bowels were functioning normally or not.

. . .

It would have only taken a moment to put a stethoscope n her stomach and see if her bowels were functioning properly.

. . .

[Where a patient complains of acute abdominal pain], nausea and vomiting and pain [and has bowel signs that are hyperactive], we would ascertain whether there was possibly an impending obstruction or an acute infection by placing a stethoscope on her stomach.

. . .

It's [a stethoscope] one of our better tools and had she made this complaint, I feel that I would have done that as good practice, and under those circumstances, it would have been a normal practice that physicians in my position in this area would have done.

Dr. Cloninger, who was also called as an expert witness by the plaintiff, testified:

So if they have signs of obstruction, which is distention, nausea, and vomiting, crampy abdominal pain, failure to pass gas and have bowel movements, then you investigate it . . . . If after ten days after an operation, the patient comes to me and says they have had no bowel movements at all, I would check the abdomen to see whether they are distended. As to what I do about listening to it, very frequently, listen.

We hold that this evidence on the "standard of care" was sufficient to allow, but not compel, the jury to find each material fact necessary to make out a case of actionable negligence. Simply put, the jury could have believed plaintiff. There was testimony and inferences from which the jury could have found that plaintiff had every sign and symptom of an intestinal obstruction and so advised Dr. Collins; that Dr. Collins failed, in contravention of good medical practice, to give plaintiff a pelvic examination or to check for high-pitched bowel sounds with a stethoscope; and that the intestinal blockage was present on 14 April 1975. This latter finding could have been based on the testimony of Dr. Cloninger, who found an intestinal obstruction when he operated on 29 April and who stated that "this loop of bowel was attached by what we call earlier fibrous adhesions, which would have to mean that the particular little area of blockage *had been there at least ten days* [or at least since 19 April 1975, five days after Dr. Cloninger testified he examined plaintiff]." The jury may have disbelieved Dr. Collins, who said he gave plaintiff a pelvic examination and "indirectly" determined the condition of her bowels. Dr. Collins testified:

> If there had been a tip-off—partial or impending obstruction, I believe I would have felt distended bowels; I believe at that time, she would have complained with more pain referable to this, which, indeed, would have led to more investigation . . . I felt the pelvic exam did not give me a hint that there was anything going on, plus what she told me.

Whether this testimony from Dr. Collins was sufficient to rebut the evidence offered by the plaintiff was for the jury to decide.

We note that Dr. Collins' "professional learning, skill and ability which others similarly situated ordinarily possess," *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E. 2d 762, 765 (1955), have not been questioned; but

> it is not enough to absolve a physician or surgeon from liability that he possess the requisite professional knowledge and skill. He must exercise reasonable diligence in the application of that knowledge and skill to the particular patient's case and give to that patient such attention as his case requires from time to time.

Galloway v. Lawrence, 266 N.C. 245, 247-48, 145 S.E. 2d 861, 864 (1966). Dr. Collins' duty to the plaintiff did not end upon the completion of the operation; Dr. Collins was required to use reasonable and ordinary care, skill and diligence in the post-operative care of plaintiff. *See Starnes v. Taylor*; and *Galloway v. Lawrence*. Expert testimony is not always necessary to establish a medical standard of care. Moreover, once a standard of care is established, our courts have made it clear that expert testimony is not essential to show a departure from that standard of care. In this case, non-expert jurors of ordinary intelligence could "draw their own inferences from the facts and circumstances shown in evidence." *Jackson v. Sanitarium*, 234 N.C. App. at 227, 67 S.E. 2d at 61-62.

Although the evidence may have been sufficient to support a jury finding that Dr. Collins was negligent in failing to exercise the "established standard of care," was there sufficient evidence to show that Dr. Collins' failure to furnish the requisite degree of care proximately caused plaintiff's condition? Arguing that plaintiff has failed to show that earlier or different treatment would have avoided the bowel obstruction and the necessary corrective operation, Dr. Collins urges us to uphold the judge's order granting a directed verdict.

We are not persuaded. We hold that the evidence was sufficient to take the case to the jury on the proximate cause issue, also. Although Dr. Cloninger testified that he would have treated plaintiff conservatively by placing a small bowel tube through her nose and into her intestinal tract to relieve the distention before doing any surgery, it is clear that plaintiff was distended and had a partial obstruction to the lower small bowel when this small bowel tube was inserted. Moreover, the jury could have found from the evidence presented that an earlier diagnosis and an earlier insertion of this bowel tube could have relieved the distention and broken the adhesions that interfered with the function of the bowels. Dr. Collins himself gave testimony which is sufficient for this purpose:

> And by the process of decompression [passing a tube that goes through the stomach and into the small bowel and sucks out the foodstuff and fluids] *many times the bowel is relieved of this distention and, on occasion, adhesions can break with this procedure without doing the surgery.* (Emphasis added.)

Dr. Cloninger's testimony was not as positive. In response to the question "Well, the sooner you diagnose an obstruction or a partial obstruction, the better your chance is to get by without surgery, isn't it?" Dr. Cloninger responded, "Not necessarily." In explaining his answer, Dr. Cloninger later indicated that "[t]he earlier you get the tube in after you make a diagnosis of obstruction [the tube may break them loose], but the thing that the tube mainly does is to keep other loops of bowels from getting involved in the obstruction." Although Dr. Collins' testimony differs somewhat from Dr. Cloninger's testimony, the jury could have found that an earlier diagnosis of bowel blockage and an earlier insertion of a bowel tube would have obviated surgery. Given this possibility it was improper for the judge to take the case from the jury by way of a directed verdict. For this reason, we

Reverse.

Chief Judge MORRIS and Judge VAUGHN concur.

APPALACHIAN POSTER ADVERTISING COMPANY v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF SHELBY, N. C. AND BOB HAMILTON, DIRECTOR OF BUILDING AND ZONING OF THE CITY OF SHELBY, N. C.

No. 8027SC950

(Filed 2 June 1981)

Municipal Corporations § 30.13— alteration of billboards—unlawful enlargement of non-conforming use

Where the evidence tended to show that petitioner owned two billboards in an area zoned for residential use, that the billboards existed before the zoning ordinances were enacted, that each billboard was attached to three poles and the display face of each billboard measured 12 feet by 24 feet, that the two structures were aligned side by side and were very close to each other, that petitioner removed the display faces from both billboards and removed three poles, that petitioner replaced these three poles and erected one new and larger display face which measured 12 feet by 47½ feet across all six poles, and that petitioner added fluorescent lighting directed at the display face, evidence was sufficient to support respondent's findings that there were originally two separate and distinct non-conforming billboard structures, that one of the billboard structures was completely removed, that the billboard structure ceased to exist as a non-conforming use when it was completely removed and could not be replaced, and that petitioner had unlawfully enlarged, extended and altered a non-conforming use, since the zoning ordinance in question prohibited structural alterations except those required by law or ordinance; the replacement by petitioner of the one billboard structure which

was completely removed went beyond the structural alterations and maintenance and repair as permitted by the zoning ordinances; and where, as in this case, a nonconformity consists in the character of the structure, apart from the use to which it is devoted, the right to make repairs has generally been limited to such as are merely routine or ordinary and which would not result in the extension of the normal life of the structure, and the replacement of a structure which has become unusable from natural deterioration has been held not permissible.

APPEAL by petitioner from *Lewis, Judge.* Judgment entered 12 July 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 8 April 1981.

This proceeding came before the Superior Court upon a notice of appeal and petition for a writ of certiorari as to a 10 August 1978 decision of the Shelby Zoning Board of Adjustment in which the Board ruled that petitioner had unlawfully enlarged, extended and altered a non-conforming use. The Superior Court determined that the record before it was insufficient, and it remanded the matter to the Board for another hearing. That hearing was held on 10 April 1980. Testimony was presented by the president of petitioner corporation and by the building inspector for the City of Shelby. Their testimony tended to show that petitioner owned two billboards in an area zoned for residential use. The billboards existed before the zoning ordinances were enacted. Each billboard was attached to three poles, and the display face of each billboard measured 12 feet by 24 feet. The two structures were aligned side by side and were very close to each other. Petitioner removed the display faces from both billboards and removed three poles. Petitioner replaced these three poles and erected one new and larger display face, which measured 12 feet by 47½ feet, across all six poles. The original display faces had been designed for paper advertisements to be glued on them; the new display face was designed for a painted advertisement. Petitioner also added fluorescent lighting directed at the display face. The work on the billboards took about a week. The Board entered an order on 10 April 1980 as follows:

> The Shelby Zoning Board of Adjustments at their regular meeting on April 10, 1979 (sic), made the following ruling and interpretation applicable to the above referenced nonconforming billboard sign:

that the work performed on the subject billboard sign constitutes a violation of the Shelby Zoning Ordinance, Sections 70.3 and 70.32.

The ruling and interpretations was based upon the Board's findings

(1) that in this matter there were (2) non-conforming, separate and distinct billboard sign structures, side by side, each measuring approximately 12′ x 24′ in dimension and each supported by (3) poles and that the (2) structures were not structurally tied together and were not considered as (1) structure.

(2) that (1) of these sign structures was completely removed including the (3) supporting poles and that by the complete removal thereof, it ceased to exist as a non-conforming use and therefore another billboard cannot be built in its place (Section 60, Shelby Zoning Ordinance).

(3) that the other of these sign structures was removed, except for the (3) supporting poles which remained; that (3) more new poles were installed in line with the (3) poles which remained; that a new and different billboard was erected across these (6) supporting poles, the billboard measuring approximately 12′ x 47½′ in dimension; that these actions constitute an enlargement, extension, and a structural alteration of this sign structure by making it nearly twice its original size which constitutes a violation of the Shelby Zoning Ordinance, Section 70.3 and that such actions constitute a violation of the Shelby Zoning Ordinance, Section 70.32, because in the Board's opinion the work performed goes far beyond what they consider to be normal maintenance and repair.

(4) that lighting was added to the resulting billboard sign, which, although not directly attached to the sign structure, constitutes a violation of Section 70.3 of the Zoning Ordinance because the light shines upon and reflects from the sign surface thereby increasing the amount of unnatural light in the surrounding area. The Board further rules that to correct the above violations it would be necessary for you to (1) remove the lighting (2) reduce the

resulting 12′ x 47½′ billboard back to (1) billboard structure measuring not more than 12′ x 24′.

Petitioner again sought review in Superior Court. The Superior Court entered an order on 12 June 1980 making the following findings and conclusions:

1. That the Findings of Fact by the Zoning Board of Adjustment of the City of Shelby, North Carolina, at the Hearing on April 10, 1980, are supported by competent, material and substantial evidence; and that the Findings of Fact by said Board support the Conclusion of Law that the Petitioner is in violation of Section 70-3 of the Zoning Ordinance of the City of Shelby, North Carolina.

2. That the Findings of Fact and Conclusions of Law by the Zoning Board of the City of Shelby, at the Hearing on April 10, 1980, are not arbitrary, unreasonable or capricious.

3. That the Zoning Board of Adjustment of the City of Shelby, North Carolina, conducted the Hearing on April 10, 1980, in accordance with fair trial standards and that said Board followed the procedures specified in the Zoning Ordinances of the City of Shelby, North Carolina.

4. That although the Zoning Board of the City of Shelby, North Carolina could have reached a decision in favor of the Petitioner on the evidence presented, this Court cannot find that said Board acted arbitrarily, capriciously or unreasonably.

BASED ON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that the decision of the Zoning Board of Adjustment of the City of Shelby, North Carolina, be affirmed.

Petitioner appeals to this Court.

Whisnant, Lackey and Schweppe, by N. Dixon Lackey, Jr., for petitioner-appellant.

Kennedy, Church, Young and Paksoy, by William C. Young for respondent-appellee.

MARTIN (Robert M.), Judge.

The standard for Superior Court review of a Board of Adjustment decision is as follows:

> Upon such review, the findings of fact made by the Board, if supported by evidence introduced at the hearing before the Board, are conclusive. *In re Application of Hasting*, 252 N.C. 327, 113 S.E. 2d 433; *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1. The matter is before the Court to determine whether an error of law has been committed and to give relief from an order of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority. *Durham County v. Addison*, 262 N.C. 280, 136 S.E. 2d 600; *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128. It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board. It may vacate an order based upon a finding of fact not supported by evidence.

In re Campsites Unlimited, 287 N.C. 493, 215 S.E. 2d 73 (1975). The arguments in petitioner-appellant's brief are directed at the findings and conclusions of the Board which the Superior Court, applying the above standard for review, has upheld.

Petitioner first argues that there is no evidence to support the Board's finding that there were originally two separate and distinct non-conforming billboard structures. The Superior Court found substantial competent and material evidence to support this finding, and we agree. Petitioner's president, Walter J. Hogan, testified before the Board as follows:

> The two advertising signs before the work was done might have been joined or might not. We're not sure, we've got them both ways. I don't know whether the signs out there were visibly joined together or not before the work was done.
>
> Before the work was done, I just couldn't say how far apart or how close the two sign faces were together. My recollection of it is that they were very close but it's been at least a year or so before this came up that I had actually looked at it.
>
> We had six poles in a line that took up forty-eight feet and had two separate signs that did not touch, that is the

original signs. There was some space, whether it was an inch or four to six inches which did not touch each other, which made it in the opinion of the Building Inspector two signs.

I originally built two individual posters. They were built in an aligned pattern.

In other parts of his testimony, Hogan referred to the billboard structures as "two signs" and he stated, "When you have two signs side by side, it is possible to remove one sign and leave the other side standing and it would be structurally sound and we could see it." Bob Hamilton, the building inspector, testified:

Based upon my memory and as well as I recall, there were two billboard structures that were located side by side in line, one with the other, each was supported by three poles in the ground and there were two separate advertising copy areas mounted on each of the three sets of poles for each structure.

The evidence supports the Board's first finding of fact.

Petitioner next challenges the Board's second finding. The first aspect of this finding, to the effect that one of the billboard structures was completely removed, is supported by the evidence. Hogan testified that both of the original display faces were taken down, but he was not sure which of the original poles were replaced. Hamilton testified, "The three poles which were replaced on the billboard were the ones which if you were standing on the site, it was the billboard to your left and they were all three on the same billboard on the left."

The remainder of this finding, to the effect that the billboard structure ceased to exist as a non-conforming use when it was completely removed and could not be replaced, is in reality a conclusion of law. Consideration of it requires examination of the relevant zoning ordinances. They are:

Sec. 60. Use.

No building or land shall hereafter be used or occupied and no building or structure or part thereof shall be erected, moved or structurally altered except in conformity with the regulations of this ordinance, or amendments thereto, for the district in which it is located.

. . .

Sec. 70. Non-conforming uses.

Any building, structure or use of land, existing at the time of the enactment of this section, or any amendment thereto, used for a purpose not permitted in the zoning district in which it is located shall be considered a non-conforming use. However:

70.3 A non-conforming use may not be extended or enlarged, nor shall a non-conforming structure be altered except as follows:

70.31 Structural alterations as required by law or ordinance or as ordered by the zoning enforcement office to secure the safety of the structure are permissible.

70.32 Maintenance and repair necessary to keep a non-conforming use in sound condition are permissible.

. . .

70.4 A non-conforming use may not be re-established after discontinuance for a period of three hundred and sixty-five (365) days. . . .

. . .

71.3 *Maintenance.* All advertising structures, together with any supports, braces, guys, and anchors shall be kept in repair and in a safe state of preservation. All signs erected to serve a temporary purpose shall be removed within thirty (30) days from the date the purpose ceased to exist.

In *In re O'Neal*, 243 N.C. 714, 92 S.E. 2d 189 (1956), our Supreme Court held that a frame building used as a nursing home could be replaced with a new fireproof structure and the non-conforming use of the premises could be continued so long as the scale of the nursing home operations was not substantially increased; however, the zoning ordinances involved in *O'Neal* did not prohibit structural alterations. We find *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W. 2d 625 (1944), to be instructive. In *Goodrich* a building permit was granted for general repairs pursuant to

which an outdoor advertising company removed certain old billboards and replaced them with new ones. There, as here, a zoning ordinance prohibited structural alterations except those required by law or ordinance. The Kentucky Court of Appeals held that the permit should not have been granted. The Court wrote:

> In *Selligman v. Von Allmen Bros.*, 297 Ky. 121, 179 S.W. 2d 207, 209, this same zoning ordinance of the city of Louisville was before us for construction, and we construed section 10 of the ordinance to mean that the owner can make no structural alteration in a non-conforming building which will indefinitely prolong its life. In the course of the opinion it was said:
>
> "The theory of zoning is to foster improvement by confining certain classes of buildings and uses to certain localities without imposing undue hardship upon the property owners. The present use of a non-conforming building may be continued but it cannot be increased nor can it be extended indefinitely if zoning is to accomplish anything. It is customary for zoning ordinances to provide that the life of non-conforming buildings cannot be increased by structural alterations and when a change is made by the owner in the building, he must make it conform to the ordinance."
>
> The following was quoted from the opinion in *A. L. Carrithers & Son v. City of Louisville*, 250 Ky. 462, 63 S.W. 2d 493, 497:
>
> " 'Structural alterations' intended to be prohibited by the zoning ordinance are the changing an old building in such a way as to convert it into a new or substantially different structure."
>
> In the Von Allmen Bros. case the owner substituted permanent brick walls for rotted exterior wooden walls, and it was held this would extend the life of the non-conforming building and was forbidden. Here a new structure was substituted for an old one. If it is proper to do this once it will be proper to do it again and thus the life of the non-conforming structure will be indefinitely prolonged, and the whole purpose of the zoning ordinance will be defeated.

Id. at 867-68, 183 S.W. 2d at 627-28. *See generally* Annots., 80 A.L.R. 3d 630 (1977) and 87 A.L.R. 2d 4 (1963). Non-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, *see State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed* 422 U.S. 1002, 45 L.Ed. 2d 666, 95 S.Ct. 2618 (1975), or attrition or other means. 8A McQuillin, Municipal Corporations § 25.183 (3rd ed., 1976 rev. vol.); 82 Am. Jur. 2d, Zoning and Planning § 179 (1976). In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses. *Id.* § 180. Where, as is the case herein, the non-conformity consists in the character of the structure, apart from the use to which it is devoted, the right to make repairs has generally been limited to such as are merely routine or ordinary and which would not result in the extension of the normal life of the structure, and the replacement of a structure which has become unuseable from natural deterioration has been held not permissible. *Id.* § 209; Annot., 87 A.L.R. 2d 4, § 18 (1963). Further, in accordance with the policy of eliminating non-conforming uses, several courts have given a strict construction to zoning ordinances allowing for the resumption of a non-conforming use. 82 Am. Jur. 2d, *supra*, § 221; Annot., 57 A.L.R. 3d 279, § 8 (1974). In the present case, the Board has taken the position that the replacement of the one billboard structure which was completely removed went beyond structural alterations as permitted by Section 70.31 and beyond maintenance and repair as permitted by Section 70.32. The Board has also concluded that Section 60, which provides that no structure shall be erected except in conformity with the zoning regulations, applies to these facts and that Section 70.4, which implicitly allows re-establishment of a non-conforming use after a discontinuance of less than 365 days, does not apply. In light of the above authorities, we cannot say that the Board's approach herein is unsupported by findings of fact, unfounded in the law or arbitrary.

Once it is accepted that one of the original billboards was completely removed and could not lawfully be replaced, it follows logically that the addition of three new poles and the erection of a new 12 foot by 47½ foot display face amounted to the enlargement, extension and structural alteration of the remaining original billboard. Further, we have little trouble with the propo-

sition that the addition of fluorescent lighting which was directed at the new display face and which increased the amount of unnatural light in the area also violated Section 70.3 of the zoning ordinances. The Board's third and fourth findings are therefore affirmed.

We agree with the Superior Court that the Board could have reached a decision in favor of the petitioner on the evidence presented. However, it is not the province of the reviewing court to substitute its opinion for that of the Board so long as a reasonable basis exists for the Board's action. Mindful of the standard for judicial review in this proceeding, we affirm.

Affirmed.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND ANS-A-PHONE COMMUNICATIONS, INC., APPLICANT v. THE PUBLIC STAFF, INTERVENOR

No. 8010UC885

(Filed 2 June 1981)

1. **Utilities Commission § 32— property included in rate base—terminal installed after test period—no offsetting adjustments to revenues**

In a proceeding to establish new rates for a utility providing mobile radio service and a radio paging service, the Utilities Commission did not err in including in the rate base of the utility the cost of a new mobile telephone terminal installed after the end of the test period without making any offsetting adjustments to revenues produced by the new terminal where the decision to install the terminal was made during the test period, the terminal was in place and operating at the time of the hearing, and the evidence showed that the new terminal was installed to improve the quality of service and it did not generate any increased revenues. G.S. 62-133(c).

2. **Utilities Commission § 38— radio common carrier—operating expenses—costs of dispatch service**

The Utilities Commission properly included in a radio common carrier's test period operating expenses certain costs related to the provision of dispatch services by its answering service, which is not a public utility, to its radio common carrier customers.

3. Utilities Commission § 37— working capital ratio—percentage of operation and maintenance expenses

The Utilities Commission did not err in using one-twelfth of the annual operation and maintenance expenses instead of one-twenty-fourth of these expenses in calculating the working capital allowance for a radio common carrier because the carrier billed its recurring charges on the 25th day of the month preceding the month in which the associated service is to be rendered.

APPEAL by intervenor, the Public Staff, from order of North Carolina Utilities Commission entered 28 February 1980. Heard in the Court of Appeals 1 April 1981.

This proceeding was instituted on 17 August 1979 when Ans-A-Phone Communications, Inc. (Ans-A-Phone), filed an application with the North Carolina Utilities Commission (Commission) pursuant to G.S. 62-130 *et seq.* requesting a rate increase and revision of regulations. The reasons given for this application were to improve and expand service, to adapt to changing conditions and to increase utility revenues in relation to costs of serving. Ans-A-Phone indicated that it provided two classes of services as a radio common carrier: radio telephone service (or mobile radio service) and radio service (or paging). Ans-A-Phone also offered an answering service, but indicated that this was a non-utility service and not considered in its application. The Commission thereafter established that the test period for determining the rate would be the twelve month period ending 31 December 1978. The Public Staff (the Staff) then intervened on behalf of the consuming public pursuant to G.S. 62-15(d).

During the four days of hearings, the Commission heard testimony from both parties and considered numerous exhibits filed by Ans-A-Phone. On 28 February 1980 the Commission entered an order authorizing Ans-A-Phone to adjust its rates and charges to produce, based upon units in operations as of 31 December 1978, an increase in annual gross revenues of $74,029. The Commission based this rate increase on the following findings:

> 3. That the test period established by the Commission is the 12 months ended December 31, 1978. The annual increase in revenues sought by Ans-A-Phone under its proposed rates as filed in the proceeding is approximately $88,135.

4. That Ans-A-Phone is providing good service to its customers in North Carolina.

5. That the original cost of Ans-A-Phone's plant in service used and useful in providing radio common carrier services in North Carolina is $482,519. From this amount should be deducted the accumulated depreciation associated with the original cost of this plant resulting in a reasonable original cost less depreciation or a net plant in service of $239,310.

6. That the reasonable allowance for working capital for Ans-A-Phone is $18,935.

7. That the original cost of Ans-A-Phone's net plant in service to customers within the State of North Carolina of $239,310 plus the reasonable allowance for working capital of $18,935 less the investment tax credit of $7,327 yields a reasonable original cost net investment (rate base) of $250,918.

8. That the Company's test year operating revenues net of uncollectibles after appropriate accounting adjustments under present rates are approximately $253,014 and under the Company's proposed rates would have been approximately $339,827. [($88,135 × .015) + $88,135 + $253,014]

9. That the appropriate level of the Company's operating revenue deductions (or expenses) under present rates after accounting and pro forma adjustments, including taxes is $269,350 which includes the amount of $52,060 for actual investment currently consumed through actual reasonable depreciation.

10. That the capital structure which is proper for use in this proceeding is the following:

Item	Percent
Long-Term Debt	40.11
Common Equity	59.89

11. That the Company's proper embedded cost of debt is 13.53%. The fair rate of return which should be applied to the original cost net investment of Ans-A-Phone (or rate

base) is 18.60%. This return on Ans-A-Phone's rate base will allow the Company the opportunity to earn a return on its common equity of 22.00% after recovery of the embedded cost of debt. Such returns on rate base and common equity are just and reasonable.

12. That under present rates the Company's pro forma return on its rate base at the end of the test year is approximately (6.33%) which is substantially below that which the Commission has determined to be just and reasonable. Therefore, in order to earn the level of returns which the Commission finds to be just and reasonable, Ans-A-Phone should be allowed to increase its rates and charges so as to produce an additional $74,029 based on operations during the test year. The Commission finds that, given efficient management, this amount of additional gross revenue dollars will afford the Company a fair opportunity to earn the level of returns on rate base, and original cost equity which the Commission has found to be fair, both to the Company and to its customers

The Staff has appealed from this order.

Thomas R. Eller, Jr., for Ans-A-Phone Communications, Inc., applicant-appellee.

Robert F. Page, for Robert Fischbach, Executive Director, Public Staff, North Carolina Utilities Commission, intervenor-appellant.

MARTIN (Robert M.), Judge.

[1] In Assignment of Error No. 1 the Staff argues that the Commission "misconstrued and misapplied G.S. 62-133(c) in allowing adjustments to rate base and expenses proposed by the Appellee (Ans-A-Phone) which were based on circumstances and events occurring after the end of the test period but before the hearing was closed, while rejecting similar, offsetting adjustments to revenues proposed by the Appellant (Public Staff)." The exceptions noted under this assignment of error are to the Commission's findings of fact and the Commission's evidence and conclusions for these findings. As earlier noted the test period established by the Commission was the twelve month period ending 31 December 1978. Staff specifically contends that the Com-

mission erroneously increased the rate base by $85,000 when it included the cost of a new Glenayre Mobile Telephone Terminal, since this cost was not offset by the revenues produced by this new terminal. To remedy this alleged error, the Staff determined the revenues as of the period ending 30 September 1979. Their calculations for this period allegedly showed an increase in revenues due to customer growth. Staff claims that the Commission erroneously ignored these calculations.

We find no merit to Staff's first assignment of error and conclude that the findings as to the rate base, revenues and expenses are grounded upon a proper application of G.S. 62-133(c) and upon substantial, competent and material evidence. Section (c) of 62-133, dealing with the fixing of rates, provides:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

Ans-A-Phone correctly applied this statute. In determining its rate base, it made adjustments for actual expenses and revenues occurring up to the time of the hearing. The expense of the new terminal was included in this determination, since the decision to install the terminal was made in 1978 and since the terminal was in place and operating at the time of the hearing. Ans-A-Phone did not offset this expense by any revenue increase because none existed. Ans-A-Phone's president testified that the old IMTS terminal was replaced with the Glenayre terminal because the old terminal had become obsolete and was daily breaking down. He indicated that the principal reason for making the change "was

service quality and not revenues." Ans-A-Phone's General Manager testified, "The new machine has no greater capacity for serving numbers of customers than the old terminal." Finally an officer of a consulting firm employed by Ans-A-Phone stated:

> I knew that the negotiations for the investment (new terminal) had been going on for some time. I also knew that the plant would be non-revenue producing; that it was put in to improve service to mobile radiotelephone customers; and that it was replacing old plant which was doing the same thing but not doing it very well. I felt I could not ignore a major investment such as this which was designed to improve service, particularly when it amounts to about 25% of the gross plant.

This evidence presented by Ans-A-Phone was considered by the Commission to be competent, material and substantial. In contrast, the Staff's evidence of increased revenues was rendered incompetent by other evidence later presented by the Staff. Thomas Collins, Jr., an accountant for the Staff, admitted:

> I did not do a detailed investigation of all expenses for that annual period (ending 30 September 1979). . . . I do not know for a fact if the expenses would be greater or less if I had investigated all expenses for 12 months ending on September 30, 1979.
>
> . . .
>
> . . . If Mr. Willis (a Staff engineer) calculated revenues for the 12 months ending September 30, 1979 on a going-level basis, there is not a matching between his revenues and my expenses for that 12 month period.

Finally we note that Willis' showing of increased revenues was based upon a mere mathematical projection and not upon a showing of actual changes in revenues as required by G.S. 62-133(c).

When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon this Court. *Utilities Comm. v. Farmers Chemical Assoc.*, 33 N.C. App. 433, 235 S.E. 2d 398, *disc. review denied*, 293 N.C. 258, 237 S.E. 2d 539 (1977). *See, also* G.S. 62-94. Such findings of fact and the Commission's determination of what rates are reasonable may not be

reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). With this in mind, the Commission's findings of fact and conclusions as to rate base, expenses and revenues cannot be reversed or modified even if this Court deems the Staff's evidence as to increased revenues competent.

[2] Staff next argues that the Commission erred in its calculation of Ans-A-Phone's reasonable test period operating expenses "by including therein some $28,692 of costs related to the provision of operator answering and message holding and relay, which are not public utility services." The Staff further contends that these services were unnecessary for subscribers using automatic paging and radio telephone units. In support of their argument, the Staff cites *Utilities Comm. v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855 (1968). This case dealt with an applicant who sought a certificate of public convenience and necessity permitting it to operate as a utility providing mobile radio telephone service in a territory occupied by a land-line telephone utility. The land-line utility, intervening as a protestant, claimed that it was authorized to render similar services. The Commission denied the application. The Superior Court later reversed on the grounds that Radio Service, Inc., was authorized to render additional services. Our Supreme Court upheld the Commission's decision noting that neither the additional answering service nor message relaying service proposed to be rendered by Radio Service, Inc., is determinative of whether the proposed services of Radio Service, Inc., are substantially the same as those of the land-line telephone company. The answering service and message relaying service were deemed "non-utility services."

Radio Service, Inc., was decided before the enactment of Article 6A of Chapter 62 of the General Statutes. In this Article radio common carriers were given utility status. G.S. 62-119(3) of Article 6A defines "radio common carriers" as:

> [E]very corporation, company, association, partnership and person and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a business of providing or offering a service for hire to the public of one-way or two-way radio or radiotelephone communications

whether interconnected with the land line telephone system or not and licensed by the Federal Communications Commission, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service.

In recognizing radio common carriers as a public utility, we believe that the legislature also recognized other services which a radio common carrier deems essential to its customers. Such services are an integral part of the carrier's function. In the case *sub judice*, the Commission concluded that the $28,692 expense, incurred by charging $3 per pager a month was "an integral, necessary part of the paging service provided by Ans-A-Phone." The Commission indicated that this expense covered dispatch services for paging customers provided by telephone operators, monitoring of the radio equipment on a 24 hour, seven day a week basis by the answering service employees and replacement of broken pagers or mobile telephones by operators on a 24 hour, seven day a week basis. This finding was supported by testimony of several public witnesses. One witness, a user of Ans-A-Phone's automatic and manual mobile telephone services, testified that she and her husband needed round-the-clock operator attendance for their concrete business. She indicated that "it would handicap our use of the system" if Ans-A-Phone no longer provided operators who held and relayed messages to her or from her to others in her business operations. The manager of the emergency room at Moses Cone Hospital indicated that many of the staff physicians at the Hospital were Ans-A-Phone customers; and that Ans-A-Phone's operator-pager system was valuable to the Hospital. A Greensboro gynecologist-obstetrician and subscriber to Ans-A-Phone's paging service, testified that "the assistance provided by the operator in receiving and forwarding messages is an integral part of the radio paging service." Furthermore, the president of Ans-A-Phone indicated that pursuant to his tariff with the Commission, he was required to offer operator dispatch services. He noted, "In my opinion it is a necessity that the utility operation continue the dispatch service for all customers." This Court concludes that the testimony of these witnesses constitutes substantial, competent and material evidence. The inclusion of the $28,692 expense as an operating expense is therefore proper. We emphasize that this conclusion is not inconsistent with that portion of the *Radio Service, Inc., supra*, decision, wherein an

answering service was denied public utility status. Ans-A-Phone, in its application for a rate increase emphasized that its application related only to the radio common carrier services offered and not to its telephone answering services and merchandising. Only the dispatch services rendered by the answering service to the radio common carrier customers were included.

[3] In their third and final assignment of error the Staff contends that the Commission erroneously used one-twelfth of annual operation and maintenance expenses instead of one-twenty-fourth of these expenses in calculating the working capital allowance. The Staff argues that the one-twenty-fourth formula was proper, since Ans-A-Phone bills its recurring charges on the 25th day of the month preceding the month which the associated service is to be rendered. The Staff's accountant further testified that he had "concluded that the majority of revenues are received before and during the period service is being rendered." The Staff has failed to cite any supporting authority for this argument. Furthermore, they have failed to present any competent, material or substantial evidence. In a similar situation our Supreme Court did not accept the Attorney General's argument that a telephone company's rate base for working capital should be reduced, since customers were billed one month in advance. The Court noted, "While the company bills its customers for local service one month in advance, the record does not show when these bills are actually paid so as to place the money in the hands of the company for use." *Utilities Comm. v. Morgan*, Attorney General, 277 N.C. 255, 274, 177 S.E. 2d 405, 417 (1970). In the case on appeal, the Commission noted in its order that operating and maintenance expenses had been divided by twelve to arrive at the cash requirement for working capital in prior telephone cases where this formula method has been used. The Staff has failed to show that this method was improper here.

After examining the entire record as submitted, we hold that the Staff has failed to show that the findings and conclusions were unsupported by competent, material and substantial evidence or were arbitrary and capricious.

Affirmed.

Judges WHICHARD and BECTON concur.

SUNSET INVESTMENTS, LTD. v. MURRAY SARGENT, JR., EBERHARD H. ROHM, AND FRANS J. J. VAN HEEMSTRA, TRUSTEES FOR ALWIN WEBER AND GATEWAY BANK

No. 8018SC901

(Filed 2 June 1981)

Uniform Commercial Code § 36.1— letter of credit—independence from underlying contract

Where plaintiff sold post office buildings in three towns to defendant trustees, plaintiff agreed to make certain warranties of those buildings, plaintiff agreed to deliver a letter of credit to secure its agreement to make improvements to the properties, defendant trustees notified plaintiff that they intended to call the letter of credit to pay for certain improvements to the building in Titusville, and plaintiff alleged that such notice constituted an anticipatory breach of the contract between plaintiff and defendant trustees because the letter of credit secured only the property in Smyrna, the trial court properly entered summary judgment for defendant trustees, since every letter of credit involves separate and distinct contracts and the contracts between the issuing bank and the beneficiary to pay money to the beneficiary upon demand must be kept chaste, that is, independent of the underlying contract between the purchaser of the letter and the beneficiary; the entire and sole thrust and theory of plaintiff's complaint and claim for relief was an attempt to require defendant trustees to apply the proceeds of the letter of credit according to the underlying contract between plaintiff and defendant trustees; the letter itself did not require documentation; and it was the responsibility of plaintiff, as purchaser of the letter, to instruct defendant bank to include in the letter such requirements for documentation as might reasonably be implemented by the bank as a condition of honor and payment. G.S. 25-5-114(1).

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 23 April 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 April 1981.

Plaintiff's complaint alleges the following essential facts and circumstances. Plaintiff sold a post office building in Smyrna, Georgia to an investor represented by defendants Sargent, Rohm, and van Heemstra (S, R, and V) as trustees for the purchaser. Plaintiff also sold post office buildings in Titusville, Florida and Rock Hill, South Carolina to another purchaser, who was also represented by S, R, and V as trustees. As a part of the sale-purchase transaction for Titusville and Rock Hill, plaintiff agreed with S, R, and V to make certain warranties of those buildings, and as security for those warranties, S, R, and V withheld $20,000.00 from the proceeds of that sale. Later, it was agreed

that $15,000.00 of that $20,000.00 would be released to plaintiff on the condition that plaintiff deliver a bond or an irrevocable letter of credit to secure its agreement to make certain improvements to the Titusville and Rock Hill properties. Subsequently, on 21 December 1977, a letter of credit issued by defendant Gateway Bank (Bank) in the amount of $20,000.00 was tendered to S, R, and V. This credit was returned by S, R, and V as unacceptable because S, R, and V contended that it attempted to secure the warranty of the Smyrna post office in addition to Titusville and Rock Hill. S, R, and V, requested that separate letters of credit be issued for the two transactions. Subsequently, plaintiff obtained another letter of credit from defendant Bank, dated 13 November 1978, in favor of S, R, and V to secure the improvements to the Smyrna building. On 1 December 1978, S, R, and V notified plaintiff that they intended to call the 13 November 1978 credit to pay for certain improvements to the Titusville building. Such notice from S, R, and V constituted an anticipatory breach of the contract between plaintiff and S, R, and V, in that the 13 November 1978 credit secured only the Smyrna building. Plaintiff would suffer irreparable damage if the 13 November credit is called to pay for improvements to Titusville.

Plaintiff sought to temporarily enjoin defendant Bank from disbursing any funds on the 13 November 1978 letter of credit, a judgment declaring that the terms of the contract between plaintiff and S, R, and V require that the funds available under that credit be used only to pay for the agreed improvements to the Smyrna building, and a permanent injunction enjoining defendant Bank from disbursing payments under the 13 November 1978 credit "unless such payments conform to the agreement between the Plaintiff and Defendants [S, R, and V] that the funds be used to pay for improvements at the Smyrna, Georgia property exclusively." Plaintiff obtained an order temporarily enjoining defendant Bank from disbursing funds under the 13 November credit.

After the pleadings were joined, S, R, and V moved for summary judgment. In support of their motion, they presented the affidavit of defendant Rohm, detailing events and transactions between plaintiff and S, R, and V pertaining to the Smyrna, Titusville and Rock Hill buildings, supported by numerous exhibits including estimates, bids, and proposals pertaining to need-

ed repairs to the Smyrna building. In response to S, R, and V's motion and supporting papers, plaintiff presented only its verified complaint. The trial judge granted defendants' motion for summary judgment and plaintiff has appealed.

Hatfield & Kinlaw, by Kathryn K. Hatfield and Vance C. Kinlaw, for plaintiff appellant.

Gabriel, Berry & Harris, by M. Douglas Berry, for defendant appellees.

WELLS, Judge.

The dispositive question in this law suit is whether the letter of credit issued by defendant Bank dated 13 November 1978 in favor of defendants S, R, and V is a "clean" credit, requiring no documentation for honor and payment; or, whether it is a "documentary" credit, requiring documentation for honor and payment.

A brief, general discussion of the nature and use of letters of credit may help clarify our task.[1] Letters of credit, in one form or another, have been used for centuries to facilitate commercial transactions. Although traditionally used more frequently in international trade, recent years have seen the use of letters of credit in a wide variety of transactions between parties in the continental United States. While letters of credit are more traditionally used to facilitate the sale and movement of goods (various forms of merchandise, crops, raw materials, etc.), there has been a growing tendency in recent years to employ their use in other commercial transactions, including construction contracts. A letter of credit is an engagement by a bank, a finance company or other issuer made at the request of its customer or some other person who seeks to secure an obligation to a third person which will arise in the future. The engagement is that if certain things are done, either by way of presentation of pieces of paper

1. Our principal sources for these background comments are a comment by Charles B. Harris, II, entitled *Commercial Letters of Credit: Development and Expanded Use in Modern Commercial Transactions*, 4 Cumberland-Samford L. Rev. 134 (1973) and a presentation by Professor Soia Mentschicoff to a symposium of the Section of Corporation, Banking and Business Law of the American Bar Association, found in 19 Bus. Law 107 (1963). *See also*, Edwards, *Introduction to the Methods of Payment Involving Banks*, 4 N.C. J. Int'l L. & Com. Reg. 207, 211-14 (1979).

or simply by making a demand for payment of a draft or acceptance, payment or acceptance will take place.

Three contracts are involved in the typical letter of credit transaction: 1) the contract between the issuer (bank) and the account party (customer) for the issuance of the credit; 2) the letter of credit itself, a contract between the issuer and the beneficiary; and 3) the underlying agreement between the beneficiary and the account party. One of the most crucial features of the commercial letter of credit is its complete separation from the underlying transaction. The issuer has no concern with the agreement between its customer and the beneficiary and thus has no duty to see that the agreement is fulfilled.

The law of letters of credit transaction, as it has evolved over time, has been impacted and shaped by codification in the Uniform Commercial Code[2] and by the formulation and publication from time to time by the International Chamber of Commerce of uniform customs and practices for the issuing, interpretation and use of such credits.

Against this general background, we note that both pertinent provisions of the UCC and International Chamber of Commerce Publication 290, the 1974 revision of the ICC's Uniform Customs and Practice for Documentary Credits, have a bearing upon, but do not entirely control, the question before us. First, it must be recognized that by their very nature, the uniform customs and practices formulated and promulgated by the ICC are essentially dynamic, recognizing as they should the expanding and changing use of letters of credit in commerce. Second, Official Comments and North Carolina Comments to the pertinent sections of the UCC make it clear that the drafters of the Code intended for the Code provisions to serve more as a ready reference source of existing law than as a final set of iron-clad rules. *See,* Official Comments to G.S. 25-5-101 and 102, and the North Carolina Comment to G.S. 25-5-101. Third, where a particular letter refers to and incorporates by reference the provisions of the ICC Publication, the argument can be made that the parties have, by contractual terms, replaced the UCC provisions with the ICC rules; or, at least, accepted the ICC rules as binding where the UCC is either

2. Codified in North Carolina in Article 5 of Chapter 25 of the General Statutes.

silent or in conflict with the rules laid down in the ICC Publication. In resolving the question before us, we must, therefore, resort to four basic sources: 1) the UCC; 2) ICC Publication 290; 3) existing case law, and 4) learned commentaries.

From these four sources, one bright star emerges to guide us in the search for enlightened judicial resolution of the problem before us: It is emphasized by all the sources we have found that the basic aspect of the successful use of letters of credit lies in recognizing at the threshold that every letter of credit involves separate and distinct contracts; and that the contract between the issuing bank and the beneficiary to pay money to the beneficiary upon demand (and documentation if called for) must be kept chaste—independent of the underlying contract between the purchaser of the letter and the beneficiary. ICC Publication 290 provides in pertinent part that "Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts." The UCC, G.S. 25-5-114(1) provides: "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." For cases in which this fundamental aspect of the law of letters of credit is enunciated and affirmed, *see, O'Grady v. Bank*, 296 N.C. 212, 232, 250 S.E. 2d 587, 600 (1978) and cases cited therein. *See also, KMW Intern. v. Chase Manhattan Bank, N.A.*, 606 F. 2d 10 (2d Cir. 1979); *Chase Manhattan Bank v. Equibank*, 550 F. 2d 882 (3rd Cir. 1977); *Barclays Bank D.C.O. v. Mercantile National Bank*, 481 F. 2d 1224 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139, 94 S.Ct. 888, 39 L.Ed. 2d 96 (1974). It is clear that plaintiff in the case now before us has not followed this guiding star, but has steered a course which has grounded its claim on the shoals of a disputed underlying contract.

A careful reading of plaintiff's complaint discloses the fatal flaw. We quote in pertinent part:

> The Plaintiff will suffer irreparable damage if the letter of credit dated November 13, 1978, is called by the Defendants, Sargent, Rohm and van Heemstra, to pay for improvements to the Titusville property, since the Plaintiff will be forced to engage in expensive litigation in the state of

New York, the attorney's fees and expenses of which will not be recoverable, in order to recover any amount paid by the Defendant, Gateway Bank, to the Defendants, Sargent, Rohm and van Heemstra, under the said letter of credit pursuant to a wrongful call of this letter of credit and a misapplication of such funds by the Defendants, Sargent, Rohm and van Heemstra.

WHEREFORE, the Plaintiff prays that the Court grant the following relief in this action:

. . . .

4. That the Court enter a Declaratory Judgment that the terms of the contract between the Plaintiff and the Defendants require that the funds available under the letter of credit issued by the Defendant, Gateway Bank, in favor of the Defendants, Sargent, Rohm and van Heemstra . . . in the amount of $20,000 . . . be used only to pay for the agreed improvements at the Smyrna, Georgia property.

5. That the Court enter a Permanent Injunction enjoining the Defendant, Gateway Bank, from disbursing or making any payments on the letter of credit dated November 13, 1978, and issued by it in favor of the Defendants, Sargent, Rohm and van Heemstra . . . unless such payments conform to the agreement between the Plaintiff and Defendants, Sargent, Rohm and van Heemstra, that the funds be used to pay for improvements at the Smyrna, Georgia property exclusively.

. . . .

It is of compelling significance that nowhere in the body of the complaint has plaintiff alleged that the letter calls for a specific or identifiable document; and that in its prayer for relief, plaintiff has made no demand for any such documents to be presented or produced. The entire and sole thrust and theory of its complaint and claim for relief is an attempt to require defendants S, R, and V to apply the proceeds of the letter *according to the underlying contract* between plaintiff and S, R, and V.

More precisely, we hold that the letter itself does not require documentation. As the purchaser of the letter, it was the responsibility of plaintiff to instruct defendant Gateway Bank to include in the letter such requirements for documentation as might be

reasonably implemented by the Bank as a condition of honor and payment. The letter in dispute, in its entirety, is as follows:

Gateway Bank
Post Office Box 20300
Greensboro, North Carolina 27420
Telephone: 919/855-7100

IRREVOCABLE COMMERCIAL LETTER OF CREDIT

DATE OF ISSUE: November 13, 1978

ADVISING BANK	APPLICANT
To be designated by beneficiary	Sunset Investment, Ltd. 1401 Sunset Drive Greensboro, N.C. 27408
BENEFICIARY	MAXIMUM AMOUNT: $20,000.00
Sargent, Rhom [*sic*] and van Heemstra, Trustees for Alwin Weber	EXPIRATION DATE: December 5, 1978

We hereby issue this documentary letter of credit in your (the beneficiary's) favor which is available against your drafts at: sight

Drawn on: Us

Bearing the clause: "Drawn under Gateway Bank L/C" (As indicated above)

SPECIAL CONDITIONS

This letter of credit refers to conditions relative to Smyrna Post Office, Smyrna, Georgia

s/ Robert K. Boroughs
Robert K. Boroughs
Vice President

Except so far as otherwise expressly stated, this documentary credit is subject to the "Uniform Customs and Practice for Documentary Credits" (1974 Revision) International Chamber of Commerce (Publication No. 290).

Member Federal Deposit Insurance Corporation

. . . was then being leased to the United States for use as a post office.

As that term is used in commercial transactions, and particularly as it is used and understood in letters of credit, there are no "documents" identified in the Gateway Bank letter. Plaintiff failed at its peril to use language restricting honor and payment of the credit. The letter is a "clean" credit, requiring no documentation.

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980). Such is the case here, and the judgment of the trial court must be affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

IN THE MATTER OF: HUBERT Y. ALTMAN

No. 8010SC923

(Filed 2 June 1981)

1. **Municipal Corporations § 9— Civil Service Commission—no authority to appoint respondent as Fire Marshal**

The Civil Service Commission of the City of Raleigh had no authority to entertain an appeal of the City's refusal to appoint respondent as City Fire Marshal since the Fire Marshal is a "division head" whose position is exempt from the provisions of the Civil Service Act; therefore, the Commission had no authority to appoint respondent as Fire Marshal or to award respondent "back pay" for the difference in salaries between his current rank of Fire Captain and the position of Fire Marshal.

2. **Municipal Corporations § 9— Civil Service Commission—appeal from discrimination decision—attorney's fees—order that City revise promotional procedures**

While the Civil Service Commission of the City of Raleigh had authority to entertain respondent's appeal from a decision of the City that he had not

been the subject of discrimination in violation of City policy, the Commission had no authority to order the City to pay respondent's attorney fees or, in the alternative, punitive damages, or to order the City to prepare and submit revised promotional policies and procedures.

APPEAL by respondent Hubert Y. Altman from *Bailey, Judge*. Order entered 26 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1981.

Hubert Y. Altman, an employee with the rank of Captain in the Fire Department of the City of Raleigh (hereinafter "City"), instituted this proceeding by appealing to the Civil Service Commission (hereinafter "Commission") of the City, pursuant to Sections (b) and (f) of the Civil Service Act of the City of Raleigh (1971 N.C. Sess. Laws, Ch. 1154, § 1), the decision of the City that he had "not been the subject of discrimination in violation of City policy." After a hearing on Altman's appeal, the Commission made findings which, except where quoted, are summarized as follows:

Hubert Y. Altman has been an employee of the Raleigh Fire Department (hereinafter "Department") for nineteen years. In 1973 he was promoted to the rank of Captain. In 1974, Captain Altman became Executive Secretary-Treasurer and Spokesman for the Raleigh Firefighter's Association. Altman was also Spokesman for the Raleigh Employees Benevolent Association. His activities as "union spokesman," and the publicity generated therefrom, "was a source of conflict and disagreement" between Altman and Department Chief R. E. Keith and "members of the Administration of the City of Raleigh." On 17 October 1977, Altman was transferred to the Fire Prevention Bureau of the Department as a Fire Inspector. Although initially displeased, Altman eventually "enjoyed his work in the Bureau," but he was "the only employee of the Raleigh Fire Department who has been transferred into the Fire Prevention Bureau over his objections and against his will" for longer than ninety days. In addition, the policies relating to transfers among the three divisions of the Department were "unwritten and informal."

The position of Fire Marshal of the City became vacant on or about 19 March 1979. On 3 April 1979, District Chief James Owens was assigned the duties of "Acting Fire Marshal." During the Spring of 1979, Altman "was told on several occasions that

unless he resigned as spokesman for and as a member of the Raleigh Firefighter's Association that he would be transferred back to a line company by Chief Keith," and Chief Keith told Altman that his "activities for the Association had seriously prejudiced his chances for promotion to position of Fire Marshal for the City." In April 1979, Altman was transferred over his objection by Chief Keith to "Fire Station Number 10, one of the least active stations in the Raleigh Fire Department." Altman was the "only member of the Raleigh Fire Department to have been transferred out of the Fire Prevention Bureau over his objections and against his will."

Altman "initiated" his appeal to the Commission "in a proper and timely manner" on 25 April 1979. On 30 May 1979, Chief Keith mailed a letter to the District Chiefs of the Department and all Captains in the Department with a year's experience in the Fire Prevention Bureau soliciting applications for the Fire Marshal position. Altman and several others then applied for the position. The City did not advertise for the position elsewhere.

The Commission then concluded that the City, through "its duly authorized agents," "discriminated" against Altman in violation of Section (i) of the Civil Service Act of the City of Raleigh in the following instances: (1) Chief Keith transferred Altman out of the Fire Prevention Bureau because of Altman's "labor affiliation," as a "discriminatory and punitive act" against Altman, and to "diminish the effectiveness of the union;" (2) Chief Keith told Altman he would not be considered for the Fire Marshal position "because of his labor affiliation even though [Chief Keith] said that Altman was well-qualified for that position;" (3) Chief Keith told Altman he would have to "resign his membership in the Raleigh Firefighter's Association" before Altman would be considered for further promotions and that Altman "would have to 'prove himself' loyal" to the Department administration; and (4) Chief Keith "harassed" Altman and "discriminated against him in various other areas. . . ."

The Commission also concluded that Altman was the "best qualified person in the Raleigh Fire Department for the position as Fire Marshal" since he was "the only individual applying for the job with extensive training in the areas of both fire prevention and fire suppression," and the "only applicant" who had

spent at least eighteen months as a "Line Captain" as well as eighteen months with the Fire Prevention Bureau, and because he passed the "examination for District Chief." The Commission concluded further that the appointment of District Chief James Owens as "Acting Fire Marshal" for the City had the "full force and effect of being a permanent assignment," and that the "promotion process of the Raleigh Fire Department . . . lacks sufficient objective criteria and written procedures to insure that promotions are based only on merit, fitness and competence in performance of duties." In addition, the Commission concluded that because Altman "has been forced to expend a considerable amount of money to obtain legal counsel in this matter" and that the attorneys representing the City were being paid by "the taxpayers of Raleigh including Captain Altman," Altman was entitled to reimbursement for his attorney's fees "[i]n order to correct this inequitable position . . . ."

Based upon its findings and conclusions, the Commission entered the following order on 29 November 1979:

> 1. Hubert Y. Altman be appointed Fire Marshal of the City of Raleigh on the condition that, upon his permanent appointment to Fire Marshal . . . , Hubert Y. Altman will no longer maintain an active status in the Raleigh Firefighter's Association.
>
> 2. Hubert Y. Altman be paid the difference in the salaries of a Fire Captain and as a Fire Marshal from the date of April 6, 1979 to the date of his permanent appointment to Fire Marshal plus any increases that he would have been entitled to during this time.
>
> 3. Interest on the back pay be paid from the date of April 6, 1979 at an annual rate of 6%.
>
> 4. Hubert Y. Altman be reimbursed for damages consisting of the cost of his legal representation by the City of Raleigh. . . .
>
> 5. In the event the City of Raleigh does not pay Hubert Y. Altman's attorney's fees, the Civil Service Commission directs that Hubert Y. Altman be compensated for the damages in the amount of attorney fees and anticipated cost of pursuing appeal, lost earnings and damages to his profes-

sional reputation in the amount of $100,000.00 as punitive damages as punishment for the wilful and deliberate acts of the City of Raleigh through its duly authorized agents by using the City Attorney's office and the appeals process as a threat and subsequent punishment.

6. The Raleigh Fire Department consider its promotional policies and procedures and present its recommendation for such changes . . . as may be necessary to eliminate the bias and discrimination inherent in the present system; such ameliorating changes to be presented to this Commission prior to review by the City Council within 90 days of the date of this order.

7. The City of Raleigh, by and through its duly authorized agents, cease and desist discrimination against the employee for union affiliation in violation of Chapter 1154, 1971 Session Laws of the General Assembly.

On 3 December 1979, the City petitioned the Superior Court for a writ of certiorari to review the decision of the Commission, and on the same day the Superior Court issued the writ. On 30 January 1980, the court granted a motion to intervene by six officers of the Department who, like Altman, had sought the Fire Marshal position. After a hearing pursuant to the writ, Judge Bailey made detailed findings and conclusions (1) that the Commission "grossly exceeded the authority and powers delegated to it by the Legislature . . ." by ordering the appointment of respondent Altman as Fire Marshal for the City "when in fact a vacancy existed in the position which had not then been permanently filled;" (2) that the Commission's finding that the "naming" of District Chief Owens as "Acting Fire Marshal" had "the full force and effect of a permanent appointment" was "unsupported by competent, material and substantial evidence on the whole record;" (3) the Commission exceeded its authority in ordering that respondent be paid the difference in salaries between the positions of Captain and Fire Marshal, with interest, retroactive to the date of District Chief Owens' "appointment" as "Acting Fire Marshal;" and (4) the Commission had no authority to order the payment of attorney's fees or, in the alternative, punitive damages, or to order the City to "prepare and submit revised promotional policies and procedures." Based on these findings and

conclusions, the court ordered (1) that the 29 November 1979 decision of the Commission be "remanded, reversed, and set aside;" (2) that the City "readvertise" within the Department for an appointment to the Fire Marshal position, and to make the appointment "based upon objective findings;" and (3) that the City not "discriminate against any applicant because of race, creed or color, or because of political or labor affiliations, or because of sex or marital status," and "in particular," not to "discriminate" against Altman. From Judge Bailey's order, respondent Altman appealed to the Court of Appeals.

City Attorney Thomas A. McCormick, Jr., and Assistant City Attorney Francis P. Rasberry, Jr., for the petitioner appellee City of Raleigh.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., and Johnson, Gamble & Shearon, by Samuel H. Johnson, for the intervenor appellees.

Blanchard, Tucker, Twiggs, Denson & Earls, by Howard F. Twiggs and Charles H. Mercer, Jr., for the respondent appellant.

HEDRICK, Judge.

We note at the outset that the City has conceded that the evidence presented before the Commission was sufficient to support the Commission's findings and conclusions that the City "discriminated" against Altman "because of his labor affiliations in transferring captain Altman out of the Fire Prevention Bureau and in stating to Captain Altman that he would not be considered for the position of Fire Marshal of the City of Raleigh."

Although numerous questions have been presented and argued by the parties on this appeal, we deem it necessary to consider only whether the Commission had the authority under the Civil Service Act of the City of Raleigh (hereinafter "Act") to enter its order dated 29 November 1979.

Chapter 1154 of the 1971 North Carolina Session Laws in pertinent part provides:

> SECTION 1. That a new Civil Service Act for the City of Raleigh is adopted to read as follows:
>
> . . .

(b) *Merit Principle.* All appointments and promotions of the City officers and employees shall be made solely on the basis of merit and fitness demonstrated by examination or other evidence of competence. However, any employee who contends that he was not promoted because of bias or for reasons not related to merit, fitness, or availability of positions, shall have the right, after exhausting all administrative remedies, to appeal his cause to the Civil Service Commission.

(c) *Employees Subject to Act.* This act shall apply to all officers and employees of the City except the following:

(1) Officials elected by the people.

(2) Employees or officials appointed by the City Council or appointed by the City Manager and approved by the City Council and their immediate secretaries.

(3) Department heads, Division heads and their immediate secretaries.

(4) Part-time or non-permanent officers or employees.

(5) Employees serving their probationary periods before becoming permanent employees, not to exceed eight months.

. . .

(f) *Appeal Board.* The Civil Service Commission shall act as an appeal board to hear all appeals of employees regarding violation of City policy, suspensions, layoff, removal, promotions, forfeiture of pay or loss of time; but the Board shall have no jurisdiction to hear an appeal until all administrative remedies have been exhausted pursuant to the City's established grievance procedure.

The Civil Service Commission shall have the authority to affirm, modify or reverse, as it deems necessary, those actions over which it has jurisdiction.

. . .

(h) *Further Duties.* The Civil Service Commission shall keep accurate records of its proceedings and shall have such

other powers and duties as are necessary to implement the provisions of this act.

(i) *Discrimination Prohibited.* No person in the service of the City or seeking admission thereto shall in any way be discriminated against or favored because of race, creed or color, or because of political or labor affiliations, or because of sex or marital status.

The record before us demonstrates that the requisites for an appeal to the Commission, as provided by Sections (b) and (f) of the Act, were properly met in the present case. The record also indicates that respondent is an employee subject to the jurisdiction of the Commission as provided by Section (c) of the Act, and the city has conceded discrimination against Altman in violation of Section (i) of the Act. The record does *not* show, however, that the *position* to which respondent sought promotion, the Fire Marshal of the City of Raleigh, is subject to the jurisdiction of the Commission under Section (c) of the Act.

[1] The record demonstrates that the Raleigh Fire Department has three divisions and that the position of City Fire Marshal is the top position in one of those divisions. The City Fire Marshal, then, is a "Division head" as described in Section (c)(3) of the Act, and the City Fire Marshal position is exempt from the provisions of the Act. The Commission therefore has no jurisdiction over the position of Fire Marshal, and as a result had no authority to entertain respondent's appeal of the City's refusal to promote him to Fire Marshal; thus, the Commission had no authority to appoint respondent to the position of Fire Marshal, or to award respondent "back pay" for the difference in salaries between his current rank of Captain and the position of Fire Marshal.

[2] The Commission did find that the City had discriminated against respondent by other actions, and the Commission had the authority to entertain respondent's appeal on those matters. The Commission's authority in such matters, however, is not without limits; under Section (f) of the Act, the Commission can merely "affirm, modify or reverse" in deciding an appeal, and under Section (h), the Commission "shall have such other powers and duties as are necessary to implement the provisions of this act." Such authority cannot be extended, in our opinion, to include ordering the payment of an attorney's fee or in the alternative imposing

punitive damages, or to include ordering the City to "prepare and submit revised promotional policies and procedures."

It follows, therefore, that the 29 November 1979 order of the Commission must be vacated. While the superior court reached the same result in its 26 March 1980 order, the superior court erroneously based its conclusion that the Commission had no authority to appoint respondent as Fire Marshal upon its determination that the position of Fire Marshal had *not* been permanently filled as found by the Commission. As we have determined that the Commission has no authority under the Act to entertain an appeal relating to the City's refusal to promote respondent to the position of Fire Marshal, the issue of whether the Fire Marshal position had been permanently filled is irrelevant.

Therefore, the Superior Court's order, as it relates to the authority of the Commission with respect to the promotion of respondent to the position of Fire Marshal, must be modified to show that the Commission had no authority to entertain an appeal on such a matter, and thus had no authority to appoint respondent to the Fire Marshal position or to award respondent "back pay" as measured by the difference in salaries between his current position and that of Fire Marshal. As modified, the order of the Superior Court dated 26 March 1980 is affirmed.

Modified and affirmed.

Judges ARNOLD and WEBB concur.

IN THE MATTER OF: CERTAIN TOBACCO OWNED BY R. J. REYNOLDS TOBACCO COMPANY

No. 8010PTC682

(Filed 2 June 1981)

1. Taxation § 25.10— ad valorem taxation—appeal to Property Tax Commission—notice of appeal by tax supervisor and county attorney

Notice of appeal of a decision of a County Board of Equalization and Review to the State Property Tax Commission was properly given by the county tax supervisor and the assistant county attorney where the county had

previously adopted a resolution authorizing the tax supervisor and the county attorney to file appeals from decisions of the County Board of Equalization and Review. G.S. 105-324.

2. **Taxation § 19.1— tobacco not held for shipment to foreign country—no exemption from taxation**

Raw tobacco was not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of G.S. 105-275(1) where the tobacco was to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products would be shipped to a foreign country; rather, the tobacco was held or stored for processing or manufacture and was taxable at the preferential rate of sixty percent of value under G.S. 105-277(a).

APPEAL by R. J. Reynolds Tobacco Company from the North Carolina Property Tax Commission. Final decision entered 24 March 1980. Heard in the Court of Appeals 30 March 1981.

In its business personal property tax listing for 1979, R. J. Reynolds Tobacco Company (hereinafter Reynolds) sought exemption from taxation by Forsyth County of property valued at approximately 14.5 million dollars. The requests for exemption were made pursuant to N.C.G.S. 105-275(1), which exempts from taxation tobacco held or stored for shipment to any foreign country, with certain exceptions. Reynolds determined the dollar value of the tobacco it sought to exempt by applying a percentage of foreign sales in relation to its total sales from the preceding calendar year. The tobacco was not physically separated.

Approximately 5.2 million dollars in value of finished goods, wrapping material and casing material could not be marketed in the United States because of wrapping covers and labels that did not conform to the domestic market, and were awaiting shipment to a foreign country. A total exemption was granted for this property on 2 August 1979.

On the same date, the tax supervisor of Forsyth County denied the request for exemption under N.C.G.S. 105-275(1) for the approximately nine million dollars in value of raw tobacco stored by Reynolds because it was not being "held or stored for shipment to a foreign country." The tax supervisor did apply the sixty percent rate to this property pursuant to N.C.G.S. 105-277(a). Reynolds appealed to the Forsyth County Board of Equalization and Review.

The Board held that the raw tobacco was exempt under N.C. G.S. 105-275(1), and the cause was appealed to the Property Tax

Commission. The notice of appeal was signed by W. Harvey Pardue, Forsyth County Tax Supervisor, and Jonathan V. Maxwell, Assistant County Attorney for Forsyth County.

Reynolds moved to dismiss the appeal on the grounds that neither Pardue nor Maxwell had lawful authority to sign the notice of appeal. The commission denied this motion and, after hearing, entered a decision holding that the subject tobacco was not "held or stored for shipment to a foreign country" and was not exempt from taxation under the provisions of N.C.G.S. 105-275(1). The commission further ordered that the tobacco was subject to tax at the sixty percent rate as provided in N.C.G.S. 105-277(a). From this decision, Reynolds appeals.

Hudson, Petree, Stockton, Stockton & Robinson, by W. F. Maready and Grover G. Wilson, for appellant.

P. Eugene Price, Jr. County Attorney, and Jonathan V. Maxwell, Assistant County Attorney, for appellee.

MARTIN (Harry C.), Judge.

[1] First, Reynolds contends that the Property Tax Commission should have dismissed the appeal. Reynolds argues that the right to appeal is controlled by N.C.G.S. 105-324(b) and that neither the tax supervisor nor the assistant county attorney has the authority to give notice of appeal under the statute. Pertinent parts of the statute are:

> § 105-324. *Appeals to Property Tax Commission from listing and valuation decisions of boards of equalization and review . . .*
>
> (b) Any property owner of a county or member of the board of county commissioners or board of equalization and review may except to an order of the board of equalization and review entered under the provisions of G.S. . . . 105-312 and appeal therefrom to the Property Tax Commission. . . .

Reynolds argues that giving notice of appeal by the county is a legislative function and is not delegable by the county. The giving of notice of appeal is not such a governmental act that prevents the county from delegating this authority to its officers and employees. The statute specifically allows a private citizen to give

notice of appeal. *See Student Bar Association v. Byrd*, 293 N.C. 594, 239 S.E. 2d 415 (1977). The county had previously duly adopted a resolution authorizing the tax supervisor and the county attorney to file appeals from decisions of the Forsyth County Board of Equalization and Review. We find no improper delegation of authority by the county.

Moreover, there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent. *Bank v. Penland*, 206 N.C. 323, 173 S.E. 345 (1934); *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E. 2d 315, *aff'd per curiam by an equally divided court*, 301 N.C. 520 (1980). This presumption applies to both procedural and substantive aspects of a case. *Gardiner v. May*, 172 N.C. 192, 89 S.E. 955 (1916). It also applies to attorneys representing municipalities. *Bath v. Norman*, 226 N.C. 502, 39 S.E. 2d 363 (1946). One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption. *Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897 (1961). Reynolds has failed to so do. All the evidence from the whole record supports the finding that counsel had authority to enter the notice of appeal on behalf of the county. The assignment of error is overruled.

[2] Next, Reynolds contends that tobacco in any form held or stored for shipment to a foreign country is exempt from taxation by virtue of N.C.G.S. 105-275(1). We do not find this to be the question before the Court. Rather, the question for our determination is whether the Property Tax Commission properly denied Reynolds's petition for exemption from taxation of a certain value of tobacco. This provision of the statute provides an exemption from taxation and is strictly construed against the taxpayer and in favor of the state. *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E. 2d 199 (1974). Words of the statute must be given their common and ordinary meaning, nothing else appearing. *Id.* In the construction of a statute, the primary rule is that the intent of the legislature controls. *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 166 S.E. 2d 671 (1969). Where the language of a statute is clear and unambiguous, its plain and definite meaning controls, and judicial construction is not necessary. *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335 (1963). If the language is ambiguous and the meaning in doubt, judicial interpretation is required to determine the

legislative intent. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). The pertinent language of N.C.G.S. 105-275(1) is clear and unambiguous. It reads: "tobacco . . . held or stored for shipment to any foreign country . . . shall not be assessed or taxed." None of these words require construction. *See Davis, supra.*

Upon considering the record as a whole, as we are required to do under N.C.G.S. 105-345.2(b)(5), we hold that the conclusions and decision of the Property Tax Commission are supported by competent, material, and substantial evidence and must be sustained.

All the evidence shows that the tobacco in question was held and stored for processing and manufacture. James W. McGrath, director of domestic tax law and assistant secretary of Reynolds, testified:

> I am perfectly willing to state now, the part of the tobacco that we are talking about and upon which exemption was claimed will be processed and manufactured into cigarettes and other tobacco products in Forsyth County, North Carolina.
>
> . . . .
>
> Q. And then shipped to a foreign country in that form, is that correct?
>
> A. That is correct, sir.

Tobacco that is being held or stored to be manufactured or processed is taxed pursuant to N.C.G.S. 105-277(a), where it is given a preferential rate of sixty percent of value for tax purposes. The legislature plainly intended to establish two classes of property: (1) under 105-275(1), if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under 105-277(a), if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. Quite obviously, the same property could not be in both classes at the same time.[1] Where statutes are related, as here, they should be

1. Whether the two statutes could be applied to the same tobacco at different times is a question not before us at this time.

construed to give effect to each of them, if possible. It is the duty of courts to harmonize statutes with other statutory provisions. *In re Assessment of Sales Tax*, 259 N.C. 589, 131 S.E. 2d 441 (1963).

Reynolds relies upon *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). We find that case readily distinguishable and not controlling. *Martin* involved property that never left its packages, was not processed or changed in form, and was only being held for transshipment under then N.C.G.S. 105-281 (repealed 1974). The principal question determined in *Martin* was whether the exemption applied to goods in a public warehouse for the purpose of transshipment, regardless of the length of time the goods were in the warehouse. The Court held the length of time the goods were in the warehouse was immaterial.

On the other hand, we find *In re Forsyth County*, 285 N.C. 64, 203 S.E. 2d 51 (1974), impels us to the decision we reach. In that case Reynolds petitioned that tobacco which had been transferred from its storage area and was being held for the purpose of processing or manufacturing into tobacco products, be taxed at the preferential rate under N.C.G.S. 105-277(a). The county argued that when the tobacco was removed from storage and entered the manufacturing process, it was no longer an agricultural product. The Court noted the many steps of processing tobacco, and held: "It is still tobacco and still an agricultural product until it comes out of the cigarette machine in a sealed package with the Internal Revenue stamp affixed." The Court affirmed the superior court's conclusion that the tobacco was entitled to be taxed under N.C.G.S. 105-277(a). The clear import of *Appeal of Forsyth County* is that tobacco is an agricultural product under N.C.G.S. 105-277(a) until it is manufactured into the finished product.

The evidence here is that all the tobacco in this case was to be processed or manufactured into finished tobacco products. We hold it was not being held or stored for shipment to any foreign country within the meaning of N.C.G.S. 105-275(1). It was being held or stored for the purpose of processing or manufacture, and taxable pursuant to N.C.G.S. 105-277(a).

The decision of the Property Tax Commission is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. TERRY LEE MELTON

No. 8014SC921

(Filed 2 June 1981)

1. **Criminal Law § 91— motion to dismiss for violation of Speedy Trial Act—proper hearing conducted**

There was no merit to defendant's contention that the trial court erred in denying his motion to dismiss for failure to comply with the Speedy Trial Act without first holding a proper hearing on his motion, since the record indicated that such a hearing was conducted. G.S. 15A-703.

2. **Criminal Law § 91— compliance with Speedy Trial Act—computation of time proper**

There was no merit to defendant's argument that 131 non-excludable days elapsed between the date of his indictment and his trial, that this exceeded the 120-day limit of the Speedy Trial Act, and that the trial court therefore improperly denied his motion to dismiss, since the trial court determined that a State's witness was unavailable for trial during a two week period; subtracting the 14-day delay from the total 131 days left 117 days from the time of indictment until the time of trial, thus bringing the delay in bringing defendant to trial within the statutory limits; the trial court's finding that the witness was unavailable because of a trip to Europe was not reviewable since defendant did not take exception to the court's finding of fact; and, although the court did not refer to it in its order denying defendant's motion to dismiss, there was another time period of seven days which was excludable due to a court ordered continuance for the purpose of determining whether defendant's case should be joined with that of his brother. G.S. 15A-701(b)(3), (7).

APPEAL by defendant from *Godwin, Judge*. Judgment entered 27 May 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 February 1981.

Attorney General Edmisten, by Associate Attorney James W. Lea, III, for the State.

R. Sterling Browne, II, for defendant appellant.

MORRIS, Chief Judge.

Defendant's sole argument is to the alleged denial of his right to a speedy trial under G.S. 15A-701 *et seq.*

The record shows that the sequence of events preceding defendant's trial occurred as follows: On 9 January 1980 defendant was charged by indictment with the crime of common law robbery. Defendant allegedly forcibly stole $950 from the person of Lewis D. Walker on 2 November 1979. On 23 January 1980 he entered a plea of not guilty to this charge.

The state made a motion pursuant to G.S. 15A-926(b)(2) asking the court to join for trial defendant's case and that of his codefendant and brother, Ronnie Melton. The court issued an order on 27 March 1980 continuing the trial of defendant's case from its scheduled date of 27 March 1980 until 3 April 1980 so that hearing on the state's motion for joinder of the codefendant might be held. This order of continuance was issued pursuant to the motion of codefendant, Ronnie Melton. Subsequently, the court denied the state's motion to consolidate the two cases for trial.

Defendant's case was next scheduled for trial on 14 April 1980. On 17 April 1980, defendant pleaded guilty to one count of common law robbery and one count of misdemeanor possession of stolen property. This plea was entered in consequence of a plea arrangement between defendant and the state. After examining defendant as to his guilty pleas, the court, on 17 April 1980, found that the pleas were not freely, voluntarily, and intelligently entered. Consequently, the court rejected defendant's pleas and directed that the case be calendared for trial upon defendant's original pleas of not guilty.

Defendant's case was subsequently scheduled for trial during the week of 28 April 1980. Both the state and defendant were prepared for trial, but the case was not reached during that week.

Defendant's case was next set for trial during the week of 19 May 1980.

On 16 May 1980 defendant made a motion to dismiss the charges against him pursuant to G.S. 15A-703. He alleged that the state had failed to bring him to trial within the time limitations of the "speedy trial act", specifically G.S. 15A-701. On 19 May 1980

the court heard evidence on defendant's motion to dismiss. The court entered its order determining defendant's motion on 23 May 1980. Among others, the court made the following findings of fact:

> 11. That the State did not calendar the defendant's case for the weeks beginning May 5, 1980, or May 12, 1980, because Lewis D. Walker, an essential witness for the State, was unavailable during those two weeks as the result of a trip to Europe;
>
> . . .
>
> 13. That a period of 131 days has lapsed between the time that the defendant was indicted and the time that the case was called for trial on May 19, 1980;
>
> 14. That, pursuant to the provisions of N.C. G.S. 15A-701(b)(3), the period of time during which the trial of the defendant was delayed because of the unavailability of Lewis D. Walker is excluded from the computation of time within which the defendant's trial must begin.

Based upon its findings of fact the court denied defendant's motion to dismiss.

Defendant's trial on these charges was held as scheduled. The jury returned a verdict of guilty of common law robbery, and the court sentenced defendant to a term of six years imprisonment.

[1] Defendant's first argument is to the court's denial of his motion to dismiss without first holding a proper hearing on his motion. Defendant contends that prior case law and G.S. 15A-703 require the court to hold an evidentiary hearing conducted in a manner consistent with the requirements of due process when determining a motion to dismiss made pursuant to G.S. 15A-703.

We need not determine whether such a hearing is mandatory in this situation, because in the present case the record indicates that such a hearing was conducted, and there is no evidence to the contrary. The court's order denying defendant's motion to dismiss begins as follows:

> THIS CAUSE COMING ON TO BE HEARD upon motion of the defendant for dismissal of the charges pending against him in

> the above-captioned action, pursuant to the provisions of N.C. G.S. 15A-703, *the Court, having heard the evidence, presented on May 19, 1980,* makes the following findings of fact: (Emphasis added.)

The record does not reflect that defendant objected to this statement nor excepted to it. Thus, we must accept its validity. The record contains no evidence, other than the court's statement, which would indicate whether an evidentiary hearing was held on defendant's motion. The presumption is that the judgment is correct. *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967). Therefore, we must assume that such a hearing was conducted.

[2] Next defendant argues that 131 non-excludable days lapsed between the date when defendant was indicted for this crime, 9 January 1980, and the date the trial actually began, 19 May 1980. This exceeded the 120-day limit established in G.S. 15A-701(a1). Consequently, defendant asserts that the court improperly denied his motion to dismiss.

G.S. 15A-703 requires dismissal of a case not brought to trial within the time limits of G.S. 15A-701(a1). However, G.S. 15A-701(b) delineates certain time periods which should be excluded in computing the time within which a criminal trial must begin. G.S. 15A-701(b)(3) provides that an exclusion should be allowed when,

> Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered. . .
>
> b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial. . .

In its order of 23 May 1980 denying defendant's motion to dismiss, the court made the following finding of fact:

> 11. That the State did not calendar the defendant's case for the weeks beginning May 5, 1980, or May 12, 1980, because Lewis D. Walker, an essential witness for the State, was unavailable during those two weeks as the result of a trip to Europe;

Defendant contends that the reasons for the witness's absence were insufficient under the statute to justify the state's delay of defendant's trial for two weeks. Therefore, the court improperly excluded the two weeks from its computation of the 120-day period. Defendant maintains that the witness's presence at trial could have been obtained through due diligence, and there is no evidence that the witness resisted appearing.

The court's finding of fact, as set out previously, that the state's witness, Lewis Walker, was unavailable is not now reviewable. Under Rule 10(b)(2), N.C. Rules of Appellate Procedure, a separate exception should be set out to the making of each finding of fact which is assigned as error. In the present case, defendant did not take exception to the court's finding of fact. Thus, it is binding upon us.

Even if we look beyond the court's finding of fact we do not find that defendant put on any evidence to refute the state's contention that the witness was unavailable for trial.

Subtracting the 14-day delay, which was caused by the unavailability of the state's witness, from the total 131 days leaves 117 days from the time of indictment until the time of trial. This brings the delay in bringing defendant to trial within the statutory limits.

Furthermore, although the court did not refer to it in its order denying defendant's motion to dismiss, there was another time period which was excludable. G.S. 15A-701(b)(7) provides that the following time period should be excluded from the 120 days.

> (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.
>
> The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:
>
> a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and

> b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;

On 27 March 1980, a judge acting upon a motion by the codefendant, continued this case to 3 April 1980. The judge in his order of continuance stated:

> The Court determines that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial, and the Court gives the following reasons for so finding:
>
> That there are pending motions to join cases by the State and counter motions to sever by the defense which will be heard on April 3, 1980 if a non-jury disposition arrangement is not found.
>
> The Court considered the following factors, among others, in determining whether to grant this continuance:
>
> 1. Whether the failure to grant the continuance would be likely to result in a miscarriage of justice; and
>
> 2. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits set by G.S. 15A-701.

The order is in compliance with the requirements of G.S. 15A-701 (b)(7). The seven-day period resulting from this court ordered continuance should be subtracted from the applicable period also.

For these reasons we hold that the court properly found that defendant's case came to trial within the 120-day limit of G.S. 15A-701 *et seq.*, and denied defendant's motion to dismiss.

No error.

Judges MARTIN (Robert M.) and WHICHARD concur.

STATE OF NORTH CAROLINA v. CLAUDIA HOWELL WELLS, ALIAS CLAUDIE HOWELL WELLS

No. 807SC1127

(Filed 2 June 1981)

1. **Automobiles § 112— manslaughter case—officer's opinion as to point of impact**

The trial court in a manslaughter prosecution arising out of an automobile accident erred in permitting the investigating officer to testify that his investigation revealed that the collision occurred in decedent's lane of travel, since the officer's testimony constituted an opinion or conclusion which invaded the province of the jury.

2. **Criminal Law § 162— necessity for motion to strike**

Where defendant objected each time a witness was asked questions calling for inadmissible opinion testimony, no motion to strike was required to preserve defendant's objections to the testimony elicited by the improper questions.

3. **Criminal Law § 169.3— objection to evidence—no waiver by cross-examination**

Defendant did not waive his objection to incompetent opinion testimony by his cross-examination of the witness in an attempt to destroy the probative value of the opinion testimony.

4. **Automobiles § 113.1— manslaughter—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for manslaughter arising out of an automobile accident where it tended to show that defendant was driving under the influence of alcohol at the time of the accident; defendant collided with a car that only seconds before had been observed to be in its proper lane of travel; almost all of the debris and gouge marks resulting from the collision and the two automobiles involved in the collision were found in decedent's lane of travel; and in the opinion of the investigating officer the collision did occur in decedent's lane of travel.

APPEAL by defendant from *Britt, Judge*. Judgments entered 24 July 1980 in Superior Court, WILSON County. Heard in the Court of Appeals 31 March 1981.

Defendant was charged with driving under the influence and manslaughter arising out of an automobile collision which occurred on 25 December 1979 in Wilson County. Upon his conviction in District Court for driving under the influence, defendant appealed to Superior Court where the two charges were consolidated for trial.

At the trial, Trooper J. H. Parks testified for the State that he was called to the scene of an accident on Rural Paved Road

1136 at 12:10 a.m. on 25 December 1979 and arrived there at approximately 12:25 a.m. It was raining lightly at the time, and the road was wet. He found two vehicles at the scene, a 1967 Chevrolet Chevelle and a 1966 Ford. The sole occupant of the Chevelle was dead, and the sole occupant of the Ford, defendant, was unconscious. Both cars were in the eastbound lane of the two lane road, the Chevelle facing west and the Ford facing south. The Chevelle was approximately 570 feet west of a bridge passing over Interstate 95, and the Ford was approximately 160 feet west of the Chevelle. Both cars were most heavily damaged on the left front side. Debris consisting of glass, pieces of chrome and dirt was located in the center of the eastbound lane, although one large piece, a fender, was located in the westbound lane. There were also fresh gouge marks in the center of the eastbound lane where the debris was located, and Trooper Parks observed asphalt under the front of the Ford. Because of the location of the gouge marks and the debris, Trooper Parks concluded that the impact had occurred in the center of the eastbound lane. While examining the Ford, Parks detected a strong odor of alcohol coming from defendant's mouth and found a half-empty bottle of vodka on the rear seat of the car. Defendant was taken to the hospital about thirty minutes later, and Parks talked with him there at approximately 1:20 a.m. He again detected the strong odor of alcohol coming from defendant, observed that defendant's eyes were glassy and red and his speech mumbled and formed the opinion that defendant had consumed a sufficient quantity of intoxicating liquor to substantially and appreciably impair his mental or physical faculties.

On cross-examination, Trooper Parks again described the location of the debris and gouge marks which he had observed at the scene of the collision and stated his opinion that the impact had occurred at that spot. He admitted, however, that the largest and heaviest piece of debris, the fender, was located in the westbound lane, that he could not accurately determine the age of the gouge marks or whether the asphalt under defendant's car came from them and that he was conducting his investigation of the scene at night with a flashlight.

Sergeant B. K. Tucker testified that defendant blew .23% on a breathalyzer test which Tucker administered to defendant at approximately 2:25 a.m. on the night of the accident.

Randy Watson testified that he saw defendant at approximately 11:30 p.m. on the night of the accident at a cafe not far from Rural Paved Road 1136. He could not tell whether defendant had been drinking and did not smell any alcohol on defendant's person. When Watson left the cafe in his car, he saw defendant's car pulling out behind him. After Watson got on Rural Paved Road 1136 traveling west, defendant passed him going approximately 60 m.p.h. and drove around a curve out of Watson's sight. As Watson approached the bridge over I-95, he saw defendant parked in a churchyard on the side of the road, but as Watson crossed the bridge over I-95, he looked in his rearview mirror and saw defendant pull out of the churchyard again heading west. On the other side of the bridge, Watson saw a car coming towards him in the eastbound lane. He first thought the car was a motorcycle because its inside headlight was out, but as it approached, he could tell it was an automobile. It was close to the center line, but not over it, and Watson slowed down as it approached to be sure he did not hit it. After passing the car, Watson looked in his rearview mirror and saw a big flash as the car which he had just passed collided with defendant's car. Watson could not tell on which side of the road the collision occurred.

Defendant stipulated that the death of the decedent resulted from the collision at issue but presented no evidence. His motion for a directed verdict was denied.

The jury returned verdicts of guilty of driving under the influence and involuntary manslaughter. From judgments imposing concurrent prison terms of six months for driving under the influence and five to seven years for involuntary manslaughter, defendant appeals.

Attorney General Edmisten, by Associate Attorney Jane P. Gray and Deputy Attorney General William W. Melvin, for the State.

Kirby and Clark, by John E. Clark, for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns error to the court's admission, over his repeated objections, of Trooper Parks' opinion as to where the collision between the two cars occurred. This assignment of error is sustained.

Our State Supreme Court has held in several cases that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent. *See Farrow v. Baugham*, 266 N.C. 739, 147 S.E. 2d 167 (1966); *McGinnis v. Robinson*, 258 N.C. 264, 128 S.E. 2d 608 (1962); *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351 (1960). A case almost directly on point is *Cheek v. Barnwell Warehouse and Brokerage Co.*, 209 N.C. 569, 183 S.E. 729 (1936). In that case the Supreme Court upheld the trial court's exclusion of opinion testimony by a nonexpert witness as to where a collision occurred based upon his examination of the scene sometime after the accident on the ground that its admission would invade the province of the jury. In the present case, the most crucial question for the jury on the manslaughter charge was whether defendant caused the collision which resulted in decedent's death by crossing the center line into decedent's lane of travel. By testifying that his investigation revealed the point of impact between the two cars to be in decedent's lane of travel, Trooper Parks stated an opinion or conclusion which invaded the province of the jury. *Cf. Kaczala v. Richardson*, 18 N.C. App. 446, 197 S.E. 2d 21, *cert. denied*, 283 N.C. 753, 198 S.E. 2d 722 (1973).

State concedes that the opinion of Trooper Parks was incompetent but argues that defendant waived his objections thereto by failing to move to strike it and by eliciting similar testimony from Trooper Parks on cross-examination. We reject both arguments.

[2] Defendant objected each time Trooper Parks was asked to state his opinion as to where the impact occurred. The questions were clearly incompetent as calling for inadmissible opinion testimony; nevertheless, defendant's objections to them were overruled, and Trooper Parks was allowed to state the inadmissible opinion called for by the questions. On these facts, no motion to strike was required to preserve defendant's objections to the testimony elicited by the improper questions. Cases to the contrary relied upon by State are distinguishable. In the majority of those cases inadmissibility was not indicated by the question but only became apparent by some feature of the answer. *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *State v.*

Huggins, 35 N.C. App. 597, 242 S.E. 2d 187, *disc. rev. denied*, 295 N.C. 262, 245 S.E. 2d 779 (1978); *State v. Robinson*, 35 N.C. App. 617, 242 S.E. 2d 197 (1978). In *Mays v. Butcher*, 33 N.C. App. 81, 234 S.E. 2d 204 (1977), although the defendant objected to the improper question, he failed to move to strike not only the answer thereto, but also the answers to several subsequent questions in the same vein to which he did not object.

[3] We also find no waiver resulting from defendant's cross-examination of Trooper Parks. It is true, as argued by State, that an objection is waived when like evidence is thereafter admitted without objection, especially where the like evidence is elicited by the objecting party himself. *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968); *Adams v. Godwin*, 254 N.C. 632, 119 S.E. 2d 484 (1961). However, it is also true that one does not waive an objection, otherwise sound and seasonably made, by attempting to explain or destroy the probative value of the evidence on cross-examination. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766 (1961); *State v. Godwin*, 224 N.C. 846, 32 S.E. 2d 609 (1945); 1 Stansbury's N.C. Evidence § 30 (Brandis rev. 1973). Defendant's cross-examination of Trooper Parks appears to have been for the purpose of destroying the probative value of the incompetent opinion stated by Parks. Defendant was entitled to offer such testimony without losing the benefit of his earlier objections to that opinion.

[4] Defendant also assigns error to the denial of his motion for a directed verdict as to the manslaughter charge on the ground that, without the incompetent testimony of Trooper Parks as to where the impact occurred, State's evidence created only a conjecture as to whether defendant's conduct was the proximate cause of the collision and resulting death of the decedent. This assignment is overruled. In ruling on a motion for a directed verdict, all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be taken into account and considered in the light most favorable to the state. *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 809 (1976). Applying these principles to the present case, State's evidence tended to show that defendant was driving under the influence of alcohol at the time of the accident, he collided with a car that only seconds before was observed to be in its proper lane of travel, almost all of the debris and gouge

marks resulting from the collision were found in the decedent's lane of travel as were both cars after the collision and, in the opinion of the investigating officer, the collision did occur in the decedent's lane of travel. These facts create more than a conjecture as to the cause of the collision and differ markedly from the facts in *State v. Hewitt*, 263 N.C. 759, 140 S.E. 2d 241 (1965), relied upon by defendant, where there was no evidence of any reckless or wanton conduct by the defendant and the physical facts observed after the accident supported several possibilities as to where the impact occurred.

In accordance with our preceding discussion, defendant is entitled to a new trial on the manslaughter charge as a result of the court's erroneous admission into evidence of the incompetent opinion testimony of Trooper Parks. Defendant also contends, however, that he is entitled to a new trial on the charge of driving under the influence because the jury's verdict thereon may have been influenced to his prejudice by the incompetent testimony of Trooper Parks. In view of the overwhelming evidence of defendant's intoxication at the time of the collision, it is unlikely that the jury would have reached a different result had the incompetent testimony been excluded.

In case No. 79CRS14141, new trial.

In case No. 79CRS14148, no error.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. DENNIS LOMBARDO

No. 802SC1203

(Filed 2 June 1981)

Criminal Law § 143.11; Searches and Seizures § 39— probation revocation hearing —evidence improperly suppressed

In a proceeding to determine whether defendant had violated a condition of his probation, the superior court erred in granting defendant's motion to suppress evidence seized by Florida authorities where the record before the superior court clearly established that the search of defendant's luggage in a Miami airport was made pursuant to a search warrant; the search warrant did

not appear of record, and the record demonstrated that defendant offered no evidence of facts with which to overcome the presumption of regularity of the search warrant or to overcome the resulting prima facie evidence of the reasonableness of the search; and the record disclosed that Florida officers had reasonable grounds to believe that defendant's luggage contained contraband and their affidavit would be sufficient to support a finding of probable cause for the issuance of the search warrant by the Florida judge.

APPEAL by the State from *Brown, Judge.* Order entered 3 October 1980 in Superior Court, HYDE County. Heard in the Court of Appeals 28 April 1981.

This is an appeal from an order, entered in the course of a proceeding to determine whether defendant had violated a condition of his probation, which allowed defendant's motion to suppress evidence seized by Florida authorities in Miami on 28 August 1979.

Defendant was convicted of felonious sale and delivery of marijuana, a violation of G.S. § 90-95(a)(1), on 13 August 1979 in the Hyde County Superior Court. A prison sentence of not less than five years nor more than five years was imposed, but was suspended upon compliance with several conditions, including the following "special condition" of probation:

> 3. During the period of probation you are not to have in your possession or under your control any controlled substances as defined by Chapter 90 of the N.C. General Statutes, unless it is duly prescribed by an authorized physician and dispensed by a physician or a pharmacist.

See State v. Trapper, 48 N.C. App. 481, 269 S.E. 2d 680, *appeal dismissed*, 301 N.C. 405, 273 S.E. 2d 450 (1980). On 29 November 1979, defendant's probation officer signed a probation violation report stating that the officer had probable cause to believe that defendant violated the above-quoted condition in that defendant "was arrested at Miami International Airport for possession of marijuana by Officers Bill Johnson and Tom Dazevedo [sic] of the Dade County Public Safety Department. . . ." Subsequently, on 24 January 1980, defendant was arrested in Florida and served with a motion for revocation of probation.

On 25 February 1980, before the hearing on the probation violation report, defendant made a motion in the Hyde County Superior Court seeking to suppress "any and all evidence" taken from defendant in Miami, Florida on 28 August 1979, "and any

evidence obtained directly or indirectly therefrom." Defendant gave as "grounds" for his motion that the "detainment and interrogation of the Defendant at the Miami International Airport on August 28, 1979, and the seizure and search of his baggage" were in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, as well as G.S. § 15A-974. Defendant supported this motion with a "Motion to Suppress and Incorporated Memorandum of Law" based upon the Miami incident, which he had filed in the Eleventh Judicial Circuit of the State of Florida, as well as with an "Order Granting Motion to Suppress" entered by the County Court for Dade County, Florida on 15 February 1980, in which that court found that defendant's detention and seizure were based upon "insufficient articulable facts to pass constitutional muster." The parties agreed upon a "statement of facts" as set forth in defendant's "Motion to Suppress and Incorporated Memorandum of Law" and the report of the Dade County, Florida investigating officer dated 28 August 1979, which was filed by the State. The uncontroverted facts disclose the following:

At 5:05 p.m. on 28 August 1979, defendant was observed by Officer William Johnson of the Dade County Public Safety Department on a sidewalk outside the National Airlines Terminal at Miami International Airport. Defendant, carrying a foldover suitbag and a briefcase in one hand and a National Airlines ticket in the other, appeared nervous and impatient. After getting the attention of a National Airlines porter, defendant set down his luggage and began talking with the porter. Officer Johnson moved closer, and saw that defendant's ticket bore a baggage claim check with the serial number "772025." Johnson then learned that defendant had checked a suitcase onto a flight and that defendant was en route to New Orleans.

Officer Johnson observed that defendant also had a brown suitcase on the sidewalk, and that defendant was concerned that his checked luggage might not get aboard the flight in time. Defendant's hands shook visibly. After showing the porter his ticket and requesting that the suitcase be placed aboard the plane, defendant was observed by Johnson to proceed into the terminal with his briefcase, suitbag, and ticket in his hands. Once inside, defendant stopped and set down his luggage, apparently to examine his ticket. Johnson then saw some movement of defend-

ant's hands which caused him to suspect that defendant had placed the claim check in his pants pocket or down his pants. Defendant then looked around nervously and continued through the airport.

At this point, Johnson walked over to Detective T. D'Azevedo of the Dade County Public Safety Department, and pointed defendant out to him. The two officers then followed defendant toward the National Airlines boarding area. D'Azevedo then displayed his badge to defendant and requested that defendant speak with him for a moment. Defendant stopped, and D'Azevedo asked to see his ticket and identification. Defendant, pale and sweaty, gave D'Azevedo his ticket and his Florida driver's license. Defendant's hands shook so violently that he nearly dropped the license. D'Azevedo turned around and began writing down the information. Johnson, who was behind defendant, then observed defendant, his hands trembling violently, placing his hand first into the front of his pants, and then, with what appeared to be a claim check in his hand, into the back of his pants. Defendant was wearing tightly fitting jeans. Johnson then moved in to secure defendant by grabbing both of his arms. Defendant pulled his hand bearing the claim check from his pants and Johnson seized it from him.

Meanwhile, D'Azevedo observed that the name on defendant's ticket, "L. Harris," did not match the name on defendant's driver's license, "Dennis Lombardo." Johnson then left to obtain the suitcase corresponding to the claim check. In response to defendant's requests to be released, D'Azevedo told him he was being detained.

Johnson procured the services of the U.S. Customs narcotic detector dog unit and after obtaining the suspect suitcase, set it down among three other suitcases randomly selected. A narcotics detector dog, "Reggie," then "alerted" to the presence of a narcotic odor coming from the suspect suitcase. Defendant was informed of this and was placed under arrest for possession of an unknown controlled substance of unknown quantity. Defendant was placed in a holding cell at the airport's police service office. Defendant's luggage was transported to Station Three, where another U.S. Customs narcotic detector dog, "Dewey," "alerted" to the presence of a narcotic odor emanating from defendant's

briefcase and suitbag. Defendant refused to give his consent to a search of his luggage, and thereafter, a *search warrant* was obtained for the suitcase, suitbag, and briefcase. Upon execution of the search warrant, twenty grams of marijuana were found in the suitcase.

After reviewing these facts and the arguments of counsel, the court concluded that there were "insufficient facts to constitutionally justify the detention and seizure of the person of the defendant and the subsequent search of the defendant's luggage and the seizure of marijuana was unconstitutional," and allowed defendant's motion. The State appealed.

Attorney General Edmisten, by Assistant Attorney General Frank P. Graham, for the State.

Herman E. Gaskins, Jr., and Joel Hirschhorn, for the defendant appellee.

HEDRICK, Judge.

The sole question presented by this appeal is whether the superior court erred in granting defendant's motion to suppress dated 25 February 1980. We note at the outset that our decision makes it unnecessary for us to discuss whether the Fourth Amendment exclusionary rule is applicable in probation revocation hearings in this State.

A motion to suppress evidence in the superior court must be in writing and must state the grounds upon which it is made. G.S. § 15A-977(a). The motion to suppress made by defendant in the present case in the superior court of this State was indeed in writing, and stated the "grounds" therefor as

> [t]he detainment and interrogation of the Defendant at the Miami International Airport on August 28, 1979, and the seizure and search of his baggage were in violation of rights guaranteed to him under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and North Carolina General Statutes Section 15A-974.

Inexplicably, both defendant's motion to suppress and Judge Brown's order allowing it ignore the fact the record before Judge Brown clearly established that the search of defendant's luggage in Miami was made pursuant to a search warrant.

Rather, the motion to suppress seems to have been treated by defendant and the superior court as one to suppress evidence discovered and seized pursuant to a *warrantless* search.

Ordinarily, a search warrant will be presumed regular if irregularity does not appear on the face of the record. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972); *State v. Travatello*, 24 N.C. App. 511, 211 S.E. 2d 467 (1975), and when the search warrant does not appear of record, it is assumed in all respects regular on appeal. *State v. Shermer*, 216 N.C. 719, 6 S.E. 2d 529 (1940). Furthermore, the wording of the Fourth Amendment would indicate that a valid search warrant is prima facie evidence of the reasonableness of the search. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E. 2d 689 (1972).

In the present case, the search warrant does not appear of record, and the record before us demonstrates that defendant offered no evidence of facts with which to overcome the presumption of regularity of the search warrant or to overcome the resulting prima facie evidence of the reasonableness of the search. Assuming arguendo that defendant's motion to suppress in the superior court did challenge the validity of the search warrant, we are satisfied that the record before us discloses that the Florida officers had reasonable grounds to believe that defendant's luggage contained contraband, *see State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed. 2d 143, 100 S.Ct. 220 (1979); *State v. Tillett*, 50 N.C. App. 520, 274 S.E. 2d 361 (1981), and that their affidavit would be sufficient to support a finding of probable cause for the issuance of the search warrant by the Florida judge. *See State v. Trapper*, *supra*. We hold that the superior court improperly granted defendant's motion to suppress.

For the reasons stated, the order allowing defendant's motion to suppress is reversed, and the cause is remanded to the superior court for the entry of an order denying the motion to suppress and for further proceedings.

Reversed and remanded.

Judges ARNOLD and WEBB concur.

Gaskins v. McCotter

ARCHIE A. GASKINS, GUARDIAN AD LITEM FOR LOSSIE V. GASKINS, PLAINTIFF v. D. C. McCOTTER, JR., TRUSTEE AND WEYERHAEUSER COMPANY, DEFENDANTS AND D. C. McCOTTER, JR., TRUSTEE, THIRD PARTY PLAINTIFF v. DURWOOD B. ARANT, THIRD PARTY DEFENDANT

No. 803SC987

(Filed 2 June 1981)

Rules of Civil Procedure § 17— substitution of trustee for guardian ad litem

Since the trial court clearly had authority under G.S. 1A-1, Rule 17(b)(1) to determine whether it was expedient for a guardian ad litem to bring and maintain an action for an incompetent when the incompetent had a general guardian or trustee in the State, the trial court manifestly had authority to substitute the general guardian or trustee as party plaintiff for the guardian ad litem in an action brought on behalf of the incompetent.

APPEAL by plaintiff from *Rouse, Judge.* Order entered 17 June 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 28 April 1981.

This civil proceeding was commenced by plaintiff Archie A. Gaskins as guardian ad litem for Lossie V. Gaskins in a complaint filed in Carteret County on 16 December 1977. In his complaint, plaintiff alleged that Lossie V. Gaskins, who had been adjudged incompetent by a jury in Craven County on 20 October 1977, had entered into a "purported contract" with defendant D. C. McCotter, Jr., for the sale of certain size timber located on a tract in Carteret County owned by Lossie V. Gaskins on 3 February 1969, and that Lossie V. Gaskins was incompetent and unable to "understand the nature, importance and consequences of her acts" at the time said contract was entered. The complaint further alleged that a deed conveying the timber was executed, but Lossie V. Gaskins never received any money for the land; that defendant McCotter, knowing of her incapacity, assigned the contract to defendant Weyerhaeuser Company on 2 June 1969; and that thereafter the Carteret County tract was "virtually stripped of all timbers . . . to the extent that it is virtually worthless today. . . . " Averring that the property in question had a "reasonable value of $150,000.00," and that the deed conveying the timber was "absolutely void" due to Lossie Gaskins' "infirmities," plaintiff prayed for the sum of $150,000 or in the alternative, "such sum as is necessary to place plaintiff's ward's property in a status quo state as of February 3, 1969," plus costs.

Defendant McCotter thereafter filed a third party complaint against Durwood B. Arant, alleging that Arant was the real party in interest in the timber transaction with Lossie Gaskins, since McCotter merely conducted an investigation into the title to the Carteret County tract and prepared the timber deed designating McCotter as trustee to hold title thereto for the benefit of Arant. McCotter further alleged that he had no dealings with Lossie Gaskins, that the conveyance was made at the request of Arant, and that he received no part of the purchase price or any other moneys in connection with the transaction. McCotter demanded judgment against Arant for all sums adjudged against McCotter in favor of plaintiff.

On 14 February 1978, Arant answered plaintiff's complaint, admitting the contract with Lossie Gaskins and the deed, but denying the other material allegations. Arant further averred, among other things, that Carteret County was an improper venue for the action, that the complaint failed to state a claim upon which relief can be granted, that plaintiff was not a proper party to maintain the action since a trustee had been appointed for Lossie Gaskins' estate, and that the action was barred by the three year statute of limitations (G.S. § 1-52). Arant also answered the third party complaint on 14 February 1978, denying liability to McCotter, but admitting that McCotter conducted the title investigation and prepared the timber deed, that McCotter as trustee conveyed the property at Arant's request, and that McCotter received no moneys in connection with the transaction. Arant also averred that the complaint failed to state a claim upon which relief could be granted.

Defendant Weyerhaeuser answered plaintiff's complaint on 8 June 1978, admitting the assignment of the timber contract, but denying the other material allegations. Weyerhaeuser pleaded the statute of limitations as a bar to the action, and also alleged that Carteret County was not the proper venue for the action, and that plaintiff was not the proper person to bring and maintain the action. The same day, Weyerhaeuser answered a cross action filed against it by McCotter, raising defenses similar to those in its answer to plaintiff's complaint.

On 6 September 1978, after a hearing, Judge Reid ordered that the venue for plaintiff's action be changed to Craven County,

and in two separate orders filed 8 September 1978, denied defendant's motions to dismiss the complaint on the grounds of insufficiency of process, and for failure to state a claim pursuant to Rule 12(b)(6) and "failure to make a necessary party."

On 21 January 1980, defendant McCotter filed a motion seeking to have B. Hunt Baxter, Jr., substituted for plaintiff in the action. In the motion, McCotter alleged that on or about 26 October 1977, plaintiff petitioned the Clerk of the Superior Court in Craven County to be appointed general guardian of Lossie Gaskins, and after a hearing, the Clerk made an order finding that plaintiff "did not possess the financial discretion and other qualifications to entitle him to be appointed guardian." McCotter further alleged that B. Hunt Baxter, Jr., was found by the Clerk to be a "fit and suitable person" and in an order dated 8 January 1978, effective 4 January 1978, Baxter was appointed "Trustee of the Estate of Lossie V. Gaskins." McCotter then alleged that since Baxter "has all the powers and authorities which are conferred upon a general guardian, he should now be substituted as plaintiff in this action . . . ." In support of his motion, McCotter offered an order of the Clerk of the Superior Court in Craven County dated 12 January 1978 appointing B. Hunt Baxter, Jr., as trustee of the estate of Lossie Gaskins, effective 4 January 1978.

Plaintiff made a countermotion to McCotter's 21 January 1980 motion, alleging that the issues raised in McCotter's motion were *res judicata*, since the trial judge on 14 November 1979 had denied a previous motion seeking to dismiss the action on the grounds that plaintiff "is not a proper person to have brought this action and for Summary Judgment." After a hearing on McCotter's 21 January 1980 motion, the court concluded that B. Hunt Baxter, Jr., was duly appointed trustee pursuant to G.S. § 33-1 and vested with all the powers conferred under G.S. § 35-2, such that Baxter was "entitled to handle all of the affairs of the said Lossie V. Gaskins, including the prosecution of this civil action;" and the court ordered that Baxter be substituted as party plaintiff in the place of Archie Gaskins. Plaintiff Archie Gaskins, guardian ad litem, appealed.

Darris W. Koonce and Bruce H. Robinson, Jr., for the plaintiff appellant.

Stith and Stith, by Lawrence A. Stith, for defendant appellee D. C. McCotter, Jr.

No counsel for the remaining defendant appellees.

HEDRICK, Judge.

Plaintiff's sole assignment of error is set out in the record as follows:

> That the Court committed error in granting the Motion to substitute B. Hunt Baxter, Jr., Trustee for Lossie V. Gaskins, as plaintiff in the place of Archie A. Gaskins, Guardian ad Litem for Lossie V. Gaskins.

This assignment of error is based upon a single exception to the entry of the order substituting B. Hunt Baxter, Jr., Trustee, as party plaintiff.

G.S. § 1A-1, Rule 17(b)(1) in pertinent part provides:

> In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or non-residents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if . . . there is no such known guardian, then such persons may appear by guardian ad litem.

G.S. § 1A-1, Rule 17(b)(3) provides:

> Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

G.S. § 33-1 in pertinent part provides:

> [W]here any adult person is . . . found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians.

See also G.S. § 35-2.

The record before us discloses that Lossie V. Gaskins was declared incompetent by a jury on 20 October 1977, and on 26 Oc-

tober 1977, plaintiff Archie Gaskins petitioned the Clerk of Superior Court in Craven County to be appointed her general guardian. Thereafter, on 16 December 1977, before the clerk had ruled on plaintiff's petition, plaintiff, as guardian ad litem, initiated the present proceeding by filing a complaint in Carteret County. At that point in time, since Lossie Gaskins had no guardian within the State, plaintiff could be appointed as guardian ad litem and could maintain an action in that capacity under the statutes cited above. Thereafter, the clerk in Craven County, acting on plaintiff's petition, filed an order finding that plaintiff would not be a fit and proper person to be appointed general guardian or trustee for Lossie Gaskins, but that B. Hunt Baxter, Jr., would be such a person, and directed that Baxter be appointed as trustee of the estate of Lossie Gaskins effective 4 January 1978. As of 4 January 1978 Baxter, as trustee, became the proper person to maintain the action under G.S. § 1A-1, Rule 17(b)(1), and Archie Gaskins could maintain the action as guardian ad litem only as long as the court "deemed" it to be "expedient." Since the court clearly had authority to determine whether it was expedient for the guardian ad litem to bring and maintain the action when the incompetent had a general guardian or trustee in this State, it manifestly had authority to substitute the general guardian or trustee as party plaintiff for the guardian ad litem.

The order appealed from is

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE MARTIN

No. 8026SC1182

(Filed 2 June 1981)

1. Homicide § 21.9— manslaughter—sufficiency of evidence

In a prosecution for involuntary manslaughter evidence was sufficient to be submitted to the jury where it tended to show that deceased was shot five

or six times, with four shots entering his back, another entering the back of his forearm, and one striking his left cheek; the lethal wound was caused by a shot into deceased's back, going through his heart; and when deceased was shot, he was not inside defendant's trailer but in the yard, some distance from the trailer.

2. **Homicide § 28— self-defense—deceased's intent to kill defendant—instruction not required**

There was no merit to defendant's contention that the trial court erred in its instruction to the jury on self-defense by failing to instruct that the jury should consider any statement by deceased of an intent to kill defendant, since the court fully and correctly instructed the jury on the law of self-defense, and defendant made no request to the court to charge concerning deceased's alleged threats to defendant.

3. **Homicide § 28.4— defense of home—instructions proper**

The trial court did not err in giving its charge on defense of the home in connection with its instruction on self-defense; moreover, since neither the State's nor defendant's evidence nor any combination thereof supported the defense of habitation, defendant was not entitled to such an instruction, and any error therein was harmless and not prejudicial to defendant.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 31 July 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 April 1981.

Defendant was convicted of voluntary manslaughter and appeals from the sentence of imprisonment.

The state's evidence showed that defendant and his former wife, Joann Shoemaker, had a child, Brent, and on 22 February 1980 they had a heated discussion by telephone concerning the child. Joann got off work about 11:00 p.m. and, with her fiance, David Morelock, proceeded to defendant's house trailer to talk with him about Brent. Defendant was not at his home, so Joann and David went to the home of defendant's mother in their efforts to locate him. Not finding defendant there, they decided to go back to his house to see if he had returned home.

David went to the door and knocked, and defendant, clothed in his underwear, answered the door. David told defendant they had to talk about some things. Joann heard a slap and saw that David had defendant by the arm. He grabbed defendant's tee shirt and they went into the house. Joann followed them into the house. Defendant had gone into a room, evidently closing the door. Joann went outside, saw the window was open, and thought

defendant had left the room. They decided to leave and had entered their van when defendant came running across the yard. He ran to his trailer and went inside. David got out of the van and had walked about halfway to the door of the trailer when a gun appeared from the doorway and defendant started shooting at David. David turned around as if to run. Seven shots were fired and David was hit in his left cheek and four or five places in his back and the back of his arm. In the opinion of the medical examiner for Mecklenburg County, the gunshot wound causing death entered David in the left back and went through the left lung and heart.

Defendant's evidence showed that he had watched television at his mother's home till about midnight and then went home. He had a Mossburg .22-caliber rifle in his home. He went to bed about 12:35 and then heard a knock at the door. He went to the door, thinking that it was his wife at the door. When he opened the door, David came in on him and pushed him across the room. He got away and ran into the bedroom, locking the door. While David was beating on the door, defendant went out the window and ran to his aunt's house and then to his father-in-law's house, but was unable to get into either place. He hid in the woods and started back to his trailer because he thought David and Joann had gone. Then he saw David coming across the field, hollering. David threatened to kill him. He ran on toward the trailer, with David behind him running "fullstream." He got into the trailer, but David kept him from shutting the door. David continued to threaten him. Defendant grabbed the rifle, which was behind the door, and backed up into the kitchen as David came through the door. When David came on him, he started firing and continued to fire till the gun clicked. David headed for the door of the trailer, and defendant grabbed his pants and ran out the back door into the woods. He went to his father-in-law's house and the police came. He admitted he had done the shooting and told the officers where the gun was located.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Bailey, Brackett & Brackett, by Martin L. Brackett, Jr., for defendant appellant.

MARTIN, (Harry C.), Judge.

[1] Defendant first argues there was insufficient evidence to overcome his motions to dismiss, contending that the uncontroverted evidence showed defendant acted in self-defense and in defense of his home. The evidence, considered in the light most favorable to the state, *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971), shows that the deceased was shot five or six times, with four shots entering his back, another entering the back of his forearm, and one striking his left check. The lethal wound was caused by a shot into David's back, going through his heart. When David was shot he was not inside the trailer, but in the yard, some distance from the trailer. This evidence is sufficient to carry the state's case to the jury. Where, as here, the state does not introduce exculpatory evidence, defendant's evidence tending to exculpate him is to be disregarded on motion for nonsuit. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). The assignment of error is without merit.

[2] Defendant contends the court erred in its instruction to the jury on self-defense by failing to instruct that the jury should consider any statement by deceased of an intent to kill defendant. In summarizing the evidence, the court included this testimony. Later, in its charge on self-defense, the court stated:

> It is for you, the Jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time and place in question. In making this determination, you consider all of the circumstances revealed by the evidence, as you find them to have existed from the evidence, including the size, age, and strength of the defendant, as compared to David Morelock, the fierceness of the assault, if any, upon the defendant by the deceased and whether or not the deceased had a weapon or some object in his possession.

Defendant made no request to the court to charge concerning deceased's alleged threats to defendant. The court is not required to mention all the testimony in applying the law of self-defense to the evidence. Where the court fully and correctly instructs the jury upon the law of self-defense, it is not error to refuse to give defendant's requested instructions. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851 (1961). Here, defendant made no such request. We find no prejudicial error in this assignment.

Further, defendant argues the court erred in its self-defense charge by instructing with respect to defendant being the aggressor when there was no evidence to sustain a finding that defendant was the aggressor. The evidence set out above clearly supports the instruction. The case is factually distinguishable from *State v. Ward*, 26 N.C. App. 159, 215 S.E. 2d 394 (1975), where there was no evidence to support an instruction that defendant was an aggressor. This contention is overruled.

We find no error in the court's charge concerning burden of proof on the self-defense issue. The court properly placed the burden of proof upon the state to prove beyond a reasonable doubt that defendant did not act in self-defense. The court repeated this instruction at least three times in its charge.

[3] Finally, defendant assigns error to the court's instructions on defense of the home. The trial court gave its charge on defense of the home in connection with its instructions on self-defense. We find no error in so doing. " '[T]he rules governing the right to defend one's *habitation* against *forcible entry by an intruder* are substantially the same as those governing his right to defend himself.' " *State v. McCombs*, 297 N.C. 151, 156, 253 S.E. 2d 906, 910 (1979) (emphasis in original). Defendant's evidence indicates a shooting inside the trailer, with defendant resisting in an alleged assault. The state's evidence indicates an unprovoked shooting by defendant while his victim was in the yard, not making any effort to forcibly enter defendant's home. Where one acts to prevent a forcible entry of his home, the defense of habitation arises. *Id.* Here, neither the state's evidence nor the defendant's evidence, nor any combination thereof, supports this defense. Defendant was not entitled to the challenged instruction. Any error therein was harmless and not prejudicial to defendant. Further, a review of this instruction discloses it to be in accord with *McCombs, supra*, where the Court held:

> The North Carolina cases indicate that the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances (e.g., attempted entry accompanied by threats) that the occupant reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony.

297 N.C. at 156-57, 253 S.E. 2d at 910 (emphasis in original). Here, no combination of the evidence supports a finding that defendant shot deceased while he was attempting to forcibly enter the trailer. We find no prejudicial error in the challenged instruction.

No error.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. MARTHA ISOM

No. 8126SC19

(Filed 2 June 1981)

1. **Criminal Law § 162— necessity for objection to evidence**

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost.

2. **Obstructing Justice § 2— intimidating a State's witness—sufficiency of warrant**

A warrant was sufficient to charge defendant with the offense of intimidating the State's witness in violation of G.S. 14-226 where it alleged that defendant did "threaten or in any other manner intimidate or attempt to intimidate" a named person who had been summoned as a witness in district court of this State in an attempt to prevent the witness from attending court by threatening by telephone to physically injure the ten-year-old daughter of the witness if the witness did not drop charges preferred against defendant for communicating threats.

3. **Criminal Law § 69— telephone call—insufficient foundation for testimony—harmless error**

In a prosecution for intimidating a State's witness, the trial court erred in failing to strike testimony by the prosecutrix's brother, in response to a question as to whether he had received any calls from defendant, that "the next day she called my number, which was the only number that she had for [the prosecutrix]," since no proper foundation was laid for the testimony; however, such error was not prejudicial to defendant where other evidence was before the jury without objection that defendant had called the prosecutrix while she was living with her brother and that the brother had talked with defendant on the telephone many times and was familiar with her voice.

4. **Obstructing Justice § 1— intimidating State's witness—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendant for intimidating a State's witness where it tended to show that the witness testified against defendant in district court on a charge of com-

municating threats; defendant was convicted on that charge and appealed for a trial de novo in the superior court; and on the day after her conviction defendant by telephone threatened to kill the witness's ten-year-old daughter if the witness did not drop the charges against defendant for communicating threats.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 31 July 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1981.

Defendant was tried separately and convicted under two warrants for communicating threats and for intimidating a State's witness in District Court, Mecklenburg County. She appealed for trials *de novo* and both appeals were tried jointly in Mecklenburg County Superior Court.

The State presented evidence at trial tending to show that defendant had a homosexual relationship with Nancy Phillips [also appearing in the record as "Nancie Phillips"], the prosecuting witness. Problems arose between them and defendant threatened to throw acid in Ms. Phillips' face if she refused to meet with defendant to engage in homosexual activity. Ms. Phillips refused defendant's demands and swore out a warrant against her charging her with communicating a threat. On the day following defendant's conviction on this charge in Mecklenburg County District Court, May 15, defendant called Ms. Phillips and threatened to kill her ten-year-old daughter if Ms. Phillips did not drop the charges against defendant. Defendant also called Ms. Phillips' brother, with whom Ms. Phillips lived, and again threatened to kill Ms. Phillips' daughter if defendant went to jail on the charges. At that time, defendant's conviction for communicating threats had been appealed for a trial *de novo* to superior court.

Defendant testified that she had been intimate with Ms. Phillips for about 18 or 19 months and that they had "broken up" about Valentine's Day of 1980. Since that time, they had been "off and on" because defendant was seeing another girl. She had never threatened to harm Ms. Phillips' daughter because she herself has two children. She did not call Ms. Phillips on May 15 and has never threatened her over the phone. She had never called Ms. Phillips' brother and does not know his telephone number. Ms. Phillips had known that defendant had killed a woman, Mary Dixon, since the beginning of their relationship. She killed Ms. Dixon in 1976 in self-defense and in defense of her children; Ms.

Dixon was reaching for her children when defendant killed her. Defendant was never convicted of any crime as a result of killing Ms. Dixon.

Defendant was found guilty of intimidating a State's witness by the jury. From a judgment sentencing her to six months in prison, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Assistant Public Defender Cherie Cox, for the defendant.

MARTIN (Robert M.), Judge.

[1] Defendant presents multiple assignments of error on this appeal. Assignments of Error Numbers 3, 4, 5, 6, 7, 8, 10, 12 and 13 are based upon Exceptions Numbers 3, 4, 5, 8, 9, 12, 14, 15 and 16. None of these exceptions, except Number 8, were properly preserved for review by noting an objection, nor were they deemed preserved or taken by rule or law. Rule 10(b)(1), N.C. Rules App. Proc. When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. *Dunn v. Brookshire*, 8 N.C. App. 284, 174 S.E. 2d 294 (1970). Although Exception Number 8 was properly preserved for review by noting an objection, we find no prejudicial error in the admission of the testimony challenged by that exception. These assignments of error are overruled.

Defendant's Assignment of Error Number 14 does not comply with Rule 10(b)(2), N.C. Rules App. Proc., in that the exceptions upon which the assignments are based fail to identify the portion of the charge in question by setting it within brackets or by any other clear means of reference. This assignment of error is therefore overruled.

[2] By her first assignment of error, defendant contends the arrest warrant charging her with violation of N.C. Gen. Stat. § 14-226 is defective. The warrant reads in pertinent part as follows:

> THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT ON OR ABOUT THE 15 DAY OF MAY, 1980 IN THE COUNTY NAMED ABOVE, THE DEFENDANT NAMED ABOVE DID

UNLAWFULLY, WILFULLY & FELONIOUSLY *THREATEN OR IN ANY OTHER MANNER INTIMIDATE OR ATTEMPT TO INTIMIDATE* NANCIE PHILLIPS WHO HAD BEEN SUMMONED AS A WITNESS IN DISTRICT COURT OF THIS STATE, IN AN ATTEMPT TO PREVENT OR DETER THE SAID NANCIE PHILLIPS FROM ATTENDING COURT BY THREATENING BY TELEPHONE TO PHYSICALLY INJURE THE TEN YEAR OLD DAUGHTER OF THE SAID NANCIE PHILLIPS IF THE VICTIM DID NOT DROP CHARGES PREFERRED AGAINST THE DEFENDANT FOR COMMUNICATING THREATS IN VIOLATION OF THE FOLLOWING LAW: G.S. 14-226. (0)(0)(0). (Emphasis added.)

Defendant contends that the warrant, specifically the italicized language, is defective because it charges the offense disjunctively and failed to inform the defendant of the exact crime of which she was accused. We disagree.

We note initially that defendant never filed a motion to quash the warrant and never raised an objection to it prior to or during trial. Where the defendant seeks clarification of the State's theory for prosecution, the proper procedure is a motion for a bill of particulars. N.C. Gen. Stat. § 15A-925; *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288, 98 S.Ct. 414 (1977).

Assuming defendant did not waive her argument, it has no merit. The purpose of a criminal process is to give the defendant notice of the charge against her so that she may prepare a defense and to enable the trial court to know what judgment to pronounce in case of conviction. *See State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998, 54 L.Ed. 2d 493, 98 S.Ct. 638 (1977). The warrant in question clearly charged the defendant with violation of N.C. Gen. Stat. § 14-226 and specifically noted the criminal conduct to be tried. It met every requirement of N.C. Gen. Stat. §§ 15A-304 and 924. It is not fatally defective because the statutory language was utilized. This assignment of error is overruled.

[3] By her ninth assignment of error, defendant attacks the testimony elicited from William Cody, Ms. Phillips' brother, during the following exchange:

Q. Since that time, since May 14, have you received any type calls from Martha Isom?

MR. ACTON: OBJECTION
EXCEPTION NO. 10

THE COURT OVERRULED.

A. Yes, I have. The next day, she called my number, which was the only number that she had for Nancy.

MR. ACTON: OBJECTION, MOVE TO STRIKE. He has no way of knowing that.

THE COURT: OVERRULED. Go ahead.
EXCEPTION NO. 11

Although we do not agree with defendant that the challenged testimony was hearsay, we are of the opinion that the trial court erred by failing to strike the challenged testimony, as no foundation had been laid for it. We fail to see, however, how the error prejudiced defendant's case. Ms. Phillips had previously testified, without objection, that defendant had called her while she was living with her brother. Mr. Cody had previously testified, without objection, that he had talked with defendant on the telephone many times and that he was familiar with her voice. The challenged testimony was not necessary to establish the caller's identity and, in fact, tended to impeach Ms. Phillips' previous testimony that defendant had called her at work. As defendant has failed 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, N.C. Gen. Stat. § 15A-1443, the error is not grounds for a new trial. N.C. Gen. Stat. § 15A-1442(4)(c).

[4] By her 11th assignment of error, defendant contends her motion to dismiss should have been allowed. We disagree. On a motion for nonsuit all the evidence must be taken in the light most favorable to the State. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). When thus viewed the evidence of the State was sufficient to carry the case to the jury, and the motion of the defendant for judgment of nonsuit was properly denied.

Defendant abandoned her second and fifteenth assignments of error in her appellate brief. After carefully reviewing the record on appeal, we find that defendant received a fair trial, free of prejudicial error.

No error.

Judges WHICHARD and BECTON concur.

GELDER AND ASSOCIATES, INC. v. AMY E. HUGGINS, EXECUTRIX OF THE ESTATE OF C. J. HUGGINS, DECEASED

No. 8010DC889

(Filed 2 June 1981)

1. **Contracts § 27.1— contract with individual or corporation—question of fact—summary judgment improper**

In an action by plaintiff to recover the costs of paving a parking lot, the trial court erred in entering summary judgment for defendant where a question of fact existed as to whether defendant's deceased husband, as an individual, owed plaintiff the amount due on the paving contract or whether the obligation was that of a realty company bearing the same name as defendant's husband.

2. **Executors and Administrators § 19.1— claim against estate—claim not barred by statute of limitations**

Plaintiff's complaint did not show on its face that plaintiff's claim for the costs of paving a parking lot was barred by G.S. 1-52(1) or any other applicable statute of limitations since plaintiff's alleged claim against defendant's deceased husband arose on 30 June 1976, some time before the husband's death, and was viable at his death; notice of the claim was given within six months after qualification of the executrix; and the suit was begun within three months after notice of rejection of the claim was given to plaintiff in writing. G.S. 1-22; G.S. 28A-19-3; G.S. 28A-19-16.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 23 May 1980 in District Court, WAKE County. Heard in the Court of Appeals 1 April 1981.

Plaintiff brought this action on 9 August 1979 to recover the costs of paving a parking lot, alleging in pertinent part the following:

1. C. J. Huggins, deceased, became indebted to plaintiff, a North Carolina corporation, for the paving of a parking lot.
2. The cost of the paving was in the amount of $1,452.60 as evidenced by an invoice dated 30 June 1976 and sent to C. J. Huggins, although addressed to Huggins Realty Company in Cary.

3. Plaintiff filed a notice of claim with the executrix of C. J. Huggins' estate, Amy Huggins, which claim was filed within the time allowed by law. The notice is incorporated into plaintiff's complaint by reference and states that C. J. Huggins owed plaintiff the disputed sum.

4. The claim was denied by Huggins' estate on 26 July 1979.

Plaintiff prayed that the court grant it relief against defendant in the amount of $1,452.60.

On 12 October 1979, defendant denied the material allegations of the complaint, moved for dismissal for failure to state a claim pursuant to G.S. 1A-1, "Rule 12(d)(6)" [sic], and alleged that plaintiff's action was barred by the statute of limitations, specifically G.S. 1-52(1). Later, defendant moved for summary judgment on the ground that the complaint showed on its face that "the obligation, if any there be," was that of Huggins Realty Company and not the obligation of C. J. Huggins, his estate, or his executrix. Defendant also asserted in support of her motion that the complaint shows on its face that the alleged obligation arose no later than 30 June 1976 and that plaintiff's claim for relief is barred by G.S. 1-52(1) or other applicable statutory provisions. In support of her motion, defendant filed a statement by the Secretary of State certifying that Huggins Real Estate Service Company was incorporated on 1 August 1969 and is an active corporation in good standing.

Plaintiff filed two opposing affidavits. In the first, C. W. Gelder, president of plaintiff corporation, swore that in performing the paving work he dealt with C. J. Huggins individually, was never informed that any corporation existed and never dealt with any corporation. In the second affidavit, plaintiff's attorney swore that he had thoroughly searched the records of the Secretary of State and found that no corporation by the name of Huggins Realty Company existed on 30 June 1976, at the time complaint was filed, or at any time set forth in the complaint.

The trial court, being of the opinion that there was no genuine issue as to any material issue of fact and that defendant was entitled to a judgment as a matter of law, allowed defendant's motion for summary judgment. Plaintiff appeals.

Edgar R. Bain for plaintiff appellant.

Seay, Rouse, Johnson, Harvey & Bolton, by Ronald H. Garber, for defendant appellee.

HILL, Judge.

The party moving for summary judgment, defendant in this case, has the burden of " 'clearly establishing the lack of any triable issue of fact by the record properly before the court.' " *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419 (1979). Movant may carry his burden

> 'by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing.' (Citation omitted.) *Id.* at p. 470.

Two things are apparent after reading the authority cited above. First, the court will not decide an issue of fact when a motion for summary judgment is made. Second, before an opponent can be required to give a forecast of evidence, the movant must give a forecast which, when considered alone, is sufficient to compel a verdict or finding in his favor on the claim or defense. *Id.* at p. 470.

By applying the principles stated above, we now determine the propriety of the trial court's grant of summary judgment in defendant's favor. Two inquiries must be made.

[1] Did C. J. Huggins, *as an individual*, owe plaintiff the amount due on the paving contract? This is the question of fact that would have to be determined in the affirmative in order for plaintiff to prevail on his cause of action.

In her motion for summary judgment, defendant asserts that the complaint shows on its face that the obligation, if any, was that of Huggins Realty Company and not that of C. J. Huggins. In a supporting document, defendant shows that Huggins Real Estate Service Company is an active North Carolina corporation in good standing. This is not the kind of forecast which is sufficient to show there is no issue of fact, thus compelling a finding in

defendant's favor, or compel plaintiff-opponent to make a forecast. The complaint clearly states that Huggins owed the debt, even if the attached invoice is addressed to Huggins Realty.

Assuming arguendo that defendant-movants' forecast was sufficient, we believe that plaintiff successfully opposed summary judgment in defendant's favor with his forecast of evidence. Plaintiff established by affidavit that its president dealt at all times with C. J. Huggins individually and that at no time was the president informed there was any corporation whatsoever. By further affidavit, plaintiff showed that despite the fact that its invoice was addressed to Huggins Realty Company, no corporation by that name existed at any relevant time. Regarding plaintiff-opponent's papers indulgently, as we must, we find that whether C. J. Huggins contracted individually with plaintiff is a triable issue of fact.

[2] Does the complaint show on its face that plaintiff's claim for relief is barred by G.S. 1-52(1) or any other applicable statute of limitations?

The alleged claim against C. J. Huggins arose on 30 June 1976, some time before his death, and was viable at his death. *See* G.S. 1-52(1).

G.S. 1-22 provides in pertinent part that:

> If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3 . . .

G.S. 28A-19-3 provides:

> (a) All claims . . . founded on contract, . . . which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate . . ..

* * *

(c) No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

G.S. 28A-19-16 provides:

> If a claim is presented to and rejected by the personal representative or collector, . . . the claimant must, within three months, after due notice in writing of such rejection, or after some part of the claim becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Plaintiff's claim clearly falls within the provisions of the foregoing statutes. It was not barred at the date of death of C. J. Huggins. Notice was given within six months after qualification of the executrix. The suit was begun within three months after notice of rejection in writing.

The motion granting summary judgment is reversed, and this cause is remanded to the superior court for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

SOUTHLAND ASSOCIATES, INC. v. WILLIAM BERNARD PEACH, ALICE BARBER PEACH, RAYMOND JOHN STANLEY, CAROLYN S. STANLEY, E. G. DUENWEG, MARY LOUISE DUENWEG, HARRISON D. COLE, CORRINE A. COLE, JAMES E. MARTIN, PEGGY N. MARTIN, MORRIS FRANKLIN BRITT, ANN ROBERTSON BRITT, JAMES R. PETERSON, BETTY W. PETERSON, JACK McM. PRUDEN, NANCY W. PRUDEN, W. Y. MANSON, PATRICIA S. MANSON, ELEANOR R. KINNEY, A. DOUGLAS RICE, CALVIN A. MOORE, RHUMELLE B. MOORE, RUBEN KIER, STEPHANIE WAIN, RALPH KIER, PERLA KIER, DAVID WAIN, SONDRA WAIN, THOMAS C. POLLOCK, LILLIAN S. POLLOCK, DAVID F. HERZIG, BRUCE ALAN ROELLKE, TRISHA PHYLLIS ROELLKE, EDWARD E. FORREST, MARY W. BROWN, GARLAND M. NANCE, JR., YVONNE C. NANCE, JOSEPH E. SOKAL, NANCY B. SOKAL, JEREMY CYRIL ROMANOVSKY, CARL F. SAPP, DOROTHY G. SAPP, WILLIAM

STANLEY METCALF, VIRGINIA M. METCALF, EARL G. MUELLER, MARY PATRICIA ETTARI, LORAN S. CLARK, CAROLA M. McEACHREN, JOHN W. McEACHREN, THOMAS D. ROWE, JR., KATHRYN K. DERR, BETTY H. ROBERTS, WARREN E. ATCHISON, RUBY M. ATCHISON, GEORGE W. FERGUSON, REBECCA F. FERGUSON, MARTIN D. CICCEHELLI, DADE WILLIAM MOELLER, BETTY R. MOELLER, SAMUEL J. CARAHER, ELAINE D. CARAHER, BRUCE MICHAEL FREEDMAN, BRAD MITCHEL FREEDMAN, GORDON C. HOPKINS, JOYCE C. HOPKINS, LARRY T. FUNK, IDA E. FUNK, ELEANOR J. EVANS, CLAYBORNE L. EVANS, HARRY S. HAMRICK, EMOGENE G. HAMRICK, GERALD R. KIRBY, CARL H. RICHTER, LOIS M. RICHTER, DAVID F. ADERMAN, JOAN O'CONNER ADERMAN, JOHN A. THAXTON, ELIZABETH D. THAXTON, CARL C. JAMES, MARJORIE P. JAMES, EILEEN A. MORRIS, DALE E. FILES, DORIS R. FILES, NATHANIEL A. GREGORY, MARY STUART L. GREGORY, ROBERT HARRIS SHAW, JR., MAXINE WELLBORN SHAW, FENNER DOUGLASS, JANE F. DOUGLASS, DOROTHY W. McGREGOR, CLARENCE H. McGREGOR, HAYDEN KING CLINE, SUSAN T. CLINE, MARVIN W. FERRELL, RUTH M. FERRELL, VICTOR A. BUBAS, MARCELYN D. BUBAS, JAY S. SKYLER, DENISE L. SKYLER, BEN EISENBERGER, JR., LUANA M. EISENBERGER, GARY S. WILSON, CHARLES S. WARNER, HEIDI H. WARNER, GUARANTY STATE BANK, TRUSTEE, CENTRAL CAROLINA BANK AND TRUST COMPANY, TRUSTEE, JOSEPHINE M. BROWN, TRUSTEE, RICHARD M. HUTSON, II, TRUSTEE, C. THOMAS BIGGS, TRUSTEE, R. ROY MITCHELL, JR., TRUSTEE, F. GORDON BATTLE, TRUSTEE, CHARLES W. WHITE, TRUSTEE, ARTHUR VANN, II, TRUSTEE, CENTRAL CAROLINA BANK AND TRUST COMPANY, ANTHONY PATRICK NUNN, HOME SAVINGS AND LOAN ASSOCIATION, WACHOVIA MORTGAGE COMPANY, DEWITT RALPH ROGERS, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DURHAM, N.C., SECURITY SAVINGS AND LOAN ASSOCIATION, BARCLAY'S BANK OF NEW YORK, THE NORTHWESTERN BANK

No. 8014SC989

(Filed 2 June 1981)

Deeds § 19.3— acreage as common area of condominium—issue of fact—summary judgment improper

In an action by plaintiff developer of a condominium complex for reformation of a declaration of unit ownership or alternatively a judgment quieting title to a 2.646 acre tract in dispute, and a decree that plaintiff had the right to construct additional condominium units on that tract, the trial court erred in entering summary judgment for plaintiff where a genuine issue of material fact existed as to whether the 2.646 acres in dispute were part of the common area of the condominium or whether they were reserved by plaintiff for future construction.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 20 May 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 April 1981.

On 30 August 1979 plaintiff filed a complaint alleging that pursuant to plans for development of an 11.402 acre tract of land owned by plaintiff into a condominium complex, plaintiff executed a Declaration of Unit Ownership which was recorded on 22 July 1974. The first sale was by deed dated 1 August 1974. The declaration contained three exhibits: Exhibit A, which contained a metes and bounds description of the 11.402 acre tract covered by the declaration; Exhibit B which contained a description of the proposed units; and Exhibit C, which was a description of each individual unit. More specifically, plaintiff alleges that it intended that the 8.756 acres constituting lot 1-A and the southern portion of Lot 1-B as shown on the plat recorded in Plat Book 79 at page 79 were to be subject to the declaration, that the 2.646 acres in dispute were to be reserved for future development and not subject to the declaration; and that it was by reason of a mistake that the entire 11.402 acre tract was made subject to the declaration. Plaintiff further alleges that the defendants knew that the 2.646 acres were not part of the "common area" of the condominium project. It seeks therefore a reformation of the Declaration of Unit Ownership, or alternatively, a judgment quieting title to the 2.646 acre tract in dispute, and a decree that plaintiff has the right to construct additional condominium units on that tract.

Defendants, purchasers of the condominium units and various banks with security interests in the units, answered denying plaintiff's allegations. In their counterclaim defendants averred, among other things, that plaintiff violated its own express warranty of title and breached its fiduciary relationship as managing agent.

After a period of extensive discovery plaintiff filed a motion for summary judgment on 15 February 1980 as to its second claim for relief on the ground that the affidavits, answers to requests for admissions, and the pleadings established that there is no genuine issue of material fact. The trial court granted plaintiff's motion and defendants appeal.

Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., for plaintiff appellee.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for defendant appellants.

ARNOLD, Judge.

Defendants' sole assignment of error is that the trial court erred in entering summary judgment in favor of plaintiff. Summary judgment is appropriate ". . . 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." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any genuine issue of material fact. *Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977). The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact, and the papers supporting the movant's position are closely scrutinized while the opposing papers are treated indulgently. *Id.*; *Van Poole v. Messer*, 19 N.C. App. 70, 198 S.E. 2d 106 (1973).

Applying these principles to the case *sub judice*, we find that plaintiff did not establish the lack of a genuine issue of material fact, and therefore we hold that the entry of summary judgment in its favor was not proper.

The resolution of the question of whether the 2.646 acres in dispute is part of the common area of Pebble Creek Condominiums or was reserved by plaintiff for future construction depends upon an interpretation of the Declaration of Unit Ownership. Where the language of a contract is plain and unambiguous the construction of the agreement is a matter of law for the court. Where, however, the contract terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms, and the jury under proper instructions by the court may determine the meaning of the language employed. 3 Strong's N.C. Index 3d, Contracts § 12.2 (1976).

Plaintiff contends that (1) Exhibit B of the Declaration of Unit Ownership, which was recorded and of which the defendants had notice, clearly shows contemplated additional units located on the land in question and (2) Section 18(B) of the declaration expressly provides that plaintiff could construct up to twenty-five (25) additional units on that land *or* on contiguous land owned by

plaintiff. Defendants' contentions, which are supported by their sworn answers to plaintiff's interrogatories, are that any plans to build additional units were abandoned in 1974 when plaintiff built the tennis courts on part of Lot 1-B, and that they were informed either that such plans had been abandoned or that there were no such plans prior to purchasing their units. Defendants further assert that by the allegations in the complaint, plaintiff admits that the entire 11.402 acre tract was made subject to the Declaration of Unit Ownership, and that Section 18(B) provides only if additional units are built on land owned by plaintiff *and* contiguous to the land covered by the declaration, then the declaration would be deemed amended to include such units for the purposes of sharing the common areas.

It is apparent from a review of the pleadings, answers to interrogatories, the documents and other materials in the record that the written contract between the parties is ambiguous and subject to two different interpretations. Due to this ambiguity we hold that a genuine issue of material fact exists and therefore summary judgment in favor of plaintiff was improperly entered.

The judgment is vacated and this cause is remanded for further proceedings.

Vacated and remanded.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA, EX REL., NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS v. TESTING LABORATORIES, INC.

No. 8010SC937

(Filed 2 June 1981)

1. Judgments § 21— modification of consent judgment

A consent judgment cannot be modified or set aside, absent fraud or mutual mistake, without the consent of the parties.

2. Judgments §§ 21.1, 21.2— procedure for vacating consent judgment

The proper procedure to vacate a consent judgment for fraud or mutual mistake is by an independent action, and the proper procedure to set aside the judgment for want of consent is by motion in the cause.

3. Judgments § 21— consent judgment based on unconstitutional statute

A consent judgment will not be set aside because it was predicated on a statute later declared unconstitutional.

4. Professions and Occupations § 1— injunction against practice of professional engineering—contempt of court

The evidence supported the trial court's order finding defendant corporation and its president in civil contempt of a permanent injunction entered by consent which enjoined defendant corporation from the practice of professional engineering.

APPEAL by defendants from *Brannon, Judge.* Order entered 3 June 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1981.

Plaintiff instituted this action on 20 December 1978 to enjoin the defendant corporation from the practice of engineering, from making "recommendations" based on its tests results, and from representing to the general public that it is a professional engineering corporation. A permanent injunction was sought on grounds that defendant was not authorized to practice professional engineering since it was not incorporated as required under the provisions of General Statutes Chapter 55B nor was it registered pursuant to the provisions of General Statutes Chapter 89C. Defendant answered, admitting that it was not a duly incorporated and registered professional corporation but denying that plaintiff was entitled to an injunction as requested.

On 20 August 1979, the following consent judgment was entered into by the parties:

> This matter coming on to be heard and being heard before the undersigned Judge, and it appearing to the Court that the Defendant is willing to amend its Charter, in the North Carolina Secretary of State's office, to read:
>
> ARTICLE III
>
> A. To maintain and conduct a laboratory or laboratories to determine by scientific investigation, studies, experiences, and testings, the ability of soils, concrete ag-

gregates, asphalt, and other structural materials of all types, to withstand pressure; to assemble data and findings; to compile reports and papers thereon; to maintain testing stations, machinery, and apparatus, and to analyze soil contents.

And whereas the Defendant has further consented to make no representations to the general public that it is a professional engineering corporation or give "recommendations" based on results of tests made by it in the normal course of its business or any other form of engineering;

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Defendant's Charter in the North Carolina Secretary of State's office be amended to read:

ARTICLE III

A. To maintain and conduct a laboratory or laboratories to determine by scientific investigation, studies, experiences, and testings, ability of soils, concrete aggregates, asphalt, and other structural materials of all types, to withstand pressure; to assemble data and findings; to compile reports and papers thereon; to maintain testing stations, machinery, and apparatus; and to analyze soil contents.

and the Defendant be and it is hereby permanently enjoined and restrained from making representations to the general public that it is a professional engineering corporation; or from "recommendations" based on results of tests made by it in the normal course of its business or any other form of engineering.

Let the Defendant pay the costs.

This the 20th day of August, 1979.

s/ D. M. MCLELLAND [*sic*]
Judge Presiding

CONSENTED TO:
TESTING LABORATORIES, INC.
By: s/ Luther Donald Barrier
President

WALKER AND DOWDA
By: s/ Perry N. Walker
Attorneys for Defendant

BAILEY, DIXON, WOOTEN,
MCDONALD & FOUNTAIN
By: s/ Wright T. Dixon, Jr.
Attorneys for Plaintiff

On 21 April 1980, plaintiff filed a motion to show cause why defendant corporation and its president, Luther Donald Barrier, individually, should not be held in contempt for violation of the 20 August 1979 Consent Order. An order to show cause was issued to defendants. A hearing was held and by order dated 3 June 1980, defendant corporation and its president were found to be in civil contempt of a permanent injunction of the Superior Court of Wake County.

From this Order, defendants appeal.

Bailey, Dixon, Wooten, McDonald and Fountain, by Wright T. Dixon, Jr., for plaintiff appellee.

Clark, Wharton and Sharp, by David M. Clark and David R. Maraghy, for defendant appellants.

VAUGHN, Judge.

By their appeal, defendants seek to have this Court reverse the 3 June 1980 contempt order and vacate the 20 August 1979 consent judgment upon which the contempt was based. In support of their position, defendants have presented arguments that various provisions of General Statutes Chapter 55B and Chapter 89C are unconstitutional, void and unenforceable. They therefore contend that their agreement to restrict their activities in compliance with these statutory provisions is a legal nullity from which no contempt may arise.

[1, 2] The issues raised by defendants are not before us on this appeal. The law of this State is well-settled that a consent judgment cannot be modified or set aside, absent fraud or mutual mistake, without the consent of the parties. *King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945). Even with the consent of the parties, a consent judgment may not be later opened, changed or set

aside unless the appropriate legal proceeding is instituted. *Complex, Inc. v. Furst* and *Furst v. Camilco, Inc.* and *Camilco, Inc. v. Furst*, 43 N.C. App. 95, 258 S.E. 2d 379 (1979). The proper procedure to vacate a consent judgment for fraud or mutual mistake is by an independent action. *Hazard v. Hazard*, 35 N.C. App. 668, 242 S.E. 2d 196 (1978). The proper procedure to set aside the judgment for reasons of want of consent is by a motion in the cause. *Overton v. Overton*, 259 N.C. 31, 129 S.E. 2d 593 (1963). In none of the proceedings below nor on this appeal have defendants made an attempt to allege that they were induced to enter the 20 August 1979 consent order through fraud or mistake or that they did not freely consent to the provisions of the consent judgment at the time of its entry.

We note that the contempt order itself contains a finding of fact that failure to raise questions of constitutionality earlier in the case was due to excusable neglect and the trial judge regarded the constitutional issues argued to the same extent as if initially presented to the court in the answer of defendant corporation or otherwise. The trial court then overruled all objections based upon the United States Constitution or the North Carolina Constitution.

[3] Without deciding the propriety of the trial judge's action, this finding in no way compels an appellate court to adjudge the constitutional questions now raised by defendants. Even were we to declare the statutory provisions to be unconstitutional, this would be of no avail to the defendants' position. Our Supreme Court held in *Roberson v. Penland*, 260 N.C. 502, 133 S.E. 2d 206 (1963), that a consent judgment would not be set aside even where a statute upon which it was predicated was later declared unconstitutional. This principle enunciated in *Roberson* was reaffirmed in the recent decision of *Insurance Co. v. Ingram, Comr. of Insurance*, 301 N.C. 138, 271 S.E. 2d 46 (1980). A "consent order [is] a final and binding decree . . . neither a subsequent change in the law, nor counsel's misconstruction of the law at the time the consent order was entered, is a ground for setting aside the order." *Industries, Inc. v. Insurance Co.*, 46 N.C. App. 91, 264 S.E. 2d 357, 359-360 (1980).

[4] Although not properly brought before us by defendants in their brief, we have nevertheless reviewed the record to deter-

mine the correctness of the trial court's order holding defendants to be in civil contempt. In contempt proceedings, the findings of fact are binding on appeal when supported by any competent evidence. They are reviewable only for the purpose of ascertaining their sufficiency to warrant the judgment. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). Our review of the record reveals evidence to support the trial court's findings, and we hold that these findings support the court's adjudication that defendants were in civil contempt of a permanent injunction of the Superior Court of Wake County.

The order is affirmed.

Affirmed.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. WILLIAM LEE COOPER

No. 8110SC13

(Filed 2 June 1981)

Searches and Seizures § 9— warrantless arrest for driving under the influence— search of vehicle improper

An officer's warrantless search of defendant's truck made after defendant's warrantless arrest for driving under the influence was improper and the trial court should have granted defendant's motion to suppress marijuana found in the truck, since defendant had been arrested and placed in the officer's patrol car before the officer returned to defendant's truck for the purpose of conducting a search for alcoholic beverages; the evidence did not support the trial court's finding that "when he [the officer] went to the pickup truck incidental to the arrest . . . , he smelled an odor of marijuana which appeared to be stronger on the driver's side," as the officer's own testimony indicated that he detected the odor of marijuana when he went to secure the vehicle rather than to arrest defendant; and the officer's testimony thus disclosed that he was engaged in an unlawful search when the odor of marijuana was first detected.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 22 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 30 April 1981.

Defendant was charged under a proper bill of indictment dated 8 July 1980 with felonious possession of marijuana. On 21 July 1980, defendant filed a motion to suppress evidence obtained by a search of a truck defendant was driving on 22 May 1980, on the grounds that the search was conducted without a search warrant, and that none of the warrantless search exceptions were applicable, such that the search was made in violation of the Fourth and Fourteenth Amendments to the United States Constitution. After a hearing, Judge Bailey made pertinent findings which, except where quoted, are summarized as follows:

At 4:00 a.m. on 22 May 1980, Officer G. M. Ray of the Raleigh Police Department, accompanied by another officer, observed a pickup truck driven by defendant driving "at a high rate of speed and erratically." Ray stopped the truck and found that each of the three occupants was under the influence of alcohol. Ray placed defendant in the patrol car, while the other officer maintained control over the other occupants. Ray then returned to the truck "incidental to the arrest as he had a right to do" and he "smelled an odor of marijuana which appeared to be stronger on the driver's side." The door on the driver's side of the truck would not open, so Ray, "in order to make a reasonable search of the vehicle for evidence related to driving under the influence, slid across the front seat" from the passenger side to the driver's side. In sliding across the seat, Ray "noticed a brown paper bag in the door well on the driver's side of the car," and in examining the bag closer, he "noticed a [sic] even stronger odor of marijuana." The bag was in plain view, and the marijuana was "in plain odor."

The truck was "not capable" of being locked, and defendant frequently placed items under the seat to keep others from noticing them. Defendant last saw "this particular bag of marijuana . . . a number of hours prior" to the detention, and the truck had been driven "erratically skidding sideways in the street on at least one occasion in the meantime." No consent was given for the search.

Judge Bailey concluded, among other things, that the officer

> went to the pickup truck incidental to the arrest as he had a right to do, . . .

and that

> no consent was needed to search for evidence of driving under the influence since such a search was incidental to the original search . . .

and that

> whether or not the bag was in plain view, which the Court finds it was, the marijuana was in plain odor . . .

and that

> [t]here is no reasonable expectation of privacy in placing a bag under the seat of a vehicle and then driving the vehicle in such a way that is quite likely that the bag will roll out or slide out and be in plain view on the floor of the vehicle. . . .

and denied defendant's motion to suppress. Defendant then pleaded guilty to keeping and maintaining a motor vehicle for the purpose of keeping marijuana. Thereafter, the present case was consolidated with a driving under the influence case for the purposes of judgment and defendant was given a six months sentence, which was suspended, and defendant was ordered to pay a fine of $300. Defendant appealed to this Court in the marijuana case pursuant to G.S. § 15A-979(b).

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Donald H. Solomon for the defendant appellant.

HEDRICK, Judge.

The order denying defendant's motion to suppress is bottomed on the conclusions that the search of the truck driven by defendant was incident to a lawful arrest for driving under the influence, that the paper bag containing marijuana was in plain view, or "plain odor," and that

> [t]here is no reasonable expectation of privacy in placing a bag under the seat of a vehicle and then driving the vehicle in such a way that is quite likely that the bag will roll out or slide out and be in plain view on the floor of the vehicle.

We agree with the trial judge that if the officer had a right to search the vehicle incident to the arrest for driving under the influence, he had the right to seize and search the paper bag con-

taining marijuana which was in plain view or "plain odor." An officer may make a warrantless search of a motor vehicle when he has probable cause to believe that the vehicle contains contraband, *State v. Greenwood*, --- N.C. ---, 273 S.E. 2d 438 (1981), or an officer may seize contraband falling in the plain view of the officer when the officer has the right to be in a position to have that view, *State v. Mitchell*, 300 N.C. 305, 266 S.E. 2d 605 (1980), and, in our opinion, the plain view doctrine should be extended to include contraband discovered through any of the officer's senses, especially odor.

The problem in the present case is that, in our opinion, the evidence and the findings do not support the conclusion that the officer had the right to search the vehicle incident to a lawful arrest. When an arrest is made, it is reasonable for the arresting officer to search without a warrant the suspect and the area within his immediate control for weapons and evidentiary items which may be concealed or destroyed. *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980), *citing Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969). The evidence here discloses that defendant had been arrested and placed in the officer's patrol car and the officer returned to the vehicle for the purpose of conducting a search of the vehicle for alcoholic beverages. The evidence clearly does not support the finding that "when he went to the pickup truck incidental to the arrest . . . , he smelled an odor of marijuana which appeared to be stronger on the driver's side." The officer testified:

> I went to secure the vehicle and to examine it for any evidence of driving under the influence, for any alcoholic beverage. I went to the truck and opened the passenger's door.
>
> As I open [sic] the door there was a strong odor of marijuana coming from the vehicle. As I secured the vehicle I was searching for the alcoholic beverage. There was a stronger odor on the driver's side of the vehicle.
>
> Q. Where were you when you first detected the odor of marijuana?
>
> A. When I opened the truck door.

I do not recall if the window was open. I did not ask the defendant for consent to go into the truck. . . .

. . .

I do not recall looking through either window when I approached the vehicle. . . . Immediately, after approaching the passenger side of the vehicle, I opened the door.

All during the time I was conducting my search, the defendant was in the rear of my police car.

While we realize that the officer would have the right under some circumstances to get into, secure, and even operate the motor vehicle, such was not the situation depicted by the evidence in the present case. The officer's testimony discloses that he was engaged in an unlawful search when the odor of marijuana was first detected. The evidence in the record simply does not support the critical findings and conclusion, and thus the order denying defendant's motion to suppress must be reversed and the cause remanded to the superior court where defendant will be allowed to withdraw his plea of guilty and enter a plea of not guilty. Since this case was consolidated for the purposes of judgment with the driving under the influence case, the judgment entered on the two cases will be vacated, and defendant will be re-sentenced under the driving under the influence case.

Reversed, vacated, and remanded.

Judges ARNOLD and WEBB concur.

IN THE MATTER OF: NORTH CAROLINA NATIONAL BANK, GUARDIAN OF GEORGE L. HUNDLEY, INCOMPETENT

No. 8022SC1076

(Filed 2 June 1981)

Attorneys at Law § 7.5— petition for advancement from incompetent's estate—attorney fees as part of costs

Where petitioner entered a voluntary dismissal of a special proceeding to obtain an advancement from the estate of her incompetent father, the trial court had no authority to order that legal fees incurred by the incompetent's

guardian in defending the petition for advancement be charged as part of the costs of the proceeding to be paid by petitioner. G.S. 7A-306(c).

APPEAL by petitioner from *Davis, Judge.* Order entered 9 October 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 5 May 1981.

Petitioner commenced this proceeding pursuant to Article 5 of Chapter 35 of the General Statutes of North Carolina, requesting an advancement out of the surplus income and principal of the estate of her father, George L. Hundley, a judicially declared incompetent. The petition was dismissed by the Clerk of Superior Court of Davidson County on 11 February 1980. Upon appeal to the superior court, petitioner filed an amended petition by stipulation. On 6 August 1980, respondent bank filed response as guardian of George L. Hundley. Thereafter, on 18 August 1980, petitioner entered notice of voluntary dismissal of her petition pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, and requested that the clerk of superior court provide her with a bill of costs for payment by her.

The bank, as guardian, filed a petition requesting that its attorneys' fees for legal services in defending the petition for advances, incurred and paid by it from the estate of Hundley, be charged as part of the costs of the proceeding and paid by petitioner. Petitioner conceded, in oral argument in this Court, that the amount of counsel fees, $5,430, is fair and reasonable compensation for the services rendered to respondent by its attorneys.

Upon the hearing on respondent's petition for reimbursement of counsel fees, the court allowed the petition and ordered the counsel fees taxed as a part of the costs and paid by petitioner.

Joseph P. Shore and Smith, Moore, Smith, Schell & Hunter, by Vance Barron, Jr., for petitioner appellant.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler, for respondent appellee.

MARTIN (Harry C.), Judge.

The sole question on this appeal is whether the court properly required petitioner to pay respondent's counsel fees as a part

of the costs of this proceeding. This is a special proceeding, commenced before the clerk of superior court pursuant to Article 5 of Chapter 35 of the General Statutes of North Carolina. *See Patrick v. Trust Co.*, 216 N.C. 525, 5 S.E. 2d 724 (1939); 1 McIntosh, N.C. Practice and Procedure § 240, n. 21 (2d ed. 1956). Matters involving the estate of a ward are resolved by special proceedings before the clerk of superior court. *See* N.C. Gen. Stat. ch. 33 (particularly § 31). *See also* N.C. Gen. Stat. 35-13. In contrast, the removal of a guardian is not by way of special proceeding, because it is not directly concerned with the estate of the ward. *In re Simmons*, 266 N.C. 702, 147 S.E. 2d 231 (1966).

In *Patrick*, relied upon by respondent, the Court was faced with the exact opposite of the question here presented. *Patrick* was also a proceeding asking for an advancement from the estate of an incompetent. The clerk, affirmed by the judge, held petitioner was entitled to an advancement, and also ordered $625 in legal fees to be paid to petitioner's attorney out of the assets of the guardianship. The Supreme Court reversed the order for attorney fees, holding that the case was a statutory proceeding, and in the absence of statutory authority allowing the taxing of such attorney fees against the guardianship assets, such fees may not be allowed from the assets of the estate. In reaching this conclusion, the Court distinguished those cases in which attorney fees are properly taxed against the assets of an estate, where the attorney represents the fiduciary in the management, conservation, creation or protection of the trust funds. No case cited in *Patrick* allowed a fiduciary to recover from the opposing party attorney fees so paid from the assets of the estate.

Our research has not disclosed a case directly in point. A brief review of the history of attorney's fees in North Carolina is helpful. Such review is presented to us by Justice Barnhill in *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578 (1952):

> Prior to 1868 counsel fees for the successful litigant were fixed by statute and allowed as a part of the cost or expense of litigation. The Code of Civil Procedure, adopted in 1868, abolished the tax fees of attorneys and made provision for the recovery by the successful party of certain amounts which were supposed to reimburse him for his expense. . . . This was changed in 1870-71 and certain fixed fees for attorneys were allowed as under the former law. . . . In 1879

> this was repealed, leaving no statutory provision for attorneys' fees as costs. . . .
>
> Thus the nonallowance of counsel fees as a part of the costs of litigation was deliberately adopted as the policy in this State as early as 1879. That policy, as modified by the provisions of G.S. 6-21, has prevailed in this State since that date.

Id. at 454, 70 S.E. 2d at 584 (citations omitted). Further insight into the historical basis for attorney fees in North Carolina is contained in Chief Justice Clark's dissenting opinion in *In re Stone*, 176 N.C. 336, 340, 97 S.E. 216, 218 (1918).

N.C.G.S. 7A-306(c), 1979 Supplement, controls costs in special proceedings, stating in pertinent part:

> § 7A-306. Costs in special proceedings. . . .
>
> . . . .
>
> (c) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees, and commissions, except that the following additional expenses, when incurred, are assessable or recoverable, as the case may be:
>
> . . . .
>
> (2) Counsel fees, as provided by law.

Thus counsel fees are not recoverable as a part of costs except where provided by law. The statute governing petitions for advancements, N.C.G.S. ch. 35, art. 5, does not authorize the recovery of counsel fees as part of the costs in such proceedings. Nor is there any case law sanctioning such recovery.

In the absence of statutory authority, it is the general rule in North Carolina that a court may not allow attorney fees as a part of the costs recoverable by the successful party in a civil action or special proceeding. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973); *Records v. Tape Corp.*, 18 N.C. App. 183, 196 S.E. 2d 598, *cert. denied*, 283 N.C. 666 (1973). "Except as so provided by statute, attorney's fees are not allowable." *Baxter v. Jones*, 283 N.C. 327, 330, 196 S.E. 2d 193, 196 (1973). Respondent would have us abandon the settled public policy of North Carolina with

respect to charging the losing party with counsel fees in such cases. This we decline to do.

The order of the superior court allowing respondent's motion to tax petitioner with respondent's counsel fees as a part of the costs is

Reversed.

Judges HEDRICK and WELLS concur.

CORNELIUS BUTLER, JR. v. ELBERT L. PETERS, JR., COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA

No. 8019SC1044

(Filed 2 June 1981)

1. **Constitutional Law § 12.1— motor vehicle dealer licensing law—posting of bond—statute constitutional**

G.S. 20-288(e) which added the posting of a $15,000 bond to the motor vehicle dealer licensing law requirements was not unconstitutional in that it unreasonably restricted plaintiff's right to engage in his occupation of manufacturing trailers, since the complexities surrounding the sale, dealer servicing, warranties, financing, titling and registration of motor vehicles makes their distribution a business which easily could be conducted so as to become a medium of fraud and dishonesty; where a business easily can be conducted so as to become a medium of fraud and dishonesty, the State's power to regulate such a business includes the right to require a bond or security for the faithful performance of the obligations incident to the business; and the regulation complained of in this case is based upon reasonable grounds, is not arbitrary, and is therefore a proper exercise of the State's police power.

2. **Constitutional Law § 12.1— motor vehicle dealer licensing law—posting of bond—exemption of some manufacturers and dealers**

There was no merit to plaintiff's contention that the exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of G.S. 20-288(e) denied plaintiff equal protection of the law, since, under N.C. law, trailers weighing less than 4,000 pounds are exempt from brake requirements, directional signals, lighting requirements, and clearance lamps; smaller trailers cost less, are of simpler construction, and involve warranty problems of less magnitude; and the difference in treatment between trailers over 4,000 pounds and trailers less than 4,000 pounds therefore has a reasonable basis in relation to the purpose of the statute in question.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 5 July 1980 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 30 April 1981.

Plaintiff is the manufacturer of special purpose trailers, such as reel trailers and trailers for moving small to medium earth digging equipment. His operation is inter- and intrastate, both in the purchase of raw material used to manufacture his trailers and in the sale of the finished trailer. His gross sales in 1978 were approximately one million dollars and in 1979 were about 1.4 million dollars.

In 1977, the General Assembly, by the passage of G.S. 20-288 (e), added to the dealer licensing law requirements the posting of a $15,000 bond. Plaintiff posted the required bond under protest and made demand for refund, which was denied by the Commissioner of Motor Vehicles. Plaintiff then instituted this action seeking to recover his bond premiums and a declaration that G.S. 20-288(e) is unconstitutional. From a judgment for the defendant, plaintiff appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, for the State.

Gavin & Pugh, by W. Ed Gavin, for the plaintiff appellant.

ARNOLD, Judge.

Plaintiff contends that the bond requirement, G.S. 20-288(e), as amended, imposed by the State under its police power, deprives him of his liberty or property in violation of Article I, Sections 1 and 19 of the North Carolina Constitution.

G.S. 20-288(e) provides as follows:

> (e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, distributor branch, or factory branch shall furnish a corporate surety bond or cash bond or fixed value equivalent thereof in the principal sum of fifteen thousand dollars ($15,000) and an additional principal sum of five thousand dollars ($5,000) for each additional place of business within this State at which motor vehicles are sold. Each application for a license or a renewal of a license shall be accompanied by a list of locations at which the appli-

cant engages in the business of selling motor vehicles in this State. A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. Every licensee against whom such action is instituted shall notify the Commissioner of the action within 10 days after process is served on the licensee. A corporate surety bond shall remain in force and effect and may not be canceled by the surety unless the motor vehicle dealer, manufacturer, distributor branch, or factory branch has terminated the operations of its business nor unless its license has been denied, suspended, or revoked under G.S. 20-294. Such cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. Provided nothing herein shall apply to a motor vehicle dealer, manufacturer, distributor branch or factory branch which deals only in trailers having an empty weight of 4,000 pounds or less." (The proviso appearing at the end of this section was added in 1979.)

[1] Plaintiff contends that this regulation unreasonably restricts his right to engage in his occupation of manufacturing trailers. The rule is that a statute or ordinance which curtails the right of any person to engage in any occupation can be sustained as a valid exercise of the police power only if it is reasonably necessary to promote the public health, morals, order safety, or general welfare. *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968); *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949). The reasonableness of an exercise of the police power is to be determined by the court and is based on human judgment, natural justice and common sense in view of all the facts and cir-

cumstances. *Raleigh v. Norfolk Southern Railway Co.*, 4 N.C. App. 1, 165 S.E. 2d 745, *remanded on other grounds* 275 N.C. 454, 168 S.E. 2d 389 (1969); 3 Strong's N.C. Index, Constitutional Law § 11.1 (1976).

It appears that North Carolina has not considered the validity of a bond requirement for applicants for a license as a motor vehicle dealer or manufacturer. Many other states, however, have held that where a business easily can be conducted so as to become a medium of fraud and dishonesty, the state's power to regulate such a business includes the right to require a bond or security for the faithful performance of the obligations incident to the business, if the requirement is based on reasonable grounds and is not essentially arbitrary. 51 Am. Jur. 2d, Licenses & Permits, § 48; *see, e.g., Witter v. Massachusetts Bonding and Insurance Co.*, 215 Iowa, 1322, 247 N.W. 831 (1933); *Grand Rapids v. Braudy*, 105 Mich. 670, 64 N.W. 29 (1895).

In view of the complexities surrounding the sale, dealer servicing, warranties, financing, titling and registration of a motor vehicle, we find that the distribution of motor vehicles is a business which easily could be conducted so as to become a medium of fraud and dishonesty. We further find that the regulation complained of herein is based upon reasonable grounds and is not arbitrary and is, therefore, a proper exercise of the state's police power.

[2] Plaintiff's second contention is that the exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement denies plaintiff equal protection of the law in violation of Article I, Section 19 of the North Carolina Constitution. We find this contention to be without merit also. The legislature may distinguish, select and classify objects of legislation, provided such classifications are not arbitrary or capricious and apply uniformly to all members of the affected class. The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971).

The record reveals that under North Carolina law trailers weighing less than 4,000 pounds are exempt from brake requirements, G.S. 20-124(f); directional signals, G.S. 20-125.1(c);

lighting requirements, G.S. 20-129(d); and clearance lamps, G.S. 20-129.1(4). Further, it appears that smaller trailers cost less, are of simpler construction, and that warranty problems of the same magnitude are not involved. The difference in treatment therefore has a reasonable basis in relation to the purpose of the legislation, and we find that the exemption of trailers weighing less than 4,000 pounds from the bond requirement of G.S. 20-288(e) does not deny plaintiff equal protection of the law.

We have reviewed plaintiff's contentions that G.S. 20-288(e) confers exclusive or separate emoluments or privileges, creates perpetuities and monopolies, creates a burden on interstate commerce and denies plaintiff his right to the pursuit of happiness in violation of the North Carolina Constitution and the United States Constitution. We find these contentions to be unfounded.

The judgment of the trial court is affirmed.

Affirmed.

Judges HEDRICK and WEBB concur.

RICHARD STEVE MESIMER v. DR. JOHN H. STANCIL

No. 8019SC1041

(Filed 2 June 1981)

Damages § 16.6— punitive damages—insufficient evidence of fraud

In an action in which plaintiff alleged that he paid defendant, his dentist, $250 to cap a tooth and that defendant refused to complete the work after grinding down plaintiff's tooth, plaintiff's evidence was insufficient to justify submission of an issue of punitive damages for fraud where there was no evidence tending to show that defendant intended to dishonor his contract with plaintiff when he made it, and the evidence showed that defendant partially performed his contracts with plaintiff and other patients who testified for plaintiff but that defendant was not able to complete performance of his contracts through incompetence or financial mismanagement.

APPEAL by defendant from *Seay, Judge*. Judgment entered 5 June 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 29 April 1981.

Plaintiff alleges that he paid defendant, his dentist, $250.00 to cap a tooth and that defendant refused to complete the work after grinding down plaintiff's tooth. Plaintiff further alleges that defendant never intended to complete work on the tooth and that defendant's false promise was intentionally designed to mislead and deceive plaintiff. Plaintiff prayed for actual and punitive damages.

When the case originally came on for trial, the trial court dismissed the claim for punitive damages under G.S. 1A-1, Rule 12(c). The jury awarded plaintiff $1,000 as compensatory damages. Plaintiff appealed, and this Court held that it was error for the trial judge to dismiss plaintiff's claim for punitive damages. A new trial was granted. *Mesimer v. Stancil*, 45 N.C. App. 533, 263 S.E. 2d 32 (1980). Upon retrial, the jury awarded plaintiff $250.00 in actual damages and $15,000.00 in punitive damages. Defendant appealed.

Wesley B. Grant, by Randell F. Hastings, for plaintiff appellee.

Williams, Willeford, Boger, Grady & Davis, by Samuel F. Davis, Jr., for defendant appellant.

HILL, Judge.

Defendant has brought forth five assignments of error on appeal. We find one to be dispositive, and for that reason decline to address the remaining assignments.

Defendant argues that the trial court erred in failing to grant his motion for a directed verdict on the issues of fraud and punitive damages.

Viewed in the proper light, the evidence shows that on 19 November 1974 defendant ground down one of plaintiff's teeth and installed a temporary plastic cap. An impression of plaintiff's tooth was made and sent to a laboratory to be fabricated into a porcelain-to-metal jacket which was to be the permanent crown. Plaintiff paid defendant $250.00—the agreed-upon price for defendant's services—the next day. On 28 January 1975, plaintiff returned to defendant's office to receive the porcelain-to-metal crown. The crown was placed in plaintiff's mouth, but immediate-

ly removed because defendant felt the jacket was not the right shade. At some point, the permanent crown was sent back to the laboratory for reshading. The permanent crown has not subsequently been installed.

Three of defendant's former patients testified for plaintiff. The first witness testified that defendant had taken some impressions of her mouth so that a full upper and partial lower denture could be made. Three or four months passed before the dentures came in, and they were never installed by defendant. Instead, defendant's wife handed the dentures to the witness in a parking lot. Another dentist installed the dentures, but they did not fit.

A second witness testified that he had paid defendant to install a partial upper plate. An impression was made, and a plate constructed, but never installed. The plate did not fit the witness's mouth. The third witness testified that she had gone to defendant to have an upper and lower plate fitted and installed. Two years after her first visit, the witness finally got a set of teeth, but they did not fit.

A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897 (1974). It is well established that "mere unfulfilled promises cannot be made the basis for an action of fraud." (Citations omitted.) *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E. 2d 364 (1942). "The rule, of course, is otherwise, where the promise is made fraudulently with no intention to carry it out, and such promise constitutes a misrepresentation of a material fact which induces the promisee to act upon it to his injury." *Davis v. Davis*, 236 N.C. 208, 211, 72 S.E. 2d 414 (1952).

It is clear from plaintiff's evidence that defendant is guilty of numerous breaches of contract. However, plaintiff's evidence is not sufficient to justify a verdict finding defendant guilty of fraud. There is no showing that defendant intended to dishonor his contract with plaintiff when he made it. In fact, the evidence shows that defendant partially performed his contracts with plaintiff and the other patients who testified for plaintiff. The evidence shows that defendant was not able to perform his contracts through incompetence or financial mismanagement. There is no

evidence that he never intended to fulfill the contract with plaintiff. The trial court erred when it failed to grant plaintiff's motions for a directed verdict on the issues of fraud and punitive damages. The prior appeal of this case decided only that plaintiff had *alleged* a good cause for punitive damages. We now hold plaintiff failed to produce sufficient evidence to submit that issue to the jury.

The jury's verdict that defendant breached his contract with plaintiff and that plaintiff suffered actual damages of $250.00 is well supported by competent evidence. Consequently, defendant's exception to the judgment with regard to those issues is without merit and overruled.

The case is remanded with the direction that the answers to issues two and four dealing with fraud and punitive damages be stricken from the judgment and a judgment consistent with this opinion be entered.

Reversed in part and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

W. H. SOUTHGATE v. JAMES S. RUSS

No. 8026DC1030

(Filed 2 June 1981)

1. Process § 9— service of process on nonresident in another state

The trial court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction based upon his residence in S.C. and service of process upon him in that state, since defendant's motion did not raise the questions of lack or service of insufficiency of service of process, and defendant in his notice of special appearance alleged that he was served with process in S.C. and this allegation constituted a judicial admission that personal service was obtained upon him in this action.

2. Rules of Civil Procedure § 12.1— insufficiency of process—waiver of objections to jurisdiction

Where defendant filed his answer, reserving his rights under his earlier notice of special appearance, but the questions of insufficiency of process or insufficiency of service of process were not presented in the earlier notice, defendant, by filing his answer without raising these objections to jurisdiction, waived these objections, and his answer constituted a general appearance in this case, removing the question of personal jurisdiction. G.S. 1A-1, Rule 12(h)(1); G.S. 1-75.7.

APPEAL by defendant from *Black, Judge*. Judgment entered 11 August 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 29 April 1981.

Plaintiff filed complaint, 16 February 1977, against defendant, alleging a cause of action for damages caused by defendant's breach of contract to purchase plaintiff's interest in a theater. The record does not contain an executed summons, although an unsigned copy is included.

On 4 April 1977, defendant filed a paper entitled "Notice of Special Appearance," and in it objected to the jurisdiction of the court on the grounds that defendant is a citizen and resident of South Carolina and that he was served with process in South Carolina. On the same date, defendant filed an answer, reserving all rights under his notice of special appearance, and denying the material allegations of plaintiff's complaint.

At trial, the original summons and return were not to be found in the court file. Defendant made a motion to dismiss for lack of personal jurisdiction due to insufficiency of process and insufficiency of service of process.

After hearing, the court denied defendant's motions to dismiss and entered judgment for plaintiff on the merits. Defendant appeals.

Ralph C. Harris, Jr. for plaintiff appellee.

Michael A. Almond for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant by his appeal raises the question of the jurisdiction of the court over his person. First, defendant argues the court erred in denying his motion to dismiss for lack of personal

jurisdiction based upon his residence in South Carolina and service of process upon him in South Carolina. This motion, filed 4 April 1977, does not raise the questions of lack of service or insufficiency of service of process.

It is alleged and admitted that defendant is a resident of the state of South Carolina. Personal service upon a nonresident of North Carolina is governed by Rule 4(j)(9)a of the North Carolina Rules of Civil Procedure. Personal service may be made on any party outside this state by anyone authorized by section (a) of Rule 4 and in the manner set out in section (j) for service on such party within North Carolina. Rule 4(a) provides that a proper person for service outside North Carolina shall be anyone who is not a party and is not less than twenty-one years of age, or anyone duly authorized to serve summons by the law of the place where service is to be made.

The two affidavits of T. H. Hydrick, Sr. show that he is not a party to the action and that he is an authorized process server in the state of South Carolina and that he served defendant with summons and complaint in this case.

More importantly, defendant in his notice of special appearance alleges that he was served with process in South Carolina. This constitutes a judicial admission that personal service was obtained upon him in this action. This admission conclusively establishes this fact for the purposes of this case. *Clapp v. Clapp*, 241 N.C. 281, 85 S.E. 2d 153 (1954); *Bell v. Chadwick*, 226 N.C. 598, 39 S.E. 2d 743 (1946); *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758 (1972); 2 Stansbury's N.C. Evidence § 177 (Brandis rev. 1973). Defendant cannot now contend he was not served with process in this case. We find no error in the denial of defendant's motion of 4 April 1977.

[2] At trial, defendant moved to dismiss for insufficiency of process and insufficiency of service of process. When defendant filed his answer, he only reserved his rights under his 4 April 1977 notice of special appearance. The questions of insufficiency of process or insufficiency of service of process were not presented in the 4 April 1977 notice. By filing his answer without raising these objections to jurisdiction, defendant waived these objections. N.C. G.S. 1A-1, Rule 12(h)(1), provides:

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Defendant's answer constitutes a general appearance in this case, removing the question of personal jurisdiction. *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974).

> [A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. . . .
>
> A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof.

In re Blalock, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951) (citations omitted). N.C.G.S. 1-75.7 contains the following:

> *Personal jurisdiction—grounds for without service of summons.*—A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; . . .

N.C. Gen. Stat. 1-75.7(1), 1979 Supp.

The trial court properly denied defendant's challenges to jurisdiction of his person.

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. BETTY LACHMAN

No. 8010SC556

(Filed 2 June 1981)

State § 12— dismissal of State employee—jurisdiction of State Personnel Commission

The State Personnel Commission had no jurisdiction to consider an appeal from the dismissal of respondent as a State employee and to order the reinstatement of respondent to her former employment where the evidence failed to show that respondent had been employed by the State for the five years immediately preceding her dismissal but showed that respondent had been so employed for less than three years. G.S. 126-5(d); G.S. 126-39.

APPEAL by petitioner from *Braswell, Judge.* Judgment entered 18 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 7 January 1981.

This is an appeal by the Employment Security Commission from a judgment of the Superior Court of Wake County affirming an order of the State Personnel Commission which required the Employment Security Commission to reinstate Betty Lachman to a position from which she had been dismissed on 24 February 1978. Respondent appealed to the State Personnel Commission from what she contended was her wrongful discharge from state employment. At the hearing before the hearing officer, respondent testified: "I was last employed with the Employment Security Commission of North Carolina and I worked there from March 1975 until the 23rd day of February, 1978." There was no evidence as to her employment prior to March 1975. Both respondent and the Employment Security Commission offered evidence as to respondent's leaving her employment. The hearing officer found facts and concluded that she had been wrongfully discharged. He recommended that she be restored to her employment. The hearing officer's findings of fact and conclusions were adopted by the State Personnel Commission which ordered respondent reinstated to the same level from which she had been dismissed. The superior court affirmed the order of the State Personnel Commission.

The Employment Security Commission appealed.

Howard G. Doyle, Chief Counsel, and Garland D. Crenshaw, for petitioner appellant.

Sloan, Hassell, and Broadwell, by Robert A. Hassell, for respondent appellee.

MORRIS, Chief Judge.

This proceeding is brought under Chapter 126 of the General Statutes under which the State Personnel System was established. G.S. 126-5(d) provides:

> Except as to the policies, rules and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4 (4), 126-4(5), 126-4(6), 126-7, and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:
>
> (1) An employee of the State of North Carolina who has not been continuously employed by the State of North Carolina for the immediate five preceding years.

None of the exceptions mentioned in this section applies to the case sub judice. G.S. 126-39 provides:

> For the purposes of this Article, except for positions subject to competitive service and except for appeals brought under G.S. 126-16 and 126-25, the terms "permanent State employee," "permanent employee," "State employee" or "former State employee" as used in this Article shall mean a person who has been continuously employed by the State of North Carolina for five years at the time of the act, grievance, or employment practice complained of.

It appears from these two sections that in order for respondent to avail herself of G.S. 126-36 and G.S. 126-37 governing appeals to the State Personnel Commission and reinstatement to former employment by the State Personnel Commission, respondent has to have been employed by the state for the five years immediately preceding 24 February 1978.

The evidence shows that respondent was employed for less than three years. This is a failure of proof necessary to give the State Personnel Commission jurisdiction. *See* 2 Am. Jur. 2d, *Administrative Law* § 328 at 150 for the statutory requirement for

jurisdiction of administrative agencies. It may well be that respondent was employed by some other agency of the state prior to her employment by petitioner. If so, the record is silent. Nor is there any indication that the procedures provided by G.S. 126-5(f) were followed, or that there was any dispute with respect to whether the provisions of the chapter were applicable. Upon the information in the record before us, it was error for the State Personnel Commission to hear respondent's appeal.

We reverse and remand to the superior court with a direction that it order the State Personnel Commission to dismiss respondent's appeal.

Reversed and remanded.

Judges MARTIN (Harry C.) and WHICHARD concur.

JACQUELINE RANDALL DORN v. ROGER WAYNE DORN

No. 8026DC1115

(Filed 2 June 1981)

Appeal and Error § 6.2— premature appeal

That portion of the trial court's order denying defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint and Rule 56(b) motion for summary judgment was clearly unappealable; moreover, the trial court's denial of defendant's motion for summary judgment and declaration that a separation agreement between the parties was invalid was gratuitous, and defendant's appeal therefrom was premature.

APPEAL by defendant from *Black, Judge.* Order entered 28 August 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1981.

This is a civil action wherein plaintiff, wife, seeks to recover from defendant, husband, permanent alimony, alimony *pendente lite,* and counsel fees. The record contains the following: (1) plaintiff's complaint filed 1 May 1980; (2) a notice dated 1 May 1980 stating that plaintiff would seek an "award of alimony, *pendente lite* and permanent, counsel fees and related relief" at a hearing in the district court on 27 May 1980; (3) a "motion to dismiss and

supporting affidavit" offered by defendant and dated 29 May 1980; (4) an order by Judge Brown dated 6 June 1980 denying defendant's "motion to dismiss" and declaring that a "separation agreement" submitted by defendant in support of his motion was "not a valid, legal, or binding Separation Agreement;" (5) an "answer to complaint and defenses" dated 10 June 1980; (6) a motion by plaintiff dated 19 June 1980 seeking an order striking the "Second, Third and Fourth Defenses of the Defendant's Answer and Paragraph 29 thereof" and, in the alternative, for judgment on the pleadings or summary judgment on the issue of "the validity of the Separation Agreement;" (7) an order by Judge Brown dated 30 June 1980 continuing the case and rescheduling the hearing on plaintiff's claim for alimony *pendente lite* to 16 July 1980; (8) an "amendment to answer adding counterclaim" dated 3 July 1980; (9) a motion and reply by plaintiff dated 11 July 1980 seeking to strike the counterclaims alleged in defendant's "amendment to answer" and, in the alternative, to dismiss the counterclaims for failure to state a claim, and, in the alternative, that defendant "have and recover nothing of the Plaintiff pursuant to his Counterclaims;" (10) a motion filed by defendant on 16 July 1980 seeking relief from Judge Brown's 6 June 1980 order pursuant to "Rule 60(d) [sic] of the Rules of Civil Procedure," and also seeking dismissal of plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) and summary judgment in favor of defendant pursuant to G.S. § 1A-1, Rule 56(b); (11) an order by Judge Black filed 28 August 1980 denying defendant's 16 July 1980 motion and allowing plaintiff's 19 June 1980 and 11 July 1980 motions; and (12) notice of defendant's appeal from Judge Black's 28 August 1980 order.

James, McElroy and Diehl, by Allen J. Peterson, for the plaintiff appellee.

Kermit D. McGinnis, for the defendant appellant.

HEDRICK, Judge.

That portion of Judge Black's order dated 28 August 1980 denying defendant's Rule 12(b)(6) and Rule 56(b) motions is clearly unappealable. *State v. Fayetteville Street Christian School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, --- U.S. ---, 66 L.Ed. 2d 11, 101 S.Ct. 55 (1980); *O'Neill v. Southern National Bank*, 40

N.C. App. 227, 252 S.E. 2d 231 (1979); *Hill v. Smith*, 38 N.C. App. 625, 248 S.E. 2d 455 (1978); *Parker Oil Co., Inc. v. Smith*, 34 N.C. App. 324, 237 S.E. 2d 882 (1977). While an appeal from the denial of a Rule 60(b) motion and the allowance of a motion to strike certain defenses and counterclaims might be appealable under some circumstances, that portion of Judge Black's 28 August 1980 order denying defendant's Rule 60(b) motion and allowing plaintiff's motions to strike is clearly not appealable under the circumstances of the present case.

Defendant's "motion to dismiss," which was filed after the matter had been scheduled for hearing on plaintiff's application for alimony *pendente lite*, alleged that plaintiff and defendant had entered into a "separation agreement" and that such agreement was a bar to plaintiff's claim for alimony. Although not denominated as such, the motion was clearly one for summary judgment pursuant to Rule 56. When the matter came on for hearing on plaintiff's application for alimony *pendente lite*, Judge Brown inexplicably considered and ruled on defendant's "motion to dismiss." He not only denied defendant's motion, but he gratuitously declared the "separation agreement" not to be "valid, legal, or binding." This untimely and gratuitous ruling on defendant's "motion to dismiss" precipitated the fatuous proceedings which followed, this premature appeal, and the resulting unreasonable delay in the disposition of a relatively simple matter. Therefore, since Judge Black's 28 August 1980 order was predicated on Judge Brown's denial of defendant's motion for summary judgment and his gratuitous declaration that the separation agreement was invalid, the appeal is premature and will be dismissed.

Dismissed.

Judges MARTIN (Harry C.) and WELLS concur.

STATE OF NORTH CAROLINA v. LINDA HENRY MARTIN

No. 8018SC1032

(Filed 2 June 1981)

Homicide § 30.3— submission of involuntary manslaughter—prejudicial error

The trial court in a second degree murder prosecution erred in submitting to the jury an issue of the lesser offense of involuntary manslaughter where all the evidence, including defendant's testimony, showed that deceased was fatally wounded when defendant intentionally discharged her gun under circumstances naturally dangerous to human life, and there was no evidence of an accidental discharge of the weapon. Furthermore, defendant was prejudiced by such error where she relied on self-defense and there is a reasonable possibility that the jury would have returned a verdict of acquittal absent the erroneous submission of involuntary manslaughter.

APPEAL by defendant from *Preston, Judge.* Judgment entered 12 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 March 1981.

Defendant was tried for second degree murder. Some of the evidence tended to show that defendant and her husband, Walter Thomas Martin, had been having domestic disagreements over a period of time. On 9 October 1979, defendant and her husband were arguing. Defendant attempted to leave their home and her husband prevented her from leaving by taking her car keys. Defendant shot her husband as he advanced toward her in their driveway, hitting him in the pelvis. Walter Thomas Martin died several days later from the gunshot wound inflicted by his wife.

The court charged the jury it could find the defendant guilty of second degree murder, voluntary manslaughter or involuntary manslaughter. From a sentence imposed upon a verdict of guilty of involuntary manslaughter, the defendant appeals.

Attorney General Edmisten by Assistant Attorney General Thomas H. Davis, Jr. and Assistant Attorney General Thomas B. Wood, for the State.

Assistant Public Defender Frederick G. Lind, for the defendant-appellant.

MARTIN (Robert M.), Judge.

The defendant assigns as error the submission to the jury of the charge of involuntary manslaughter. "Involuntary man-

slaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). "[T]he crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm. (Citations omitted.)" *State v. Ray*, 299 N.C. 151, 158, 261 S.E. 2d 789, 794 (1980).

The evidence as to the shooting in the case *sub judice* came from the testimony of defendant. She testified as follows:

> Next, I did shoot the gun. The last time I really aimed the gun, he was standing here, and I aimed it in between him and the tree. . . .
>
> . . .
>
> . . . [T]he last time I aimed the gun, actually took an aim with the gun, it was between him and the tree, to where it was close enough pointed toward him, that he would know that I meant for him to stay back, that I was using the gun to keep him back.
>
> . . .
>
> I didn't try to hit him the first time I shot.
>
> . . .
>
> I was shooting the gun to warn him back, and I was surprised when it hit him.
>
> . . .
>
> . . . I did not take aim, I did not mean to hit him with the gun.
>
> I aimed at nothing. I intentionally pulled the trigger. I did not intentionally shoot my husband. I intentionally pulled the trigger, thinking at the time that it would warn him back, not realizing that it was in the position to actually hit him. I am not saying to you, that I would not have shot to hit him, had he persisted in moving towards me. I am saying, at that

> time, I was still trying to warn him. I meant for him to stay away from me. I was trying to warn him with a shot, with a sound, to make him know that I meant not to come towards me. I did not want to have to shoot him. I don't think I had time to even think about firing the weapon straight up in the air to make a sound that would have warned him. I just saw him there, up close to me, and fired.

Here all the evidence, including defendant's testimony, shows that the deceased was fatally wounded when defendant intentionally discharged her gun under circumstances naturally dangerous to human life. There was no evidence of an accidental discharge of the weapon. Defendant testified that she intentionally shot in the vicinity where her husband was standing, four to five feet from her, without taking aim, in self-defense, but without any intent to injure or harm him. She intended to warn him to stop advancing towards her. This could not be involuntary manslaughter. *State v. Ray, supra; State v. Brooks,* 46 N.C. App. 833, 266 S.E. 2d 3 (1980).

As there was no evidence presented in this case upon which a jury could base a verdict of involuntary manslaughter, it was error for the trial court to submit to the jury involuntary manslaughter as an alternative verdict.

The question for decision, then, is whether under the circumstances of this case that error was prejudicial to defendant. Our appellate courts have generally held that the submission of a lesser included offense not supported by the evidence is error favorable to the defendant and one for which he cannot complain on appeal. *State v. Ray, supra. Ray,* however, stands for the proposition that where "a reasonable possibility [exists] that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief." *Id.* at 164, 261 S.E. 2d at 797. As stated in *Ray,* "the unwarranted submission of involuntary manslaughter in a homicide case involving a self-defense claim may often result in error prejudicial to a defendant." *State v. Ray, supra* at 167, 261 S.E. 2d at 799. We cannot conclude that the jury had rejected self-defense at the time it considered involuntary manslaughter. We therefore conclude that in this case, absent the erroneous submission of involuntary manslaughter, there is a reasonable

possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant. N.C. Gen. Stat. § 15A-1443; *State v. Ray, supra.*

The defendant has been acquitted, in effect, of all degrees of homicide for which she was tried, other than involuntary manslaughter. That degree of homicide was not supported by the evidence and its submission to the jury as a possible verdict was error prejudicial to defendant. Therefore, the judgment of the trial court must be vacated and the defendant discharged.

Reversed and remanded.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. GEORGE TURMAN

No. 8112SC33

(Filed 2 June 1981)

1. **Rape § 19— taking indecent liberties with child—constitutionality of statute**

There was no merit to defendant's contention that G.S. 14-202.1, the statute prohibiting taking indecent liberties with a child, was unconstitutional in that it denied due process because of vagueness, denied equal protection because of age classification, and was an overbroad restriction on protected activity.

2. **Rape § 19— taking indecent liberties with child—touching of child unnecessary**

It is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of G.S. 14-202.1.

APPEAL by defendant from *Preston, Judge.* Judgment entered 13 August 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 May 1981.

Defendant was convicted of taking indecent liberties with a child. From the judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

Assistant Public Defender, Twelfth Judicial District, John G. Britt, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant was convicted of violating N.C.G.S. 14-202.1, and now attacks the constitutionality of this statute. He contends the statute is unconstitutional in that (a) it is a denial of due process because of vagueness, (b) it is a denial of equal protection because of age classification in the statute, and (c) it is an overbroad restriction on protected activity. Defendant does not cite any authority in support of his contentions.

It is clear that the challenged statute is constitutional. Our Supreme Court has passed upon these identical arguments in *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981). Further elaboration on these points in this opinion would serve no useful purpose. The law as stated in *Elam* controls this appeal, and the assignments of error directed to the constitutionality of the statute are overruled.

[2] Defendant contends the court erred in its charge by instructing the jury that masturbation in the presence of another would be an immoral or indecent act within the meaning of the statute. Defendant argues that because the statute uses the words "with any child," there must be some touching of the child to constitute an indecent liberty under the statute. We reject the argument and hold that it is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C.G.S. 14-202.1. *See State v. Turgeon*, 44 N.C. App. 547, 261 S.E. 2d 501, *disc. rev. denied*, 299 N.C. 740 (1980). The purpose of the statute is to give broader protection to children than the prior laws provided. *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965). The word "with" is not limited to mean only a physical touching. *See* Webster's Third New International Dictionary 2626 (1971). We find no prejudicial error in the challenged instruction.

Accordingly, we hold that the acts allegedly performed by defendant were "immoral, improper, or indecent liberties" within the meaning of the statute. Therefore, we overrule defendant's last assignment of error, in which he contends the trial court erred in denying his motions to dismiss for insufficiency of the state's evidence.

No error.

Judges HEDRICK and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 JUNE 1981

ALSTON v. HONEYCUTT No. 8015SC1045	Alamance (80CVS33)	Affirmed
BOSTIC v. HOUSING AUTHORITY v. BOSTIC No. 8021DC863	Forsyth (79CVD1611 consolidated with 79CVM1917)	Affirmed in Part & Vacated in Part
HOWARD v. HOWARD No. 8029DC1048	Henderson (79CVD745)	Affirmed
IN RE GUTHERIE No. 805DC869	Pender (80J13)	Affirmed
JOHNSON v. STONE No. 8017SC836	Surry (78CVS970)	Dismissed
LEVINE v. DONATHAN No. 8028DC1152	Buncombe (77CVD2473)	Appeal Dismissed
PARK HAVEN INVESTMENT v. LAMB No. 8014SC577	Durham (76CVS1402)	Affirmed
SHELEY v. GREEN No. 8010SC882	Wake (78CVS1771)	Affirmed
STATE v. AUSTIN No. 803SC1128	Pamlico (80CRS374)	No Error
STATE v. CARDWELL No. 8112SC66	Cumberland (80CRS15268)	No Error
STATE v. CLARK No. 8118SC86	Guilford (80CRS46804)	Affirmed
STATE v. COLLINS No. 819SC32	Vance (80CRS4650)	No Error
STATE v. ELKINS No. 8012SC1202	Cumberland (80CRS5895)	New Trial
STATE v. GRAYER No. 8012SC790	Cumberland (79CRS39988)	Affirmed
STATE v. LOCKLEAR No. 8020SC822	Richmond (80CRS0059) (80CRS0060)	No Error
STATE v. McBRIDE No. 8017SC893	Rockingham (80CR813) (80CR814)	No Error
STATE v. McKOY No. 8011SC1191	Lee (80CRS2093)	No Error

STATE v. REDDICK No. 802SC1147	Martin (80CRS1554)	No Error
STATE v. TRIPLETT No. 8125SC49	Caldwell (80CRS3350)	No Error
STATE v. WHITE No. 802SC1125	Beaufort (80CRS3587)	No Error

STATE OF NORTH CAROLINA v. KELVIN WENDELL SELLARS

No. 8015SC991

(Filed 16 June 1981)

1. **Criminal Law § 21.1— failure to hold probable cause hearing—defendant not prejudiced**

Defendant failed to show that he was prejudiced by the continuance of his probable cause hearing; and his subsequent indictment on the same day that the probable cause hearing was continued rendered unnecessary a probable cause hearing, as G.S. 15A-606(a) requires a probable cause hearing only in situations in which no indictment has been returned by a grand jury.

2. **Robbery § 2— indictment—one offense properly charged**

There was no merit to defendant's contention that the indictment charging him with armed robbery charged him with two offenses in violation of G.S. 15A-924, since the indictment charged defendant with one offense, armed robbery of the prosecuting witness, and the fact that in the robbery defendant obtained money both from the prosecuting witness and the motel where she worked did not create separate offenses.

3. **Criminal Law § 22— arraignment—calendaring unnecessary—trial during same week as arraignment**

No calendaring of defendant's arraignment was necessary, since he was tried in Chatham County, a county which did not hold at least 20 weeks of trial sessions involving criminal cases in 1979, and G.S. 15A-943(a) was therefore inapplicable; furthermore, defendant's trial the week of his arraignment violated no statutory mandate applicable to him.

4. **Constitutional Law § 31— indigent defendant—no right to State appointed investigator**

Defendant, an indigent, did not show that the expenses of a private investigator and of an alleged expert in the area of reliability of eyewitness identification were necessary expenses of representation that the State was required to provide, since defendant did not show that there was a reasonable likelihood that a private investigator would discover evidence which would materially assist him in the preparation of his defense, and defendant made no showing that the alleged expert's testimony would assist him, as the stated purpose of the expert's testimony was to lay a basis for defendant's argument that it was possible that the prosecuting witness made a mistake in her identification of defendant. G.S. 7A-450(b).

5. **Criminal Law § 91— 195 days between indictment and trial—no denial of speedy trial**

Though 195 days elapsed from defendant's indictment to his trial, defendant was nevertheless tried within the 120-day period of the Speedy Trial Act, since 148 days were properly excluded due to the pendency of defendant's motion for change of venue and, excluding those 148 days, defendant's trial was held within the statutory period. G.S. 15A-701(b)(1)(d).

6. Criminal Law § 91— 331 days between mistrial and second trial—no denial of speedy trial

Though 331 days elapsed between defendant's mistrial and his second trial, defendant's second trial nevertheless began within the 120-day period required by the Speedy Trial Act where the trial court properly excluded delays occasioned by the unavailability of essential witnesses and time which elapsed because the venue of the case was within a county where, due to a limited number of court sessions, the time requirements of G.S. 15A-701 could not be met. G.S. 15A-701(b)(3), (8).

7. Criminal Law § 66.18— in-court identification—admissibility determined at prior trial

In a second trial of defendant after his first trial ended in a mistrial, the trial court did not err in refusing to hold voir dire examinations during the second trial in order to determine the admissibility of witnesses' identification testimony, since defendant was unable to demonstrate to the trial court that any new evidence would be forthcoming in a second set of voir dire examinations.

8. Criminal Law § 66.16— identification of defendant—no taint from photographic identification

The trial court did not err in admitting into evidence the in-court identification of defendant by two witnesses, and there was no merit to defendant's argument that a pretrial photographic identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, where the witnesses testified that they first observed defendant in a motel lobby which was well lighted; both were able to describe defendant; both selected defendant's photograph from a set of ten ordinary photographs all depicting black males; police officers made no suggestion to the witnesses as to which picture to choose; and the witnesses never wavered in their identification.

9. Criminal Law § 162.6— objection to evidence—specific grounds given

Where defendant gave specific grounds for his objection to the admission of evidence based on its relevancy and materiality, he could not argue on appeal that the evidence was objectionable on statutory grounds that the evidence was not disclosed to him pursuant to an order compelling discovery.

10. Criminal Law § 113.9— instructions—failure to request correction

Defendant could not complain on appeal that the trial court erred in its jury instructions where defendant failed to bring the matter before the trial court to seek a correction.

11. Criminal Law § 112.7— alibi—jury instruction

Defendant was not prejudiced by the trial court's erroneous instructions with regard to defendant's alibi evidence where, prior to jury deliberations, the trial judge corrected his misstatement and the correction nullified any prejudice to defendant.

12. Criminal Law § 113.1— jury instructions—summary of evidence—jury's recollection controlling

There was no merit to defendant's contention that the trial court erred when it refused defendant's request that it instruct the jury that their recollection of the evidence was controlling and that, if it conflicted with summaries of evidence by the court or by the attorneys, the jurors were to rely on their recollection, since the trial judge clearly outlined to the jury its responsibility for finding the facts.

13. Rape § 6— jury instructions—recapitulation of evidence

There was no merit to defendant's contention that there was no testimony by the prosecuting witness that the reason she submitted to sexual relations was that she feared defendant's use of a pistol and that the trial court erred in so instructing, though there was no direct statement by the prosecuting witness that she submitted to defendant's sexual attack because she was afraid of the gun, since there was ample circumstantial evidence that defendant had used the gun first to rob her and then to get her into his car, and the evidence was clear that defendant had the gun in the car and that the prosecuting witness was scared because of the gun.

14. Criminal Law § 113.2— jury instructions—summary of evidence sufficient

There was no merit to defendant's argument that, since identification of defendant as the perpetrator of the crimes was a substantial issue, the judge, in summarizing the evidence, should not have placed defendant at the scene of the crime without raising defendant's contention that defendant was improperly and erroneously identified by the prosecuting witness, since the trial court gave an adequate summary of defendant's alibi evidence and of the State's burden to prove beyond a reasonable doubt that defendant was the one committing the alleged crimes.

15. Kidnapping § 1.3— purpose of kidnapping—jury instructions

Where a kidnapping indictment charged that defendant kidnapped the prosecuting witness "for the purpose of using her as a shield and for the purpose of facilitating the flight of defendant," the trial court did not err in determining that there was insufficient evidence to go to the jury on the question of defendant's use of the prosecuting witness as a shield and in dropping this allegation from his charge.

16. Kidnapping § 1.2— sufficiency of evidence

There was no merit to defendant's contention that the State failed to prove all of the elements of the offense of kidnapping as charged because there was no evidence that defendant used the prosecuting witness as a shield or for the purpose of facilitating his flight, since the State's evidence tended to show that defendant forced the prosecuting witness to go with him and his companion after they had robbed her; while there was no evidence that defendant actually used the prosecuting witness as a shield, it was entirely reasonable for the jury to believe that he would have had the need arisen; defendant and his companion would not have left the prosecuting witness at the motel where she was robbed to call police, and in that sense, defendant's taking her was for the purpose of facilitating his flight.

State v. Sellars

17. Rape § 5— first degree rape—sufficiency of evidence

There was no merit to defendant's contention that there was no evidence as to his use of deadly force and therefore no evidence to convict him of first degree rape, since, although there was no evidence that defendant raped the prosecuting witness while wielding a gun, the record was replete with sufficient references to the gun—at the motel where the victim was robbed, in an automobile in which she was abducted, and outside the automobile when defendant shot her four times—so that the charge of first degree rape was properly submitted to the jury.

18. Constitutional Law § 81— consecutive sentences—no cruel and unusual punishment

Where the punishment imposed in each of defendant's cases was within statutory limits, it could not be considered cruel or unusual, nor was the imposition of consecutive terms cruel or unusual punishment.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 20 June 1980, in Superior Court, CHATHAM County. Heard in the Court of Appeals 2 March 1981.

On 10 December 1978, defendant was arrested by proper execution of four warrants charging him with aggravated kidnapping, armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, and first degree rape. On 22 January 1979, defendant was arraigned in Alamance County on each of the four charges, and to each he pleaded not guilty. By a 14 June 1979 order of Judge McKinnon, the venue of defendant's trial was changed to Chatham County where, after arraignment on the four charges on 16 July 1979, defendant was tried. On 21 July 1979, Judge Rouse entered a judgment finding the jury hopelessly deadlocked and declaring a mistrial.

On 16 June 1980, defendant was again brought to trial on the four indictments. At that trial, the State's evidence tended to show that, between 8:30 and 9:00 o'clock on the night of 3 December 1978, two black men, one of whom was the defendant, entered the Village Inn Motel in Alamance County, where a young woman, referred to hereinafter as the prosecuting witness, was working as the desk clerk. In the office with the prosecuting witness was Don King, another employee of the motel. The two men complained of car trouble, stayed in the telephone area of the motel for two or three minutes, then left. After Don King left, at approximately 9:25, the two black men returned to the motel where the defendant, wielding a small chrome-plated handgun,

demanded the money from the cash register. The other man, meanwhile, had taken the prosecuting witness's pocketbook. The two men then left the office, taking her with them. They forced her into an old light blue car parked in the motel parking lot. Defendant drove the vehicle for 20 to 25 minutes—first on Interstate 85 towards Haw River and finally onto a dirt road. During this time, the prosecuting witness, who started the ride in the back seat, was told to climb to the front seat where she was forced to remove her clothing. After both men had fondled her, she was made to return to the back seat.

After defendant pulled onto the dirt road, he stopped the car and forced the prosecuting witness to have sexual intercourse. Thereafter, she was told to get all her clothes and to get out of the car. While defendant was threatening the prosecuting witness about what the two men would do if she reported them, he pulled the gun and shot her twice, once in the abdomen and once in the shoulder. The two men then ran to the car; the prosecuting witness, thinking they had left, got up and began walking toward the hard-surfaced road. The two men, however, had not left; they turned on the headlights of the car, and the defendant jumped out and ran to her. While she pleaded, "I'm dying, please, don't hurt me. Don't shoot me anymore," the defendant shot her twice more, once in the face and once in the back. He and the other man then drove off. After waiting a short time to be sure they had left, the prosecuting witness got to her feet and walked back to the hard-surfaced road where she found help.

Defendant's evidence tended to show that, on 3 December 1978, he was at his home after being released on bond from Rockingham County jail. On that date, he borrowed his sister's blue Plymouth and met John Wiley at Ron's Quickee Mart. Since he had decided to ride around with Wiley in his car that night, defendant decided to lend his sister's car to his cousin and look-alike, Mario Steadman, and his companion Michael Green. Wiley, his girl friend, and defendant left the Quickee Mart sometime around 7:00 p.m. and headed north on Highway 86. After riding around for several hours, defendant returned to the Quickee Mart where he was supposed to meet Steadman and pick up his sister's car. Steadman did not come, and defendant asked Wiley to take him home. By 10:00 p.m., defendant was home, and he remained there the rest of the night.

The jury returned verdicts of guilty of kidnapping, armed robbery, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and second degree rape. After hearing the state's evidence concerning defendant's two previous convictions for armed robbery, Judge Brewer sentenced defendant to prison terms running consecutively, both to the sentence imposed in an earlier armed robbery conviction and to one another. From this judgment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the state.

Paul H. Ridge and James K. Roberson for defendant appellant.

MORRIS, Chief Judge.

The record of this complex case reveals a number of pretrial motions and orders which involved at least seven judges in both Alamance and Chatham counties. Defendant took exception to, and appealed from, the actions of six of these judges. On this appeal, defendant argues twenty-five assignments of error, all of which we have considered.

Pretrial Issues

Defendant raises four questions concerning alleged errors occurring prior to his second trial. The first question involves the failure of the trial court to conduct a probable cause hearing. The record shows that, on 2 January 1979, at defendant's probable cause hearing, the state moved for a continuance which was granted by Alamance County District Court Judge Harris, who set a 4 January 1979 date for the hearing. Judge Harris's order stated as the reason for the continuance the fact that the state was not prepared for the hearing. Later during the day of 2 January 1979, the grand jury of Alamance County returned four indictments against defendant, and, as a result, defendant's probable cause hearing was never held.

[1] Defendant assigns as error the denial of his 17 January 1979 motion to dismiss for failure of the trial court to hold a probable cause hearing prior to his indictment. Similarly, he assigns as error the denial of his post-indictment demand for a probable cause hearing. In support of his assignments of error, defendant refers to G.S. 15A-606(a) and (f):

> (a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. . . .
>
> . . .
>
> (f) Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable cause hearing.

Defendant argues that he did not waive his right to a probable cause hearing, that the state did not show good cause for the 2 January 1979 continuance of the probable cause hearing, and that the state did not file a timely and proper motion to continue.

The purpose of a probable cause hearing is to determine whether the accused should be discharged or whether sufficient probable cause exists to bind the case over to superior court and to seek an indictment against the defendant. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, cert. denied, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972). Section (f) of G.S. 15A-606 is designed to prevent unnecessary delay in the procedure leading to charges or dismissal of charges against a defendant. In light of the purpose of a preliminary hearing and of G.S. 15A-606(f), we can find no prejudicial harm resulting from the decision by Judge Harris to continue the probable cause hearing. We are not here deciding whether the trial court acted properly under the guidelines of G.S. 15A-606(f). That decision is unnecessary since defendant has failed to show that his case was prejudiced in any way by the continuance of the probable cause hearing. Furthermore, as noted in *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977), there is a substantial question as to whether the provisions of G.S. 15A-606(f) were designed to provide a defendant with additional rights, rather than to set rules for the orderly and efficient administration of justice. *Id.* at 555, 234 S.E. 2d at 741.

Defendant's post-indictment efforts to have a probable cause hearing were properly unavailing. In *State v. Lester*, supra, the North Carolina Supreme Court held that G.S. 15A-606(a) requires a probable cause hearing only in situations in which no indictment has been returned by a grand jury. In the present case, therefore,

defendant was not entitled to a probable cause hearing after his 2 January 1979 indictments.

We, therefore, hold that the continuance of defendant's probable cause hearing was not prejudicial to him and that his subsequent indictment rendered unnecessary a probable cause hearing.

[2] The second pretrial issue concerns defendant's 12 February 1979 indictment on the charge of armed robbery. The indictment read in part that defendant

> unlawfully, wilfully, and feloniously having in his possession and with the use and threatened use of firearms . . . whereby the life of [the prosecuting witness] was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away $274.50 while at the Village Motel and $9.00 from the person of [the prosecuting witness], of the value of $283.50 dollars, from the presence, person, place of business, of the Village Motel and [the prosecuting witness].

On 23 February 1979, well over four months before defendant's first trial, defendant made a Motion for Election or Dismissal for Duplicity, alleging that the armed robbery indictment charged defendant with two offenses in violation of G.S. 15A-924. Judge McKinnon, who heard the motion, signed an order dated 12 June 1979, denying defendant's motion and stating in part:

> The Court has considered the bill of indictment and the arguments of counsel and is of the opinion that it charges only one charge of armed robbery whereby the personal property of two persons was taken and is of the opinion that no duplicity exists in the bill of indictment. . . .

Defendant assigns as error this order by the trial court, and he argues that the count charged two offenses; that, in fact, defendant could have been charged in two counts with two offenses; and that the state should have been forced to elect between the two offenses.

We do not agree. Defendant was charged with one offense, the armed robbery of the prosecuting witness. The fact that in that robbery defendant obtained money both from the prosecuting witness and the Village Motel does not create separate offenses. Defendant's argument is, therefore, without merit.

[3] The third pretrial issue is related to defendant's arraignment. The record shows that defendant was subjected to two sets of indictments, the first being returned on 2 January 1979, and the second being returned on 12 February 1979. The chief difference in the two sets of indictments is that, in the second set, defendant was charged with first degree rape whereas, in the first set, he had been charged with second degree rape. At defendant's first trial, beginning 16 July 1979, he was arraigned, over his objection, on the second set of indictments. Over his further objections, his trial began on the same day as his arraignment. Eleven months later at his second trial, defendant objected to his being tried upon the arraignment of the first trial, and he argues that the only arraignment properly held for him was the one with respect to the original bills of indictment. He argues then, as he does now, that his arraignment at his first trial had not been calendared pursuant to G.S. 15A-943(a) and that, furthermore, he was tried that same week over his objection and in violation of G.S. 15A-943(b). He cites *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977), to support his argument and his conclusion that he is entitled to a new trial.

Defendant's argument is without merit. The G.S. 15A-943(a) requirements for calendaring arraignments apply only to those North Carolina counties "in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates. . . ." We here take judicial notice of the dates and terms of superior court and of the fact that Chatham County is not one of those which, in 1979, held at least 20 weeks of trial sessions involving criminal cases. *State v. Shook*, supra. Consequently, G.S. 15A-943 does not apply to the facts of this case.

G.S. 15A-944 does apply to defendant's situation. It reads:

> In counties other than those described in G.S. 15A-943 the prosecutor may, but is not required to, calendar arraignments in the manner described in that section.

In the present case, therefore, no calendaring of defendant's arraignment was necessary. Furthermore, his trial the week of his arraignment violated no statutory mandate applicable to defendant.

[4] The final pretrial issue raised by defendant involves his right to expert assistance.

Before defendant's first trial in 1979, defendant filed a Motion for Private Investigator and Expert Assistance in which he alleged that the state's inadequate response to his discovery requests necessitated defendant's own investigation. That motion was denied by Judge John Martin on 5 March 1979. In Judge Martin's order, he directed the state to respond to certain of defendant's discovery requests.

On 9 July 1979, defendant filed another Motion for Expert Assistance in which he sought the court's approval of the state's payment of money necessary to secure Dr. Robert Buckhout, "an expert in the area of reliability of eyewitness identification." Judge Battle denied defendant's motion without prejudice to the right of defendant to renew the motion before the judge assigned to defendant's case. On 16 July 1979, prior to defendant's first trial, defendant's Motion for Expert Assistance was again denied, this time by Judge Rouse. Defendant, prior to his second trial, renewed his motion which was denied by Judge Smith. We here consider the question of whether defendant, an indigent, showed the respective courts that the expenses of a private investigator and of Dr. Buckhout were "necessary expenses of representation" that the state was required to provide. G.S. 7A-450(b).

The law is well settled in North Carolina that the right to state-appointed investigators arises "only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense." *State v. Alford*, 298 N.C. 465, 469, 259 S.E. 2d 242, 245 (1979). Whether an expert should be appointed to assist an indigent in the preparation of his case is a question which depends upon the facts of each case and which lies within the discretion of the trial judge. *Id.*

Defendant, in his motion for a private investigator, failed to show that there was a reasonable likelihood of such discovery. Indeed, his motion painted a picture of frustration on the part of defendant because of alleged delays in state's compliance with discovery. Judge Martin's order of 5 March 1979, directing the state to comply with most of defendant's discovery requests

should have obviated the alleged reason for appointment of a private investigator.

The various trial courts' refusals to approve state money for securing the aid of Dr. Robert Buckhout were likewise within their discretion. Defendant made no showing that Dr. Buckhout's testimony would assist him. The alleged purpose of Dr. Buckhout's testimony was to lay a basis for defendant's argument that *it was possible* that the prosecuting witness made a mistake in her identification of defendant. We do not believe the state is required to pay for expert witnesses whose testimony amounts to generalities and to speculation as to whether those generalities apply to a specific case.

We note, however, that Dr. Buckhout did testify at defendant's second trial and that his fee was paid by defendant's family. Under all the circumstances of this case, we find no abuse of discretion in the trial courts' denials of defendant's motions for expert assistance.

Speedy Trial Issues

At three different times, defendant filed motions with the trial courts seeking dismissal of the actions against him on the grounds that he had not received a trial within the time periods prescribed by North Carolina's Speedy Trial Act, G.S. 15A-701, *et seq.* Each motion was denied, and to these denials, defendant assigns error.

G.S. 15A-703 imposes on a defendant charged with a criminal offense the burden of proof in supporting a motion to dismiss based upon alleged failure to comply with the time limits for trial as specified in G.S. 15A-701. The state, however, has "the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not (sic) the time limitations . . . have been complied with." G.S. 15A-703; *State v. Edwards*, 49 N.C. App. 426, 271 S.E. 2d 533 (1980). With those principles in mind, we shall review the three arguments advanced by defendant.

[5] Defendant's first argument is that more than 120 days elapsed from his indictment on 2 January 1979, to his first trial which began 16 July 1979. Under the provisions of G.S. 15A-701(a1)(1), we begin with the proposition that defendant's first

trial should have been held within 120 days of his indictment. Since there are more than 120 days from 2 January to 16 July 1979, it was incumbent upon the state to go forward with evidence demonstrating to the trial court that certain periods of time should have been excluded from the total number of days elapsing between indictment and trial. The record demonstrates that the state did go forward with such evidence. This Court, after reviewing Judge Rouse's order pertaining to defendant's motion to dismiss, concludes that he properly denied defendant's motion.

We admit that, from Judge Rouse's order, it is somewhat difficult to ascertain exactly how he numerically calculated the exclusionary periods applicable to defendant's case. There is no doubt, however, that there was a sufficient number of days which should have been excluded so that the total days elapsing between indictment and trial did not violate the Speedy Trial Act provisions.

In his order, Judge Rouse made the following findings of fact concerning motions which, under G.S. 15A-701(b), were to be considered in calculating eligible exclusionary periods:

> 2. [O]n February 8, 1979, the defendant filed a motion in which he raised the question of the capacity of the defendant to proceed and moved the court that the defendant be committed to a State mental health center for observation and treatment for the period necessary to determine the defendant's capacity to proceed.
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> 3. Thereafter on February 12, 1979, the defendant was ordered committed to Dorothea Dix Hospital for the purpose of determining his capacity to proceed. The following day, February 13, 1979, the presiding judge amended the Order committing the defendant to Dorothea Dix Hospital and committed the defendant to Central Prison, Raleigh, North Carolina.
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> . . .
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> 5. The report with respect to the defendant's capacity to proceed was dated April 5, 1979, and this report was received by counsel for the defendant on April 12, 1979. . . .

6. On January 17, 1979, a motion for change of venue or for special venire was filed. The hearing on the motion for a special venire or change of venue was first heard before Judge McKinnon on June 11, 1979. He ruled on the motion, denying same on June 12, 1979. On June 14, 1979, the State withdrew its objection to the motion for a change of venue and Judge McKinnon entered an order on that date transferring these cases for trial to Chatham County.

7. By motion filed March 20, 1979, the State moved that the defendant be directed to provide blood and hair samples and for saliva and dental impressions. On March 26, 1979, an objection and motion to vacate this Order was filed. The objection and motion to vacate was denied by Judge Martin on March 26, 1979. On May 1, 1979, a motion to suppress was filed by the defendant. This motion was heard and ruled upon by Judge McKinnon on June 12, 1979.

Judge Rouse properly excluded, under G.S. 15A-701(b)(1)(d), the period of time from defendant's motion for change of venue (17 January 1979) to Judge McKinnon's order granting defendant's motion and transferring the cases to Chatham County for trial.[1]

We do not deem it necessary to rule on the question of additional exclusionary periods since, according to our calculations, defendant was tried within 120 days of his indictment. We note that 195 days elapsed from defendant's indictment to his trial, but, of those 195 days, 148 were properly excluded due to the pendency of defendant's motion for change of venue. Defendant's first trial, therefore, was held within the 120-day period.

We do not accept defendant's contention that Judge Rouse improperly overruled other judges involved in defendant's trial

1. G.S. 15A-701(b)(1) reads in pertinent part:

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

. . .

d. Hearings on pretrial motions or the granting or denial of such motions. . . .

by retroactively excluding periods of time for motions and orders in which the respective judges had made no rulings concerning exclusion. We read the Speedy Trial Act to authorize the trial judge, who hears the motion to dismiss on the grounds that defendant was not given a speedy trial, to calculate exclusionary periods. Certainly the silence of other judges as to exclusionary periods cannot mean that they intended such periods not to be excluded, as defendant argues. It was, therefore, proper for Judge Rouse to calculate exclusionary periods.

Defendant's second speedy trial argument is that, because his arraignment at his first trial was improper, the first trial was a nullity. Therefore, according to defendant, the calculation of time elapsing before his second trial (16 June 1980) should have started at his 2 January 1979 indictments. Since we have already determined that defendant's arraignment was proper, this question is moot.

[6] Defendant's final, alternative speedy trial argument is that more than the statutory period of 120 days elapsed from his mistrial of 21 July 1979 until his second trial on 16 June 1980. G.S. 15A-701(a1)(4) allows the state 120 days from the declaration of a mistrial to try a defendant again. We note that there were 331 days between defendant's mistrial and his second trial. In order to complete the analysis necessary to determine whether defendant was denied a speedy trial under North Carolina law, we must again examine the G.S. 15A-701(b) exclusionary periods allowed by Judge Brewer who denied defendant's motion to dismiss. Judge Brewer found the following facts pertinent to defendant's present argument:

> 5. This case was scheduled for trial on the 5th day of November, 1979. On the 5th day of November, 1979, in the Superior Court of Chatham County before Judge Donald Smith, the defendant made a motion for a continuance. The basis for the defendant's motion was the unavailability of an essential witness for the defendant. The defendant's motion for a continuance was allowed on the 5th day of November, 1979. The witness became available by virtue of his recapture by authorities on or about the 3rd day of June, 1980.
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> 6. As a part of the order allowing the defendant's motion for a continuance, Judge Smith entered the following Order. "It

is further ordered that a period of time between this date, November 5, 1979, and such time as a special session of Court may be scheduled shall be excluded from making all computations under the 120 day rule contained in subsection 7 of Chapter 15A of the General Statutes of the State of North Carolina."

7. A tentative special term of Superior Court was scheduled on the 28th day of January, 1980, but was cancelled by the Administrative Office of the Courts, acting under the authority of the Chief Justice of the State of North Carolina, because of the continued unavailability of the witness for the defendant, and because of legitimate scheduling conflicts precluding the appearance of the attorney for the State of North Carolina, Mr. Lester Chalmers.

8. Between January 1, 1980, and June 16th, 1980, there were two weeks of regularly scheduled Criminal Superior Court in Chatham County, February 11th and April 21st. During these two weeks, the Court was fully utilized for the trial of criminal cases, specifically ten days of actual Court during those two week sessions.

9. The Administrative Office of the Courts designated the 16th day of June, 1980, a regular term of Criminal Superior Court for Chatham County, as the appropriate week for the trial of this action. . . .

We have reviewed the evidence on which Judge Brewer based his findings of fact. We have found that defendant made no objection to the evidence and that there was competent evidence to support the findings of the trial judge. Those findings of fact are, therefore, binding and conclusive on this appeal. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

Defendant's exception to the order of Judge Brewer, therefore, raises the question of whether the trial court's conclusions of law were correct and were supported by the findings of fact. The pertinent conclusions of law made by the court were:

1. The period from November 5th, 1979 to June 16th, 1980, shall be excluded in computing the time within which the trial of these criminal offenses must begin.

. . .

3. Taking into account all excluded periods less than 120 days have expired since the declaration of the mistrial on the 21st day of June, 1979.

4. The defendant's motion for dismissal with or without prejudice for failure for the State to provide a speedy trial should be denied.

G.S. 15A-701(b)(3) clearly allows exclusion of time for delay occasioned by the unavailability of essential witnesses.[2] Similarly, G.S. 15A-701(b)(8)[3] allows the trial court to exclude time which elapses because the venue of the case is within a county where, due to a limited number of court sessions, the time requirements of G.S. 15A-701 cannot be met.

The trial court's first conclusion was, therefore, clearly supported by the findings of fact and within the framework of G.S. 15A-701. Its third and fourth conclusions legitimately follow. Defendant's final speedy trial argument is, therefore, overruled.

Questions Related to Admission of Evidence

On this appeal, defendant brings forward five questions related to the trial court's admission of or alleged failure to admit certain evidence. First, defendant contends that Judge McKinnon erred in an order of 12 June 1979 in which he denied portions of defendant's discovery motion. He argues that Judge Martin had already ordered such discovery and that Judge McKinnon's ac-

2. G.S. 15A-701(b) allows the following periods to be excluded in computing the time within which the trial of a criminal defendant must begin:

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial. . . .

3. (8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met. . . .

tion, in effect, amounted to his overruling another superior court judge.

The record shows that two paragraphs of defendant's original Motion for Discovery of 8 February 1979 requested the state to

> [d]ivulge in written or recorded form, the substance of any and all steps taken by law enforcement officers, investigators or the State . . . in making identification upon which the charges against defendant are based . . . [and to]
>
> . . .
>
> [p]rovide defendant a list of all witnesses known to the State who can or might give testimony in this case and designate the matters or facts upon which each of such possible witnesses can or might give testimony. . . .

On 5 March 1979, Judge Martin allowed portions, including these two, of defendant's motion. On 12 June 1979, Judge McKinnon heard defendant's motion to exclude certain evidence because of alleged noncompliance with defendant's discovery order. Judge McKinnon in his order, found that the state had sufficiently complied with defendant's first request quoted hereinabove, by its indication that the testimony of one police officer would reveal all the steps taken to allow the prosecuting witness to identify defendant and by its revealing that Don King might also testify as to defendant's identify. Judge McKinnon found that the state had furnished defendant with a list of all known witnesses, but, citing *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), he refused to order the state to comply with defendant's request to supply him with the facts upon which each state witness would testify.

Defendant's argument about these proceedings is twofold. First, he argues that one superior court judge may not overrule another superior court judge, as Judge McKinnon allegedly overruled Judge Martin. Second, defendant argues that the state, having failed to comply with Judge Martin's order, should have been barred from introducing evidence it refused to disclose to defendant.

This Court does not believe it necessary to rule on the issues defendant has attempted to raise. Defendant has failed to demonstrate to this Court any exception he took to the introduc-

tion of evidence he claims should have been barred. More importantly, defendant has made no showing at all that he was surprised by the evidence or that he was, in some other way, prejudiced by its introduction. His assignment of error is, therefore, overruled.

[7] Defendant's second contention is that the trial court erred in refusing to hold *voir dire* examinations during the second trial in order to determine the admissibility of the identification testimony by the prosecuting witness and Mr. King.

We reject defendant's contention. At the first trial of defendant, complete *voir dire* examination of both the prosecuting witness and King had been conducted for the purpose of determining the admissibility of their eyewitness identification. At defendant's second trial, no *voir dire* hearings were necessary unless there was some showing by defendant that he could offer evidence that would be different from that given at the first hearing. *State v. Williams*, 33 N.C. App. 397, 235 S.E. 2d 86, *review denied*, 293 N.C. 258, 237 S.E. 2d 540 (1977).

It is clear from a reading of the record that defendant was unable to demonstrate to Judge Brewer that any new evidence would be forthcoming in a second set of *voir dire* examinations. We, therefore, find no error in Judge Brewer's denial of defendant's motion for those examinations.

From our ruling on this issue, it follows that the trial court did not err, as defendant claims, in denying defendant's motion to vacate the verdicts and order a new trial on the basis of error in refusing to hold these *voir dire* examinations.

[8] Third, defendant contends that the trial court erred in admitting into evidence the in-court identification of defendant by the prosecuting witness and Don King. Defendant argues that the pretrial photographic identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification of defendant.

Convictions based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside if the photographic identification procedure was so impermissibly suggestive that it gives rise to a substantial likelihood of irreparable misidentification at trial. *Simmons v. United States*, 390 U.S. 377,

88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976).

Defendant, prior to his first trial, moved to suppress the identification testimony of the prosecuting witness Mr. King. The court conducted a *voir dire* examination of both of these witnesses. The prosecuting witness testified that, when she observed defendant in the lobby of the motel, the lighting was fairly good. She was able to observe defendant face to face. Later, she was able to describe the defendant as being about five eleven, very slim, black, but light skin, with a moustache, a thin beard, and shaded glasses. When she was given a set of ten photographs by Alamance County Officer Porter, she was able to identify defendant as being the man who robbed and raped her. There was no evidence that Officer Porter suggested defendant's picture to the prosecuting witness. The prosecuting witness stated on *voir dire* that she "was sure of who he was" when she chose defendant's picture.

After considering the evidence on *voir dire*, the trial court found, in part, that on the night of 3 December 1978, the lobby of the Village Motel was well lighted; that the prosecuting witness was able to observe defendant and his accomplice three or four minutes at close proximity; that the prosecuting witness was able to describe defendant; that she selected his photograph from a set of ten ordinary photographs all depicting black males and that she did so without any suggestion by police officers. The trial court concluded that the pretrial identification procedure was not so impermissibly suggestive as to give rise to irreparable misidentification and that the prosecuting witness's in-court identification was of independent origin and was based on her observation of defendant on 3 December 1978.

Don King stated on a separate *voir dire* that he observed defendant in the lobby of the motel where lighting conditions were "not bright" but "not real low". He was able to describe defendant in sufficient detail to allow someone in the Sheriff's Department to draw a composite. When he was shown the set of ten photographs, no one suggested defendant's picture to him, but defendant's picture "caught . . . his eye."

At the close of this *voir dire*, the trial court again found that the witness had had time to observe defendant in a well-lighted area and that, without suggestion, he had been able to pick out defendant's picture from a set of ten photographs. The court's conclusion concerning this identification by King paralleled its conclusion concerning the prosecuting witness's identification.

Based on our review of the record and considering the totality of the circumstances, we find that the trial court did not err in its subsequent denial of defendant's motion to suppress the identification testimony of the prosecuting witness and King. The court's findings of fact were supported by competent evidence that the two witnesses were able to observe defendant for a period long enough and in a space well lighted enough to allow later identification. There was no evidence of suggestiveness. The witnesses were not told they *had* to identify one or any of the photographs. They never wavered in their identification. The trial judge's findings were based on competent evidence and are binding on appeal. *State v. Jackson*, supra.

Defendant's fourth issue regarding admission into evidence relates to certain photographs of defendant and of the victim of the crimes. Over defendant's objection, the state was allowed to introduce into evidence a photograph of defendant that was taken on 11 December 1978, the date of defendant's arrest. The defendant argues that the admission of the photograph into evidence was prejudicial error because, although it was a photograph covered by Judge Martin's order compelling discovery, the state had failed to provide defendant with a copy of it.

[9] We are not compelled to consider this assignment of error on appeal. At trial defendant gave specific grounds for his objection to the admission of this evidence. At one point, defense counsel stated that the photograph was not "relevant or proper being on December 11, 1978, or later. . . ." At another point, counsel objected on the grounds that the photograph was "not material to this case." Defendant did not inform the trial court that he was basing his objection to the admission of this evidence upon G.S. 15A-910(3). Defendant, therefore, failed to present to the trial court the grounds for exclusion he now argues. Defendant having made a specific objection at trial based on the relevancy and

materiality of the evidence, may not argue on appeal the statutory grounds. See generally, 1 Stansbury's N. C. Evidence § 27 (Brandis Rev. 1973). Even if the court should consider this assignment of error, there is no error. Under G.S. 15A-910(3), the trial court has discretion in determining whether to exclude certain evidence not disclosed pursuant to an order compelling discovery. Defendant has failed to show, nor can this Court find, any abuse of the trial court's discretion.

Defendant makes another assignment of error relating to the introduction of photographs of the wounds that the prosecuting witness sustained on the night of 3 December 1978. Defendant argues again that the photographs were not given to him pursuant to the pretrial discovery order and that, therefore, they should have been excluded. According to defendant, the trial court's allowing these photographs into evidence prejudiced the defendant, because they were inflammatory in nature and could have caused sympathy for the prosecuting witness and, therefore, for the state.

The photographs about which defendant complains do not appear as part of the record on appeal. Defendant, therefore, has not shown error. *State v. Samuel*, 27 N.C. App. 562, 219 S.E. 2d 526 (1975).

Finally, defendant assigns as error the refusal of the trial court to allow certain expert testimony of Dr. Robert Buckhout who had qualified, without objection, as "an expert in the field of psychological elements of eyewitness identification." The record shows that Dr. Buckhout had testified at length about the various factors, such as lighting, stress conditions, and lapse of time, which influence a person's identification of another person. He had also been allowed to testify as to the elements necessary for putting together a proper, non-prejudicial photographic lineup.

The question which defendant claims Dr. Buckhout was not allowed to answer was:

> Q. Dr. Buckhout, I'll ask you if in this case the jury should find from the evidence that the law enforcement authorities, prior to submitting this group of photographs that I've handed you, State's Exhibit 26, a through j, had been given a description by one or more witnesses or individuals, that

> suspect was described as being a black male, age twenty-one, height about 5'10" tall, slender build, medium skin color, moustache, short afro, shaded glasses, and wearing a grey hooded jacket, do you have an opinion satisfactory to yourself as to whether or not the photos that I have handed you and just referred to meet the standards that you have testified to with respect to good testing, do you have an opinion?

The record shows that Dr. Buckhout was allowed to answer this question out of the presence of the jury. Thereafter, the jury returned, and the questioning of Dr. Buckhout resumed.

We have carefully studied the answer tendered by Dr. Buckhout out of the presence of the jury and his testimony after the jury returned. We see no difference in the substance of these two sets of testimony. Before the jury, Dr. Buckhout was able to testify in part, as follows:

> Yes, with respect to this group of photographs that I was handed that were marked Defendant's-State's Exhibit 26 a through j, I can evaluate that group of photographs with respect to the standards of fairness and suggestibility that I referred to. Proceeding with my evaluation of that group of photographs as a photo spread for identification purposes, referring to Exhibit 17 which is the standard, from this point on, we'll be concerned with how well the set of photographs provides a test given that the first photograph is that of the defendant because the major job is to assume that the other photos should match it so that it provides a fair test of memory.
>
> Under those circumstances, the other photos should match in as many ways as possible that key photograph of the suspect. And as I looked over these, grouped them on the major characteristics, the major features, the major feature that stood out, the something to match up to was the wearing of glasses. And the wearing of glasses in this particular case by the suspect himself, there are four other photographs of men wearing glasses. The others have no glasses and would not be considered to be a part of the test on the grounds that major features should be considered when you do that match-up job.

> So that these photographs would fall off right away, making our multiple choice test one out of ten photographs in effect that would reduce it down to one out of five. And of these, we look at the other physical characteristics and see whether they match that of the defendant, and in my opinion they do not.
>
> Some of the gentlemen in the pictures are different weight, age and different hair style. Hair style in particular would eliminate these two photographs, No. 8 and No. 10 because they are distinctly different from that of the defendant. This leaves us with one out of three. And even with these photographs, there are problems with them from a photographic point of view in that they are different photographically. The defendant is pictured against the wall facing it with a fairly bright light behind him. The other two gentlemen are portrayed in different poses; one of them is seated and is distinctively different from that of the defendant and is also showing a different skin tone, which would be another major feature, based upon the fact that this shows a lighter skin person.

His testimony concerning the photographic lineup did not stop here but continued for several more paragraphs.

After reviewing this line of testimony, this Court concludes that Dr. Buckhout *did* answer the question defendant posed and that defendant's assignment of error, therefore, has no merit.

Jury Instructions

[10] Defendant makes six assignments of error and brings forward six arguments concerning the trial court's instructions to the jury. The defendant's first contention is that the court erred in referring to defendant's chief alibi witness John Wiley as "James Wiley" and that that error "could have likely been perceived by the jury as a discrediting" of defendant's alibi evidence. Defendant, however, failed to bring the matter before the trial court to seek a correction. As the Supreme Court pointed out in *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977), "[i]f the defendant deemed such variance as appears in the record to have been prejudicial to him, he should have directed this to the attention of the court in time for a correction prior to the verdict." *Id.* at 407, 238 S.E. 2d at 517.

[11] Defendant's second argument concerns the trial court's erroneous instructions with regard to defendant's alibi evidence. In part, the court stated:

> Therefore, I charge, that if upon considering all the evidence in the case, including the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, *you must find him guilty.* (Emphasis added.)

Of course, this *lapsus linguae* is erroneous. We believe, however, that, prior to jury deliberations, the trial judge corrected his misstatement and that that correction nullified any prejudice to defendant. The record shows that the judge stated:

> Ladies and gentlemen, one thing. It has been called to my attention that during my instructions relating to alibi, that there is some question as to what I said with regard to whether I said that if you have a reasonable doubt as to the presence of the defendant at or participation in the crime you may find him not guilty, or that I might by inadvertence have said, you may find him guilty. Whichever I said at that earlier time, it was my intent at that time and it is my intent now to instruct you, and my instructions to you are that, I charge if, upon considering all of the evidence in this case, including the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in any of the crime charged he has made to that crime, you must find him not guilty.

In light of this correction and considering the complete set of instructions, especially those instructions dealing with the state's burden of proof, this Court finds no prejudicial error in this portion of the charge.

[12] Defendant's third contention is that the trial court erred when it refused defendant's request that it instruct the jury that their recollection of the evidence was controlling and that, if it conflicted with summaries of evidence by the court or by the attorneys, the jurors were to rely on their recollection. Of course, defendant is correct in his assertion that the jury, in arriving at a verdict, must be governed by their recollection of the testimony. *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84, *cert. denied*, 332

U.S. 764, 68 S.Ct. 69, 92 L.Ed. 349 (1947). In this case, our task is to determine whether the trial judge clearly outlined to the jury its responsibility for finding the facts. After reviewing the instructions, we conclude that the jury was sufficiently advised of that responsibility. At the beginning of its recapitulation of the evidence presented, the court stated:

> Now at this time, ladies and gentlemen, I'll be very brief. I'll briefly recapitulate for you what some of the evidence presented by the State and some of the evidence presented by the defendant in this case show. Now it is not my intent to recapitulate all the evidence. My summary of the evidence shall be extremely short. If my recollection of the evidence differs from yours, then disregard completely my recollection of the evidence and rely exclusively and entirely upon your own recollection of the evidence.

Near the end of this charge to the jury, the trial judge detailed the task of the jury in the following way:

> Now, members of the jury, you have heard the evidence in this case, for the arguments, the final speeches of the attorneys in the case, attorneys for the defendant, and the attorney for the State. You've heard the instructions of the Court. As I indicated to you during my instructions, I have not summarized all the evidence in this case. It is, however, your responsibility to consider all of the evidence whether it has been called to your attention or not, either by the Court or by the attorneys in their speeches to you. All of the evidence is important and it is your responsibility to consider what all the evidence is.
>
> . . .
>
> You, ladies and gentlemen, are the triers of fact and it is your sole, exclusive, promise and responsibility to find the true facts of these cases and to render a verdict reflecting the truth as you find it to be.

From the foregoing portions of the trial court's instructions, this Court concludes that defendant's argument has no basis, and we overrule his assignment of error.

[13] Defendant's fourth contention concerning the judge's instructions to the jury is that there was error in the judge's

recapitulation of the evidence surrounding the prosecuting witness's rape. The record shows the judge charged the jury as follows:

> The State further offered evidence tending to show that she did not consent to this sexual relation.
>
> That the reason she submitted to sexual relations was because of her fear of the pistol which he had threatened her with earlier and that she would be hurt with that pistol.

Defendant argues that there was no testimony by the prosecuting witness that the reason she submitted to sexual relations was that she feared defendant's use of the pistol. We do not agree.

While there was no direct statement by the prosecuting witness that she submitted to defendant's sexual attack because she was afraid of the gun, there was ample circumstantial evidence that defendant had used the gun first to rob her and, then, to get her into the car. The evidence was clear that defendant had the gun in the car, and that the prosecuting witness was scared because of the gun. Defendant's argument has absolutely no merit. We would point out also that the jury, relying on its own collective recollection of facts, found the defendant guilty of second degree rape and, therefore, must have ruled out the use of a deadly weapon.

[14] Defendant's fifth assignment of error relates to the trial court's refusal to instruct the jury about the question of defendant's identification. Defendant argues that, since the identification of the defendant as the perpetrator of the crimes was a substantial issue, the judge, in summarizing the evidence, should not have placed defendant at the scene of the crime without also raising defendant's contention that defendant was improperly and erroneously identified by the prosecuting witness.

Under North Carolina law, a trial judge is not required to state the contentions of the parties, but when he does give the contention of the state on a particular aspect of the case, it is error to fail to give defendant's opposing contention which arises out of the evidence on the same aspect of the case. *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973). After reviewing the instructions as a whole we are convinced that the trial court gave an adequate summary of defendant's alibi evidence and of the

state's burden to prove beyond a reasonable doubt that defendant was the one committing the alleged crimes. Four times, once for each charge against defendant, the court noted that defendant had put on evidence tending to establish that he was not at the scenes of the crimes on 3 December 1978. As to the identification question, the court went to great lengths to outline the problem and the state's burden of proving defendant to be the man who robbed, kidnapped, raped, and assaulted the prosecuting witness:

> Now, I instruct you, ladies and gentlemen, that the State of North Carolina has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt, as I defined that term to you earlier. This means that you, the jury, must be satisfied beyond a reasonable doubt that this defendant was the perpetrator of the crime charged before you may return a verdict of guilty.
>
> The main aspects of identification are the observation of the offender by the witness before, and at the time of, the offense, or after the offense.
>
> In examining the testimony of the witness as to his or her observation of the perpetrator before or at the time of the crime, you should consider the relevant facts such as the capacity of the witness to make an observation, through his or her senses; opportunity of the witness to make an observation; and such details as lighting, the quality of the lighting of the scene of the alleged crime at the time of observation, the mental and physical condition of the witness; the length of time of the observation; and any other condition or circumstance which might have aided or hindered the witness in making his or her observation.
>
> In examining the testimony of a witness as to his or her observation after the crime, you should consider relevant factors such as the capacity of the witness to make such an observation, through his or her senses; the opportunity of a witness to make an observation; the details as to lighting; the mental and physical condition of the witness; the length of time of the observation; and any other condition or circumstance which might have aided or hindered the witness in making the observation. However, your consideration must go further. The identification of this defendant by the

witness as the perpetrator of the offense must be purely the product of the witness' recollection of the offender and derived only from the observation made at the time of the offense. In making this determination you should consider the manner in which the witness was confronted with the defendant after the offense, the conduct and comment of the persons in charge of the photographic identification procedure and any circumstances which may have influenced the witness in making an identification, which either reinforced the accuracy of the witness' identification of the defendant or which cast doubt upon it.

The identification witness is a witness like any other. That is, you should assess and determine the credibility of the identification witness in the same way you would any other witness in determining the adequacy of his or her observation and his or her capacity to observe.

If defendant found these instructions of the court deficient, he should have brought his objections before the trial judge in order to allow him to make any required corrections. In *State v. Davis*, 297 N.C. 566, 256 S.E. 2d 184 (1979), the Supreme Court held that defendant was not entitled to complain of the trial court's failure to detail fully the inconsistencies of the state's evidence since defendant failed to request a more detailed statement of the contentions. In the case *sub judice*, defendant likewise is not entitled to complain.

[15] Defendant's final contention concerning jury instructions is that the trial court erred in failing to instruct the jury on the charge of kidnapping[4] in a manner consistent with the indictment and with defendant's written request. The kidnapping indictment

4. G.S. 14-39(a), under which defendant was charged, states:

Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

reads in part that defendant "unlawfully and wilfully did feloniously kidnap [the prosecuting witness] . . . for the purpose of using her as a shield *and* for the purpose of facilitating the flight of the defendant. . . ." (Emphasis added.) The record shows that the trial court, in submitting the elements of kidnapping, failed to instruct the jury on defendant's use of the prosecuting witness as a shield. From his instructions it appears to this Court that the trial judge determined that there was insufficient evidence to go to the jury on the question of defendant's use of the prosecuting witness as a shield and that he, therefore, dropped this allegation from his charge. We believe that this decision by the trial judge was proper.

In an analogous situation, in *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975), the Supreme Court held that, even though defendant was charged with breaking and entering with intent "to steal, take and carry away *and* with intent to commit the crime of Murder. . .," *Id.* at 144, 214 S.E. 2d at 22, the state was required to prove only one intent. As the *Boyd* opinion pointed out, analogous rulings have been made in cases in which defendants have been charged with breaking and entering under G.S. 14-54:

> It has long been the law in this State in prosecutions under this statute and its similar predecessors that where the indictment charges the defendant with breaking *and* entering, proof by the State of either a breaking *or* an entering is sufficient; and instructions allowing juries to convict on the alternative propositions are proper. (Citations omitted.)

Id. at 145, 214 S.E. 2d at 22.

We hold that indictments under the kidnapping statute may allege one or several of the purposes set forth in G.S. 14-39(a), but that the state need prove only one purpose in order to sustain its burden of proof as to that element of the crime. Similarly, when a trial judge determines that the state has failed to prove one or more of the purposes of kidnapping alleged in the indictment, he

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

may properly refuse to instruct on that purpose or those purposes.

In the present case, the jury's finding that defendant was guilty of taking the prosecuting witness against her will for the purpose of facilitating his flight is entirely within the statutory scheme. Defendant's assignment of error related to this charge is overruled.

Other Post-Evidence Questions

We next consider defendant's allegations that the trial court erred both in denying defendant's motions to dismiss at the close of state's evidence and at the close of all the evidence and in denying defendant's motion to vacate the verdicts of the jury. Defendant's two assignments of error are related to the same general argument, which is that there was insufficient evidence on which to convict defendant. Defendant separately argues his case for each count with which he was charged.

In determining whether to grant a motion to dismiss at the close of the evidence, the trial court must consider the evidence in the light most favorable to the state, and the state is entitled to the benefit of every reasonable inference to be drawn from it. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973). In order for the state to withstand a motion to dismiss, there must be substantial evidence against the accused on all material elements of the offense charged. *State v. Board*, 296 N. C. 652, 252 S.E. 2d 803 (1979). With these rules in mind, we shall review defendant's specific arguments.

[16] In the kidnapping indictment, defendant was charged with kidnapping the prosecuting witness "for the purpose of using her as a shield and for the purpose of facilitating the flight of the defendant. . . ." Defendant argues that, since there was no evidence that defendant used the prosecuting witness as a shield or for the purpose of easing his flight, the state failed to prove all of the elements of the offense of kidnapping as charged. After reviewing the evidence, this Court concludes that there was sufficient circumstantial evidence as to the purpose of the prosecuting witness's kidnapping to withstand defendant's motions to dismiss and to vacate the verdicts. State's evidence tended to show that

defendant forced the prosecuting witness to go with him and his companion after they had robbed her. While there was no evidence that defendant actually used the prosecuting witness as a shield, it was entirely reasonable for the jury to believe that he would have had the need arisen. Furthermore, as the state points out in its brief, obviously defendant and his companion were not going to leave the prosecuting witness at the motel to call the police. In that sense, defendant's taking her was for the purpose of facilitating his flight, or at least it was reasonable for the jury to conclude that it was.

[17] As to the rape charge, defendant alleges there was no evidence as to defendant's use of deadly force and, therefore, no evidence to convict defendant of first degree rape. According to defendant, the court's erroneous refusal to dismiss the first degree rape charge resulted in the jury's being influenced to find defendant guilty of second degree rape. This Court finds that, although there was no evidence that defendant raped the prosecuting witness while wielding a gun, the record is replete with sufficient references to the gun - - - at the motel, in the automobile, and, finally, outside the automobile when defendant shot the young woman four times—that the court's charge was proper. Defendant's argument is specious.

As to all four charges, defendant makes the same argument that there was insufficient evidence as to defendant's identity to allow the case to go to the jury or to allow the verdicts to stand. He bases this argument on his earlier contention that the eyewitness identification testimony of the prosecuting witness and King should have been suppressed on the grounds of impermissibly suggestive pretrial identification procedures. This contention we have already rejected. Defendant's argument here is also rejected.

Defendant assigns as error the sentences that the trial court imposed upon him.

The record shows that, prior to defendant's being sentenced, counsel for the state advised the court (1) that defendant had been convicted of armed robbery in Person County in 1978 and that he was sentenced to not less than eight nor more than fifteen years imprisonment; and (2) that defendant was thereafter convicted in Rockingham County of armed robbery for which he had

received a sentence of not less than forty nor more than sixty years imprisonment. In the present armed robbery case, the trial judge imposed a term of not less than forty nor more than sixty years imprisonment, this sentence to run consecutively with defendant's sentence imposed in Rockingham County for armed robbery. For his conviction of second degree rape, defendant was sentenced to thirty years, running consecutively with the sentence imposed for armed robbery. The trial court consolidated judgment for the kidnapping and the assault with a deadly weapon with intent to kill inflicting serious bodily injury charges and sentenced defendant to twenty years, to run consecutively with the sentence imposed for rape.

Defendant argues that the prison sentences and their being imposed consecutively constituted cruel and unusual punishment in violation of the Constitution of North Carolina and of the United States Constitution. Defendant's argument has no merit.

[18] A sentence of imprisonment within the maximum authorized by statute is not cruel or unusual punishment unless the punishment provisions of the statute itself were unconstitutional. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973). The punishment imposed in each of defendant's cases was within statutory limits and, therefore, proper. As to the imposition of consecutive terms, the North Carolina Supreme Court has specifically approved consecutive sentences and has rejected arguments that such sentences are cruel and unusual punishment. *Id.*

Defendant's final assignment of error, relating to the entry of judgments against him, is based upon arguments presented earlier in his brief. We have rejected these arguments and, hence, find no basis for his final assignment of error.

In defendant's trial, this Court finds

No error.

Judges MARTIN (Robert M.) and WHICHARD concur.

STATE OF NORTH CAROLINA v. GLENWOOD EARL MOSES AND LESLIE GIBBS, JR.

No. 808SC1207

(Filed 16 June 1981)

1. **Criminal Law § 66.18— in-court identification—admissibility determined at prior trial—voir dire not necessary at second trial**

Where a voir dire hearing was held on the admissibility of in-court identification testimony at defendant's first trial which ended in a mistrial, no voir dire hearing on the admissibility of the identification testimony was required at defendant's second trial in the absence of a showing by defendant that he could offer evidence additional to or different from that given at the first hearing.

2. **Criminal Law § 66.9— photographic identification—officer's suggestion of defendant's name—no impermissible suggestiveness**

A pretrial photographic identification of defendant by a robbery victim was not impermissibly suggestive because an officer suggested to the victim the possible name of the person who robbed her where the officer did not suggest defendant's physical identity to her, and the victim was able without prompting to select defendant's photograph, which contained no name, from a lineup containing the photographs of six persons.

3. **Criminal Law § 92.1— consolidation of charges against two defendants**

There was no merit to defendant's contention that the trial court erred in consolidating his trial for armed robbery with that of a codefendant because certain evidence was admissible only against the codefendant since a pistol and currency found in a search of a car occupied by both defendants was admissible against both; the trial court instructed the jury not to consider against defendant evidence which was found on the person of the codefendant; and neither defendant offered any evidence and there was no fundamental conflict between them in the case.

4. **Criminal Law §§ 26.8, 128.1— mistrial—failure to find facts—subsequent trial not double jeopardy**

Any error in the trial court's failure to make findings of fact in declaring a mistrial at defendant's first trial as required by G.S. 15A-1064 was not prejudicial to defendant where the mistrial was granted at defendant's request, and defendant's subsequent retrial did not place him in double jeopardy.

5. **Criminal Law § 88.1— refusal to permit certain cross-examination**

In this prosecution for armed robbery, defendant's constitutional right to cross-examination was not violated by the trial court's refusal to permit defense counsel to ask a State's witness questions concerning his receipt of money from the police department after the robbery in question where the trial court found that the answers to such questions had no bearing on the witness's credibility and were immaterial and irrelevant on the basis of evidence at an *in camera* hearing which tended to show that the witness had

received money for supplying the police with information concerning drug sales and the location of drug selling operations, the witness was frightened that revealing such information in open court would endanger his life, and the witness had received no money for information he gave the police concerning the robbery in question. Art. I, Section 23 of the N.C. Constitution; Sixth Amendment to the U.S. Constitution.

6. Criminal Law § 86.8— State's witness—cross-examination as to whether committed certain crimes—assertion of right against self-incrimination

The trial court did not abuse its discretion in refusing to permit defendant's counsel to cross-examine a State's witness as to whether he had committed breakings and enterings and larcenies on two specified dates after the witness asserted his right against self-incrimination.

7. Criminal Law § 90.1— State's impeachment of own witness—harmless error

Any error in permitting the State to contradict its own witness by an officer's testimony that the witness told him that defendant committed the robbery in question was not prejudicial to defendant.

8. Criminal Law § 113.1— recapitulation of evidence—lapsus linguae

Defendant was not prejudiced by the trial court's *lapsus linguae* in instructing the jury that there was evidence tending to show defendant's presence "at" the motel where a robbery occurred rather than "near" the motel.

9. Searches and Seizures §§ 11, 34— valid reason to stop vehicle—items in plain view—probable cause to search vehicle—search incident to arrest

Officers had a valid reason to stop defendant's car where they had a warrant for the arrest of a codefendant who was riding in the car and information linking defendant and the codefendant to an armed robbery, and officers lawfully seized a gun holster and money which were in plain view in the car. Furthermore, officers had probable cause to search the car and to seize a gun found under the front seat, and officers lawfully seized money and a motel room key found on defendant's person as an incident of defendant's lawful arrest.

10. Criminal Law § 9.4— instructions on aiding and abetting

The trial court adequately instructed the jury on aiding and abetting where the court charged that, in order to find defendant guilty of armed robbery as an aider and abettor, the jury would have to find that defendant, although not physically present at the time the robbery was committed, "shared the criminal purpose" of the perpetrator and to the knowledge of the perpetrator was aiding or was in a position to aid him.

APPEAL by defendants from *Bruce, Judge*. Judgments entered 1 August 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 28 April 1981.

Defendants Moses and Gibbs were charged in separate indictments with the 19 April 1980 armed robbery of Annie Mae Lee.

The first trial against defendant Moses ended in a mistrial. At the second trial, the State's motion to consolidate the cases of the two defendants was granted.

At the consolidated trial, the State's evidence tended to show that on 19 April 1980 at approximately 8:15 p.m., defendant Moses, wearing a black and red toboggan, entered the Motel 6 located on the Highway 70 by-pass in Goldsboro. After requesting a room, and while the desk clerk, Annie Mae Lee, was obtaining a room key, Moses came behind the counter, pulled a gun, and demanded money. After obtaining $301.00 from the cash register, Moses left the motel office.

At approximately 8:30 p.m., Moses was seen by witness William Earl Brown, with defendant Gibbs in Gibbs' brown Camaro on the service road serving Motel 6. After responding to a call reporting the crime and investigating the incident, members of the Goldsboro Police Department obtained a warrant for the arrest of defendant Moses. The warrant was executed at approximately 11:00 p.m. That same night, at about midnight, defendant Moses was observed by police officers following Gibbs and a third person from a house on South George Street and getting into Gibbs' car. Police officers stopped Gibbs' car and placed Moses under arrest. Under the right front seat of the automobile in front of where Moses sat, the police officers found $157.00 in currency and a .32 caliber revolver. On the backseat, the officers found a gun holster. Following the search of the car, defendant Gibbs was placed under arrest. In a search of Gibbs at the police station, officers discovered $50.00 in currency and Motel 6 room key. In a further search of Moses at the police station, officers found $12.00 in currency in the lining of defendant Moses' coat.

Neither defendant offered any evidence. The jury returned guilty verdicts as to both defendants and from judgment entered on the verdicts, each defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

George F. Taylor for defendant Moses.

Hulse & Hulse, by H. Bruce Hulse, Jr., for defendant Gibbs.

WELLS, Judge.

For the sake of clarity, we shall treat each defendant's appeal separately.

Defendant Moses' Appeal

[1] Defendant Moses first assigns as error the trial court's denial of his motion to suppress the in-court identification of him by State's witness Annie Mae Lee. Although defendant made no motion to strike the allegedly improper testimony at his second trial, he did object to the questions leading to the in-court identification. Normally, upon even a general objection to identification evidence, there should be an immediate *voir dire* hearing to determine the admissibility of evidence. 1 Stansbury's N.C. Evidence § 57, at 176 (Brandis rev. 1973). In the case before us, however, a *voir dire* had been held at the previous trial of defendant. At the second trial, no *voir dire* hearing was necessary unless there was some showing by defendant that he could offer evidence that would be different from that given at the first hearing. *State v. Williams*, 33 N.C. App. 397, 398-99, 235 S.E. 2d 86, 87, *disc. rev. denied*, 293 N.C. 258, 237 S.E. 2d 540 (1977). Defendant Moses made no showing that he had additional or different evidence from that given at the first *voir dire* hearing. His assignment of error, therefore, relates back to his motion to suppress made at the first trial and presents the question of whether the denial of his motion violated his due process rights guaranteed by the U.S. Constitution and the North Carolina Constitution and deprived him of a fair and impartial trial.

In *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), our Supreme Court reiterated the test for determining the validity of pretrial identification procedures:

> The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. [Citations omitted.]

Id. at 9, 203 S.E. 2d at 16. Factors to be considered in evaluating the likelihood of mistaken identification include (1) the opportunity of the witness to observe the defendant at the time of the

crime, (2) the witness' degree of attention, (3) the accuracy of the witness' description of the defendant, (4) the level of certainty demonstrated by the witness, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed. 2d 401, 411 (1972); *see also, State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977).

After reviewing the record in the present case in light of these principles, we conclude that the trial court properly denied defendant Moses' motion to suppress the in-court identification of him by witness Lee. At defendant Moses' first trial, a *voir dire* was conducted to determine the admissibility of the identification testimony. Lee testified that Moses entered the office of Motel 6 twice on the day of 19 April 1980, once at approximately 5:00 p.m., and later, at the time of the armed robbery. At both times, the office was brightly lighted. At the 5:00 meeting, defendant Moses stood a couple of feet from the witness and remained four or five minutes, giving Lee ample time to observe him. At the second meeting, Lee recognized Moses as the one who had come in earlier. When he came behind the counter, "he was close enough [for Lee] to slap him in the face." Lee was able to describe defendant Moses to police officers as being a black male, about six feet tall, wearing a toboggan, brown slacks and a blue coat. Within an hour or so after the robbery, Lee selected Moses' picture positively from a photographic line-up which included photographs of five other persons. The propriety of that line-up has not been challenged by defendant Moses.

[2] In his argument, defendant Moses relies heavily on the manner in which Lee discovered his name. After describing Moses to the police officers, Lee was asked if she knew Earl Moses. Her response was, "Yes. Come to think of it, that's who the man was." The suggestion to Lee of a possible name for the person robbing her, however, did not suggest to her Moses' physical identity. In an analogous situation in the case of *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979), our Supreme Court found no impermissibly suggestive pretrial identification procedure where publicity as to defendant contained only his name and no photographs. Likewise, in the case *sub judice*, Lee simply heard a name. Thereafter, in the photographic line-up, she was able, without prompting, to select defendant Moses' photograph which contained no name. We find nothing which suggests that the

pretrial procedures were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

[3] Defendant Moses' next assignment of error raises the question of whether the trial court properly allowed the State's motion to consolidate his trial with that of defendant Gibbs. The defendant argues that consolidation resulted in the admission of evidence against co-defendant Gibbs that was inadmissible against him and that the limiting instructions by the court could not have cured the prejudicial effect of such evidence. G.S. 15A-926(b)(2)a allows joinder of charges against two or more defendants when each defendant is charged, as in the present case, with accountability for each offense. Where a defendant objects to the joinder of charges, the trial court must deny such joinder whenever, before trial, it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants. G.S. 15A-927(c)(2)a. "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929 (1980). The rule on consolidation in such cases as the one before us is clearly stated in *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). We quote:

> Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. *State v. Taylor*, supra; *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972).

289 N.C. at 658-59, 224 S.E. 2d at 561-62. At trial, Moses objected to testimony from officers to the effect that their search of Gibbs' auto revealed a pistol and some currency and the search of Gibbs' person revealed currency and a Motel 6 room key. First, we note

that the evidence as to the gun and the currency in the car was admissible against both defendants. Next, we note that when Moses objected to the questions as to what the search of defendant Gibbs' person revealed, the trial court promptly instructed the jury not to consider that evidence as to Moses. Finally, we note that neither defendant offered any evidence and that there is no fundamental conflict between them in this case. *Cf., State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976), *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 45, 50 L.Ed. 2d 69 (1976). We see nothing here which has the result of depriving defendant Moses of a fair and impartial trial. Under the circumstances of this case, there was no abuse of discretion by the trial judge in allowing the State's motion and this assignment is overruled.

[4] Defendant Moses next assigns as error the trial court's denial of his motion to dismiss based upon his plea of former jeopardy, contending that the court in his first trial failed to state the reasons for the mistrial, as required in G.S. 15A-1064. This assignment is groundless. Advertent as we are to the constitutional prohibitions against double jeopardy and their proper application, *see, State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977); *State v. Cooley*, 47 N.C. App. 376, 384, 268 S.E. 2d 87, 92, *disc. rev. denied*, 301 N.C. 96, 273 S.E. 2d 442 (1980), we hold, nevertheless, that defendant Moses' subsequent trial was not precluded by his plea of former jeopardy where the record discloses that the order of mistrial in the previous trial was granted at defendant's request. Nor are we persuaded that Moses had been prejudiced because the trial judge at the first trial did not make findings of fact, as required in G.S. 15A-1064.[1] Where the mistrial has been granted at defendant's request, there can be no prejudice *to defendant* in the failure to make such findings. Thus, if there was error in the failure of the trial judge to make such findings, it was harmless error and does not constitute grounds for a reversal. *See, State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). This assignment is overruled.

[5] Defendant Moses assigns as error the refusal of the trial court to allow defendants' attorneys to ask State's witness Brown

1. § 15A-1064. Mistrial; finding of facts required.—Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

questions concerning Brown's receipt of money from the Goldsboro Police Department in June or July 1980. He contends that the trial court's refusal denied him his right to cross-examination as guaranteed by the North Carolina Constitution, Article I, Section 23, and by the Sixth Amendment to the United States Constitution. William Earl Brown told one of the police officers that shortly before or after the robbery he had seen defendant Moses in the car of defendant Gibbs on the service road near Motel 6. When defense counsel for Moses attempted to ask Brown why the Police Department had paid him money, a conference of the judge, the attorneys, and the court reporter was held in chambers. After the conference, the court conducted an *in camera* hearing with witness Brown, Brown's attorney, and the court reporter. That hearing tended to show that witness Brown had received money for supplying the police with information concerning drug sales and the location of drug selling operations. Brown indicated that he was frightened that revealing such information in open court would endanger his life. When the trial judge questioned him about whether he had received money for information he gave the police concerning the armed robbery, Brown responded in the negative. The trial court thereafter entered an order prohibiting questions related to why Brown had received money from the Goldsboro Police Department. The court found that the answers to such questions had no bearing on Brown's credibility as a witness and were immaterial and irrelevant.

While the defendant is entitled to a full and fair cross-examination of State's witnesses, *State v. Bumper*, 275 N.C. 670, 674, 170 S.E. 2d 457, 460 (1969), the scope of cross-examination at trial rests largely within the discretion of the trial judge. *State v. Britt*, 291 N.C. 528, 544-45, 231 S.E. 2d 644, 655 (1977); *see also, State v. Royal*, 300 N.C. 515, 528, 268 S.E. 2d 517, 526 (1980). His rulings thereon will not be held error in the absence of a showing that the verdict was improperly influenced by such rulings. *State v. Britt, supra.* In the case at bar there is no showing of improper influence on the verdict caused by the trial court's limitation of cross-examination of the witness Brown. The assignment of error is overruled.

[6] A related assignment of error brought forward by defendant Moses concerns the trial court's further limitation of his cross-

examination of the witness Brown. The record shows that defendant's attorney attempted to ask the following questions:

Q. You did break into . . . [Adele Robinson's] house and steal her television set on the 12th day of July, 1980?

Objection; sustained.

* * *

Q. Did you break and enter into the home of Adele Robinson and steal her television on that day?

Objection.

COURT: The case is pending?

MR. TAYLOR: Yes, sir.

COURT: Sustained.

* * *

Q. Now, I'll ask you if you did not on the 15th day of June, 1980, break and enter the dwelling of Leroy Edwards at 201 Fedelon Trail, Goldsboro, North Carolina, and steal, take and carry away from said home a .22 caliber semi-automatic rifle and a Black and Decker saw, the value of $125.00?

COURT: Do you want to answer that?

A. No, I don't.

Q. What was that?

A. No.

COURT: He doesn't want to answer that question.

MR. TAYLOR: I think he's got to give a reason.

A. I have a right.

MR. TAYLOR: I would like to hear it from the witness. I wanted, I want it stated in the record why the witness is not answering that question.

COURT: Step over here and tell Mr. Hood.

Out of the hearing of the jury:

A. They told me my rights and I don't want to answer the question.

In the hearing of the jury:

MR. TAYLOR: That is not good enough.

COURT: The Court rules that the defendant [*sic*] refusing to answer the question is an exercise of his right under Article 5 of the Amendment [*sic*] to the Constitution of the United States as applied to the State by the 14th Amendment.

* * *

MR. TAYLOR: Upon what grounds, could I ask Your Honor.

COURT: On the grounds that the answer might tend to incriminate the witness.

We hold that the trial judge properly exercised his discretion in disallowing this disputed cross-examination. An ordinary witness in a trial, being under compulsion to testify, may invoke the protection of the privilege against requiring a witness to give self-incriminating testimony. *See generally,* 1 Stansbury's N.C. Evidence § 57 (Brandis rev., 1973). While there is some fundamental conflict between this rule and a defendant's right to confront witnesses against him through cross-examination, in the case now before us, the disputed questions had nothing to do with Brown's testimony against Moses, but were clearly offered to test his credibility as a witness by showing bad character. We find that a fair balancing of the interest of the defendant in impeaching the witness and the interest of the witness in protecting himself from incrimination by responding to questions which in effect accused him of criminal acts gave the trial judge clear discretion to rule as he did and this assignment is overruled.

[7] Next defendant Moses assigns as error the trial court's allowing the State "to impeach" its witness Brown and the trial court's later instructions relating to the impeachment. The testimony about which defendant Moses complains concerned evidence given by police officer Melvin which Moses contends

conflicted with evidence given by witness Brown. The sequence of events leading up to the basis for this assignment of error was as follows. Officer Melvin testified that when he encountered Brown near the scene of the robbery, he inquired as to whether Brown had seen a person fitting the description Melvin had been given by Lee. Brown then informed Melvin that he had seen such a person, identified the person as Moses, and informed Melvin that Moses was in Gibbs' car. Brown followed Melvin as a witness and testified on direct to these events. On cross-examination by Gibbs' counsel, Brown testified that he had not told Melvin or any other police officer that Moses was the person who robbed the motel, but had informed Melvin that he had seen Moses in the car with Gibbs. Melvin was then recalled and was allowed to testify over Moses' objections that when Brown identified Moses as the person fitting the description, Melvin said to Brown "he robbed Motel 6" and then Brown said, "Earl Moses did it. Leslie Gibbs, Jr., was driving the car. It was a brown Camaro belonging to Leslie Gibbs, Jr." Upon Moses' objection, and prior to Officer Melvin's recall testimony as described above, the trial court conducted a *voir dire* examination of Melvin, and then gave the following limiting instruction to the jury:

> Ladies and gentlemen, what William Earl Brown said to Ronald Melvin on the 19th day of April, 1980, is admitted solely for the purpose of corroboration of the testimony of William Earl Brown. It is not substantive evidence. To corroborate means to add to; to impeach means to tear down. Under the law of this State, consistent statements made by a witness on a previous occasion are considered to corroborate or add to the credibility of the witness.
>
> In this case if William Earl Brown made statements that were made that are inconsistent with the testimony of the witness, are said to impeach or tear down the testimony of a witness. Now, what William Earl Brown said to Ronald Melvin is not evidence of the truth of what was said on the 19th of April, 1980, but is only admitted for the purpose as it might bear on the credibility of William Earl Brown.

Defendant cites *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980); *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); and *State v.*

Bagley, 229 N.C. 723, 51 S.E. 2d 298 (1949) in support of his argument. All of these cases state the general rule that in a criminal case, neither party may impeach the testimony of its own witness, either directly or through the testimony of another, and that it is error to do so. In the case before us, however, we find that there was no prejudice to the defendant because there is no reasonable possibility that, had the error not been committed, a different result would have been reached. *See*, G.S. 15A-1443. The State's evidence as to Moses' identity was overwhelming. Lee, having seen Moses in the motel office twice within a space of less than four hours, remembered his description clearly, and when his name was first mentioned to her, instantly recalled him as the person who robbed her. Her testimony of the length of time she had known Moses and the circumstances under which she had known him leave little doubt as to the certainty of her identification of him. Brown's unimpeached testimony placed Moses near the scene of the robbery shortly after it was committed, dressed as he was described by Lee, but did not place Moses at the motel—or even place Brown at the motel. It does not appear reasonable to assume that the jury relied on Melvin's testimony contradictory to Brown's statements on cross-examination to identify Moses as the robber. This assignment is overruled.

[8] A similar disposition must be made of Moses' assignment of error relating to the following portion of the charge to the jury:

> There's also evidence tending to identify . . . Moses as being present at the Motel 6 shortly before or shortly after the robbery. This is the testimony of William Earl Brown.

Obviously, the use of the words "*at* the Motel 6" rather than "*near* the Motel 6" was a *lapsus linguae*, and the error, if any, was not prejudicial. This assignment is overruled. *See, State v. Sanders*, 280 N.C. 81, 86, 185 S.E. 2d 158, 162 (1971).

We have reviewed the other assignments of error brought forward by defendant Moses, and find them to be without merit, and overrule them.

Defendant Gibbs' Appeal

Defendant Gibbs presents eight questions for this Court's consideration. Three of these questions, dealing with impeach-

ment of State's witness and the right of cross-examination, have been answered in our treatment of defendant Moses' appeal. With regard to these three questions, defendant Gibbs presents no new arguments which might distinguish his position from that of Moses, and we, therefore, find no need for further discussion of those questions. Those assignments are overruled.

[9] Defendant Gibbs also assigns as error the trial court's denial of his motion to suppress evidence obtained (1) from his automobile and (2) from his person, both during a warrantless search. Upon defendant Gibbs' motion, the court conducted a *voir dire* examination to determine the admissibility of the evidence. The State presented evidence tending to show that, based on the information received by the Goldsboro Police Department, a warrant was issued for the arrest of defendant Moses. While one police officer stated that he did not believe he had enough information to obtain a warrant for Gibbs' arrest, there was information, known by the police officers involved, that linked Moses *and* Gibbs to armed robbery. When the police officers stopped Gibbs' car to execute the warrant against Moses, they found Moses in, and removed him from, the backseat. In the process, two policemen saw money lying under the front seat and a gun holster on the backseat. While obtaining these items, one policeman found a .32 caliber revolver under the right front seat of the car. After arresting Gibbs they searched him and found $50.00 and a Motel 6 room key.

After reviewing this and other evidence produced at the *voir dire*, we find no error in the trial court's admission of the evidence seized. The police officers had a warrant for the arrest of Earl Moses and, therefore, had a valid reason to stop the car. The gun holster and the money were legally seized from the vehicle because they were in "plain view." *State v. Harvey*, 281 N.C. 1, 11-12, 187 S.E. 2d 706, 713 (1972); *State v. Virgil*, 276 N.C. 217, 227, 172 S.E. 2d 28, 34 (1970). Where there are facts sufficient to establish probable cause to believe that a vehicle contains contraband, a warrantless search is permissible. *See, Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970). Furthermore, the search of Gibbs' person was incident to a lawful arrest and was, therefore, valid. *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978).

[10] Defendant Gibbs next assigns as error the trial court's instructions to the jury on the theory of aiding and abetting. Specifically, he complains of the following excerpt from the charge to the jury:

> I charge that for you to find the defendant, Leslie Gibbs, Jr., guilty of robbery with a firearm because of aiding and abetting, the State of North Carolina must prove to you by the evidence and beyond a reasonable doubt three things: First, that the crime of robbery with a firearm was committed by Glenwood Earl Moses; and second, that the defendant, Leslie Gibbs, Jr., although he was not physically present at the time that the crime was committed, shared the criminal purpose of Glenwood Earl Moses and to Moses' knowledge was aiding him or was in a position to aid him at the time the crime was committed.
>
> With respect to criminal purpose, I instruct you that purpose or intent is a circumstance that is seldom, if ever, capable of proof by direct evidence. It may be a mental state of mind and there can be no eyewitness as to what's going on in a person's mind. An intent or purpose may be proved from circumstances from which it may be inferred both before and at the time of and after the alleged crime. If you find that the defendant, Gibbs, knowing what Moses was about, drove Moses to Motel 6 and waited outside either in or near his car and drove Moses away from the robbery, then that would be aiding Moses or being in a position to aid Moses within the meaning of the applicable law to this case.
>
> I said a minute ago, the State must prove to you three things. I was in error. I should have said two; consider that I said two things in connection with the defendant, Leslie Gibbs. The State of North Carolina must prove two things by the evidence and beyond a reasonable doubt, those two things being in summary that the crime of robbery with a firearm was committed by Glenwood Earl Moses, and that the defendant, Leslie Gibbs, although not physically present at the time the crime was committed, shared the criminal purpose of Glenwood Earl Moses and to Moses' knowledge was aiding or was in a position to aid him at the time the crime was committed.

I, therefore, charge that if you find from the evidence and beyond a reasonable doubt that on or about the 19th day of April, 1980, Glenwood Earl Moses committed the crime of robbery with a firearm; that Glenwood Earl Moses had in his possession a firearm and that he took and carried away U.S. currency from the person or presence of Annie Mae Lee, without her voluntary consent by endangering or threatening Annie Mae Lee's life with the use or threatened use of a pistol, Moses knowing that he was not entitled to take the currency and intending at the time to steal the currency, and that Leslie Gibbs, Jr., shared the criminal purpose of Glenwood Earl Moses, and to the knowledge of Glenwood Earl Moses, driving Moses to Motel 6, waiting and drove him away, and that in doing so was aiding Glenwood Earl Moses, or was in a position to aid Glenwood Earl Moses at the time the crime was committed, then it would be your duty to return a verdict of robbery with a firearm as to the defendant, Leslie Gibbs, Jr.

If, however, you do not so find or if you have a reasonable doubt as to one or more of those two things, it would be your duty to return a verdict of not guilty as to the defendant, Leslie Gibbs, Jr.

Defendant Gibbs' argument is that the instruction "sharing the criminal purpose" is not consistent with the requirement set forth in *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963), that the jury find that the defendant actively encouraged the perpetrator of the crime by word or deed, and that the jury should have been instructed that it had to find that, by his conduct, Gibbs made it known to Moses that he was standing by to render assistance if necessary.

We disagree. To support defendant Gibbs' conviction of aiding and abetting in an armed robbery, the State had to prove, and the jury was required to find, (1) that the defendant was present, actually or constructively, with intent to aid the perpetrator in the commission of the armed robbery should his assistance become necessary and (2) that such intent was communicated to the actual perpetrators. *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976). "The communication or intent to aid, if

needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *Id.* at 291, 218 S.E. 2d at 357; *see also, State v. Murphy*, 49 N.C. App. 443, 445, 271 S.E. 2d 573, 574 (1980). We believe that the instructions of the trial judge adequately explained to the jury what it had to find in order to find the defendant guilty of aiding and abetting. If the defendant Gibbs, "although not physically present at the time the crime was committed, shared the criminal purpose of . . . Moses and to Moses' knowledge was aiding or was in a position to aid him . . .", then the defendant Gibbs encouraged Moses and had, in some manner, let Moses know this fact. This assignment is overruled.

A related assignment of error, that the trial court incorrectly refused to use defendant Gibbs' requested instructions, based on *State v. Gaines, supra*, is likewise overruled. The instructions tendered by the court were correct and as we have noted above, paralleled the requirements of *Gaines*. The trial court is not required to give requested instructions word for word. It is sufficient if the trial judge's charge is in substantial conformity with the requested instructions, which were supported by the evidence. *State v. Davis*, 291 N.C. 1, 13-14, 229 S.E. 2d 285, 294 (1976).

Defendant Gibbs' other two assignments of error, that the court erred in denying his motion for a mistrial and in denying his motion for directed verdict, were dependent on his success in assignments of error which we have overruled. They are, therefore, without merit and are overruled.

In the trial of each defendant, we find

No error.

Judges VAUGHN and CLARK concur.

NEIL E. LOY, PLAINTIFF v. LORM CORPORATION, MARL CORPORATION, L. W. MITCHELL, ALICE H. MINGES, AND ROY W. WESCOTT, DEFENDANTS

No. 801SC771

(Filed 16 June 1981)

1. Corporations § 4.1— majority shareholders—fiduciary duty to minority shareholders

In North Carolina majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation.

2. Corporations § 4.1— action by minority shareholder against majority—burden of proof

Once a minority shareholder challenges the fairness of actions taken by the majority, the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith.

3. Corporations § 4.1— action by minority shareholder against majority—transfer of corporate assets to another corporation—breach of fiduciary duty—sufficiency of evidence

Plaintiff minority shareholder made out a prima facie case that defendant majority shareholders breached the fiduciary duty owed to plaintiff as a minority shareholder in transferring the assets of the corporation to a corporation wholly owned by defendants where he presented evidence tending to show that the assets of the corporation were worth approximately $100,000 to $120,000; the corporate assets were transferred without consideration to the corporation wholly owned by defendants without a board of directors meeting and without notice to plaintiff; and plaintiff realized no benefit as a minority shareholder from this transfer of assets.

4. Corporations § 6— shareholder's derivative action—no necessity for demand upon directors—dissipation of corporate assets—sufficiency of evidence

Plaintiff minority shareholder was not required to make a demand upon the board of directors of a corporation before bringing a derivative action against directors of the corporation where plaintiff alleged that defendants constituted a majority of the board of directors at the times in question, and plaintiff's evidence was sufficient to establish a prima facie case that the three defendants harmed the corporation by wrongfully dissipating its assets to themselves through a corporation which they wholly owned.

5. Corporations §§ 4.1, 25— preincorporation shareholders' agreement—binding effect on corporation

The evidence on a motion for summary judgment raised genuine issues of material fact as to whether the individual defendants, incorporators, shareholders and directors of defendant corporation which owned property leased to a restaurant owned by the individual defendants and plaintiff, orally agreed prior to incorporation to permit plaintiff to buy a 25% stock interest in the corporation when he became financially able to do so in return for

plaintiff's agreement to supervise construction of the restaurant and to manage it when completed, and whether the agreement was binding on defendant corporation under the theory that it was intended by the individual defendants to be a preincorporation shareholders' agreement which was binding on the corporation or under the theory that the corporation adopted the shareholders' agreement by accepting its benefits with knowledge of its provisions.

6. Evidence § 29.2— admissibility of business records

In an action for breach of contract to permit plaintiff to purchase stock in a corporation, evidence of the corporation's tax returns, financial statements and other records was competent to establish damages for breach of contract and to establish the value of the total stock interest held in the corporation by the three individual defendants.

APPEAL by plaintiff from *Brown, Judge.* Order entered 19 March 1980 in Superior Court, DARE County. Heard in the Court of Appeals 3 March 1981.

Plaintiff, Neil E. Loy, a minority shareholder in Lorm, Inc. (Lorm) brought an individual action against Lorm's three majority shareholders (three defendants) and against another corporation, Marl, Inc. (Marl), which was wholly owned by the three defendants. As part of this same suit, Loy also brought a shareholders derivative action against Lorm. The trial court granted a summary judgment in favor of Marl and directed a verdict at the close of plaintiff's evidence in favor of the three defendants and Lorm.[1]

In 1964, the three defendants—Billy Mitchell, Alice Minges, and Roy Wescott—contacted Loy and proposed to finance the construction of a restaurant to be known as The Port O' Call Restaurant. Loy agreed to supervise the restaurant construction and manage it when completed. Loy and the three defendants formed a corporation, Lorm, to operate the business under the Port O' Call name; each paid $1,000 and received a twenty-five percent stock interest in the corporation. The three defendants independently also formed Marl, to finance the purchase of the land, the construction of the restaurant, and the purchase of the necessary restaurant equipment and supplies. Marl then leased the land, building and restaurant equipment to Lorm on a yearly basis. Loy alleges in his complaint that as partial consideration for his management services, the three defendants agreed to let

1. In Section II, *infra*, we discuss the applicability of the directed verdict to Lorm.

him buy a twenty-five percent stock interest in Marl when he could afford to do so. The three defendants deny that such an agreement was ever made.

From 1964 until 1976, Loy served as the general manager of the Port O' Call Restaurant making it "one of the most successful, profitable and well-known restaurants on the Outer Banks of North Carolina, . . ." During this time, Loy was paid a salary for his services as manager, and his salary was increased at various times over this ten-year period. Additionally, Loy's former wife worked at the restaurant providing assistance in its general operation without pay.

On 10 July 1975, Loy advised the three defendants that he "was ready, willing and able to purchase a 25% stock interest in Marl Corporation on the terms and conditions theretofore orally agreed." The three defendants denied that any such agreement existed and refused to sell to Loy stock in Marl. As a result of this disagreement, Loy resigned as the manager of the Port O' Call Restaurant but remained a shareholder in Lorm. Shortly after Loy's resignation, the three defendants formed Bar, Inc. (Bar) and without any consideration passing, transferred the assets of Lorm to Bar. In Spring 1977, the three defendants also sold a large amount of stock in Marl to a Frank Gajar for $300,000.00. Gajar then began operating the restaurant through his own corporation, Port O' Call, Ltd.

Loy further alleges in his complaint that as a result of these transactions, the three defendants (1) breached their fiduciary duty owed to Loy as a minority shareholder in Lorm; (2) engaged in self-dealing which harmed Lorm; (3) extracted profits from Lorm by having Marl and Lorm agree, over Loy's objections, to the payment of excessively high rental fees; and (4) breached their oral agreement with Loy that he could buy a 25% stock interest in Marl. Loy is before us, appealing from the entry of summary judgment for Marl and from the directed verdict in favor of the three defendants and Lorm.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Norman W. Shearin, Jr., and Roy A. Archbell, Jr., for plaintiff appellant.

Aldridge, Seawell & Khoury, by Christopher L. Seawell, for defendant appellees.

BECTON, Judge.

At the outset, it is important to emphasize that Lorm and Marl were closely-held corporations in which all three defendants were shareholders, directors and officers. The two corporations were formed at the same time with the same purpose—to establish the Port O' Call Restaurant.[2] The corporations had interlocking directorates with the three defendants firmly in control of both corporations. Plaintiff sued the three defendants in their capacities as shareholders, directors and officers of both corporations. Because of the multiple relationships shared by the three defendants with the two corporations, references to all of the defendants in the pleadings and testimony are difficult, but not impossible, to keep straight. However inartfully the pleadings are drawn, the complaint does sufficiently allege a claim for relief against the three individual defendants, against Lorm and against Marl.

I

Loy's first assignment of error is that the trial court committed error by directing a verdict for the three defendants at the close of the plaintiff's evidence. It is a well-established rule of law in North Carolina that:

> [i]n passing upon such a motion [for directed verdict], the court must consider the evidence in the light most favorable to the non-movant. [Citation omitted.] That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor.

Summey v. Cauthen, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973); *see also Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). After considering the evidence in the light most favorable to the non-movant (in this case the plaintiff, Loy), the trial court should deny the motion for directed verdict if "it finds 'any evidence more

2. Conflicting testimony appears in the record but seems to indicate that the name Marl was chosen by using the initials of each of the defendants and plaintiff—M-Mitchell; A-Alice; R-Roy; L-Loy. Likewise the name Lorm was supposed to be another combination of the same initials, but a typographical error in the incorporation papers resulted in the acronym Lorm rather than Larm.

than a scintilla' to support plaintiff's prima facie case in all its constituent elements." *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 638, 640, 272 S.E. 2d 357, 360 (1980) *quoting* 2 McIntosh, North Carolina Practice and Procedure 2d, § 1488.15 (Phillips Supp. 1970). In reviewing a trial court's decision to grant a directed verdict, an appellate court must ask itself the same question presented to the trial court, "namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 397 (1971); *Hunt v. Montgomery Ward & Co.* With our scope and standard of review established, we turn to plaintiff's legal arguments.

In ruling on the motion for directed verdict made by the three defendants in their capacity as shareholders in Lorm, the trial court decreed that:

> 3. The Defendant's motion for directed verdict on Plaintiff's claim for individual damages is allowed.
>
> 4. The Defendants' motion for directed verdict on the ground that Plaintiff's evidence is insufficient as a matter of law to make out a case against the Defendants is allowed.

[1, 2] It is conceded by the three defendants that in North Carolina majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation. As stated by the North Carolina Supreme Court:

> [t]he devolution of unlimited power imposes on holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them—the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. . . . It is the fact of control of the common property held and exercised, and not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders. Actual fraud or mis-

management, therefore, is not essential to the application of the rule.

Gaines v. Manufacturing Co., 234 N.C. 340, 344-45, 67 S.E. 2d 350, 353 (1951); *see also* Robinson, North Carolina Corporation Law and Practice, § 9-11 at 196 and 198n.6 (2d ed. 1974). It is also well established in North Carolina, and acknowledged by the three defendants, that once a minority shareholder challenges the fairness of the actions taken by the majority, the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith. *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 444, 80 S.E. 2d 358, 363 (1954); Robinson, *supra*, at §§ 9-12, 12-5.

[3] The three defendants take the position that the plaintiff's own evidence established the fairness of their dealings with Lorm. Our review of the record, however, does not support this position, nor does it support the trial court's order of directed verdict. Loy alleged, and sought to prove, that the three defendants breached their fiduciary duty (1) by having their separate corporation, Marl, charge Lorm with unreasonably high rents in an effort to extract profits from Lorm, and (2) by dissipating the assets of Lorm to themselves through Bar—a corporation which they owned and operated. While Loy's evidence may not have established that the rents charged to Lorm were unreasonable, he did, in our opinion, present a prima facie case that the assets of Lorm were drained from Lorm by the three defendants without Loy sharing proportionately as a shareholder.

At trial, Loy presented plenary evidence that the assets[3] of Lorm in 1976 totaled approximately $100,000 to $120,000; that these assets were transferred, without consideration, to Bar—a company owned by the three defendants; that this transfer was completed without a board of directors meeting and without notice to Loy; and that Loy realized no benefit as a minority shareholder from this transfer of assets. Loy's expert witness—Jack Adams, a certified public accountant—testified:

I do have an opinion of good will which was attributable to Lorm Corporation, trading as Port O' Call Restaurant as of

3. Corporate assets may include among other things real property, equipment, supplies, inventory, accounts receivable and *good will*.

> January 1, 1976. Based on the tax returns for the years that you mentioned were provided to me, I would have to estimate that the good will for Lorm Corporation would be between $100,000 and $120,000, based on my opinion.
>
> . . .
>
> In my opinion the fair market value of Neil E. Loy's stock in Lorm Corporation [25% stock interest], trading as Port O' Call Restaurant, on January 1, 1976, based on my estimate of the net book value of Lorm Corporation, the net book value was a thousand dollars for twenty-five percent and then the good will of twenty-five to thirty thousand dollars would give a fair market value of twenty-six to thirty-one thousand dollars.

Moreover, Adams' analysis of Lorm's and Bar's tax returns revealed that:

> In examining PX-1, which is a 1976 tax return for Bar, Inc., on the analysis of retained earnings for the year, it shows an increase to retained earnings for [assets] donated from Lorm Corporation $334.00. As to what that means, after seeing the Lorm Corporation tax return and Lorm shows a property distribution of that same amount, it would appear to me that it was property that was transferred from Lorm Corporation to Bar Corporation during 1976.

Loy testified that he never received any money from the transfer of Lorm's assets, nor did he ever receive any notification of a Lorm shareholders' meeting after he resigned as the manager of Port O' Call Restaurant. Defendant Billy Mitchell substantially corroborated this testimony when he was called as an adverse witness by Loy. Mitchell said:

> Prior to transferring the assets of Lorm Corporation to Bar, Inc., we did not notify Mr. Loy that this transfer was about to take place. We did not have a directors meeting of Lorm Corporation before this donation of assets was made. We did not have a meeting of shareholders before this transfer was made. Lorm Corporation has never had a written lease agreement with Marl Corporation. As to the status of Lorm Corporation today, I would presume it is inactive because it didn't pay its state filings. In other words, it died a natural death.

The Business Corporation Act, Chapter 55 of the North Carolina General Statutes, mandates that fundamental changes in a corporation be made by vote of all the shareholders.[4] Corporate mergers and transfers of all the assets of a corporation in particular are required to be approved by a vote of all the shareholders. Moreover, "[t]he directors of the transferor corporation must adopt a resolution recommending the transfer and directing its submission to a vote at a meeting of shareholders. Written notice of the meeting must be given to each shareholder of record in the usual manner; . . ." Robinson, *supra*, at § 25-3. *See* G.S. 55-112(c)(1) & (2). Failure to conform to these mandates of the statute constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority.

Based on the evidence presented then, Loy made out a prima facie case that the three defendants breached the fiduciary duty owed to him as minority shareholder in Lorm. In making out such a case, the burden shifted to the three defendants to establish in defense that the transfer of Lorm assets to Bar was inherently fair to all the Lorm stockholders. The trial court, therefore, committed error in directing a verdict for the three defendants at the close of plaintiff's case. Accordingly, we reverse that judgment.

II

In granting the defendants' motion for directed verdict, it is unclear if the trial court's order also included Loy's shareholders derivative suit against Lorm. In making the motion, defendants' counsel equivocally moved:

> That the plaintiff's evidence on whole is insufficient as a matter of law to make out any case against either Lorm . . . or against the individual defendants and Lorm Corporation, and I suppose Lorm Corporation is a nominal defendant, but I'll add them in, *although I don't suppose we can really represent the Lorm Corporation.* (Emphasis added.)

4. There are three well-recognized exceptions in which the board of directors of a corporation may make fundamental changes: (1) when the board of directors feels that the corporation is in a failing condition, and a major sale is necessary to meet corporate liabilities, G.S. 55-112(b)(1); (2) when the corporation is formed for the purpose of selling the corporate property and assets, G.S. 55-112(b)(2); and (3) when a transfer of assets is undertaken not to terminate the business, but to further it, G.S. 55-112(b)(3).

In its order, the trial court allowed "the Defendants' motion for directed verdict on the ground that Plaintiff's evidence is insufficient as a matter of law." No specific reference was made as to which of the defendants this order pertained.

[4] If the trial court intended for the directed verdict to apply to Loy's derivative suit, then it was granted in error. Loy alleged, and his evidence at trial was sufficient to support a jury finding, that the three defendants harmed Lorm by wrongfully dissipating its assets to themselves through their corporation, Bar. As a general rule, a shareholder in a derivative suit must allege that he demanded, unsuccessfully, that the corporation itself institute an action against the directors. *Jordan v. Hartness*, 230 N.C. 718, 55 S.E. 2d 484 (1949). No allegation is necessary however, when, as in this case, the defendants constitute a majority of the board of directors, and its is obvious that making such a demand on the corporation would be in vain. *Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co.*, 240 N.C. 495, 82 S.E. 2d 771 (1954); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *reh. denied*, 296 N.C. 740, 254 S.E. 2d 181 (1979). Directors owe a duty of fidelity and due care in the management of a corporation and must exercise their authority solely for the benefit of the corporation and all its shareholders. *Belk v. Belk Dept. Stores, Inc.*, 250 N.C. 99, 108 S.E. 2d 131 (1959). For the reasons stated above and in Section I of this opinion, plaintiff has established a prima facie case that Lorm was harmed by the actions of its directors. Therefore, plaintiff's derivative suite should not have been dismissed at the close of plaintiff's evidence.

III

[5] Loy also argues that the trial court committed error in granting a summary judgment in favor of Marl. Loy alleged in his complaint that the three defendants, as the owners of Marl, agreed to let Loy buy a 25% stock interest in Marl when he was financially able. Loy contends that this agreement by the three defendants bound Marl to the agreement. The three defendants deny that such an agreement was ever made. When the motion for summary judgment was being heard, the parties relied primarily on their pleadings. The three defendants, however, sought to bolster their motion with certain testimony given by Loy at an earlier deposition.

The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue. "The procedure [for a summary judgment motion] is designed to allow a 'preview' or 'forecast' of the proof of the parties in order to determine whether a jury trial is necessary. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). *See* Louis, 'Federal Summary Judgment Doctrine: A Critical Analysis,' 83 Yale L. J. 745 (1974)." *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 149, 229 S.E. 2d 278, 281 (1976). Summary judgment, then, should be granted only when the pleadings and supporting materials show that no genuine issue as to any material fact exists, and the movant is entitled to a judgment as a matter of law. The burden is on the movant to establish that there are no material questions of fact in issue. *Nasco Equipment Co. v. Mason; Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

Rule 56(c) of the North Carolina Rules of Civil Procedure specifically provides:

> The judgment sought shall be rendered forthwith 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.

In order to determine, for Rule 56 purposes, if a genuine issue as to a material fact exists, our courts have held that:

> an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.

Railway Co. v. Werner Industries, 286 N.C. 89, 95, 209 S.E. 2d 734, 737 (1974).

Looking only at the pleadings and supporting material — Loy's deposition — we must determine if the trial court was correct in finding that Marl was entitled to a favorable judgment as a matter of law. We conclude that the pleadings and deposition do raise a material question of fact about (1) the existence of an

agreement between the three defendants and Loy with regard to future purchases of Marl stock, and (2) the effect of such an agreement on Loy's claim against Marl itself.

In Loy's first claim for relief, he alleges:

> As an inducement to plaintiff to become involved in the management and operation of the Port O' Call Restaurant, and as consideration for his services in that regard, the individual defendants agreed in principle that plaintiff would receive an ownership interest in both Lorm Corporation, which was to be the "operating corporation" and Marl Corporation, which was to own the property on which the restaurant was to be built.
>
> . . .
>
> It was further agreed between plaintiff and the individual defendants, that upon the incorporation of Marl Corporation, the individual defendants would receive a 33⅓% stock interest in Marl Corporation and that thereafter, plaintiff would have the right during his employment to acquire from the individual defendants, a 25% stock interest in the Marl Corporation for a total purchase price equal to 25% of the original construction cost of the Port O' Call Restaurant.
>
> . . .
>
> Subsequent to the issuance of stock in Marl Corporation and Lorm Corporation, plaintiff continued in his capacity of supervising the construction of the Port O' Call Restaurant through completion and thereafter undertook complete responsibility for the management and operation of the said restaurant, . . . which was done with the express understanding and agreement of the parties hereto that an ownership interest in Marl Corporation was to be a part of the consideration to plaintiff for said services.
>
> On or about July 10, 1975, plaintiff advised the individual defendants that he was ready, willing and able to purchase a 25% stock interest in Marl Corporation on the terms and conditions theretofore orally agreed. However, the individual defendants failed and refused to honor their commitment under the original oral employment agreement by refusing to convey to plaintiff shares in Marl Corporation.

> Subsequent to the aforesaid demand by plaintiff in July of 1975, plaintiff made numerous demands of the individual defendants, and/or their agents, that they comply with their agreement to sell plaintiff a 25% interest in Marl Corporation in accordance with the original oral employment agreement, . . . plaintiff has an equitable ownership in 25% of the assets of Marl Corporation, and is, therefore, entitled to receive from the individual defendants 25% of the net proceeds from the operation of Marl Corporation since July 10, 1975, the date defendants were to transfer to the plaintiff a 25% stock interest in Marl Corporation.

It is clear, based on the pleadings, that a question of fact does exist as to whether the three defendants, as Marl incorporators, made an agreement in exchange for Loy's promise to supervise and manage the Port O' Call Restaurant. Notwithstanding this question of fact, Marl argues that the alleged agreement only establishes a possible claim against the three defendants individually, not against the corporate defendant, Marl. Loy's deposition—the only material offered by the defendants in support of the summary judgment motion—actually supports Loy's claim that his agreement was with the individual defendants in their representative capacity for Marl. In Loy's deposition, the following transpired:

> Q. You state in your complaint that because this stock purchase agreement was not carried out by either Lorm *or Marl Corporation*, you have been damaged in the amount of $100,000, is that correct?
>
> A. Yes.
>
> Q. Did you ever have any dealings with the defendants when they were acting on behalf of Marl Corporation and promised in their capacities as stockholders and directors of the Marl Corporation to convey to you any stock in Marl Corporation?
>
> A. Yes, this was my understanding.

If Loy can convince the jury that an agreement does exist, then a material question of fact also exists about the binding effect such an agreement would have on Marl. Although Marl was

not formed at the time the alleged agreement was entered into,[5] Marl may nevertheless be liable to Loy based on the three defendants' breach of such an agreement on two different theories. First, the agreement made by the three defendants as promoters and incorporators of Marl raises a question of fact about whether the agreement was intended by the three defendants to be a stockholders' agreement. This presents a question of fact which can only be decided by the trier of fact after considering all the circumstances surrounding the agreement. In *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964), Justice Sharp (later Chief Justice) found that an agreement to elect the plaintiff president for five years made by the promoters and subsequent shareholders of a closely-held insurance company was not violative of public policy. Indeed, the court held in *Wilson* that "[t]his preincorporation contract between the parties was intended to serve as a stockholders' agreement after incorporation. *Id.* at 127, 136 S.E. 2d at 574. Once interpreted as a shareholders agreement, the *Wilson* court relied on the Business Corporation Act, G.S. 55, *et seq.*, to find the preincorporation agreement binding on the promoters in their capacity as shareholders.

Likewise, if Loy can show that a preincorporation agreement was made in this case and was intended by the incorporators to be a shareholders agreement, then under the recent case of *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980), Marl itself may be bound by the agreement and liable for its breach. In *Snyder*, all the shareholders of a closely-held aviation corporation agreed in writing to sell 6,000 shares of stock to a third party who was interested in investing in the corporation. As part of that agreement, the shareholders promised to use some of the money received from the sale to pay off an outstanding debt owed to one of the corporation's employees—the plaintiff. The corporation was not a signatory to the agreement, and there was nothing in the agreement indicating that the individual defendants were acting for the corporation. After the sale was completed, the plaintiff-employee never received any money from the corporation or from the shareholders as payment for the pre-existing debt. In reversing this court, the Supreme Court said: "we think under these circumstances plaintiff may prove the corporation bound by

5. Plaintiff alleges that the stock purchase agreement was made by the defendants in late 1964 and that Marl and Lorm were incorporated after that time.

the [shareholders] agreement, notwithstanding that the corporation itself was not a signatory thereto." *Id.* at 210, 266, S.E. 2d at 597. In reaching this decision, the Supreme Court held:

> Under some circumstances, the action of *all* the shareholders of a close corporation bind the corporation even if the corporation is considered to be a legal entity separate from the shareholders. . . . The contract of the owners of all shares will be regarded as binding on the corporation if so intended.

Id. at 210, 266 S.E. 2d at 597-98. *See* 1 O'Neal, Close Corporations § 5.28 (1971).

In the case at bar, the three defendants were sued in their capacities as shareholders, directors and officers of Marl. If Loy can show (1) that a preincorporation agreement was made; (2) that the three defendants intended for this agreement to be a shareholders agreement; (3) that all the shareholders of Marl made the agreement; and (4) that they intended to bind Marl, then Loy can establish that Marl should be bound by the agreement. Loy made these allegations, and his deposition supports his complaint. The pleadings, then, raise a material question of fact about the intent of the three defendants in their capacities as incorporators and shareholders of Marl to enter into an agreement binding Marl. It is well established that "[w]hether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact. *Storey v. Stokes*, 178 N.C. 409, 100 S.E. 689 (1919); *Devries v. Haywood*, 64 N.C. 83 (1870)." 300 N.C. at 217, 266 S.E. 2d at 602.

The presence of a writing in *Snyder* and the lack of one in this case is no bar to Loy's claim. North Carolina has no statute of frauds requiring a writing to prove a contract of this nature. In this case, an oral contract, if proven, would be binding with the equal force of a written one. The key, then is that

> [a] shareholder agreement, whether executed at a formal stockholders' meeting or by informal action [like an oral agreement], can bind the corporation when the shareholders are acting on behalf of the company; however, the courts hold that the corporation will be bound by such a contract only if all the stockholders are parties.

Note, *Close Corporations*, 16 Wake F. L. Rev. 975, 980 (1980). *See* 1 O'Neal, *supra*, § 5.28 at 100 and 101n.4. It follows then that just as the plaintiff in *Snyder* was given a chance to show that the agreement of all the shareholders was "tantamount to a promise by the signatories, *to cause the corporation* to issue the stock. . ." 300 N.C. at 222, 266 S.E. 2d at 604, so should Loy in this case be permitted to show that the three defendants' agreement was intended to bind Marl in the issuance of stock to Loy.

The second theory under which Marl may be held liable to Loy is by its adoption of the preincorporation agreement. Preincorporation agreements are entered into for a variety of reasons including to solicit stock subscriptions, to incorporate and to purchase materials to start up the corporation. Additionally,

> [p]reincorporation agreements include contracts between third parties and the promoters or other persons acting on behalf of the corporation. Sometimes these contracts play a very important part in securing leases, options, property rights, supply contracts and other arrangements that will be favorable for the new corporation.

Robinson, *supra*, at § 2-4.

Loy contends that the agreement was essentially a "preincorporation agreement" between Marl's promoters and a third party (Loy), made to secure an experienced manager for the restaurant to be built by Marl and operated by Lorm. Although the agreement was allegedly made by the three defendants as incorporators, the incorporators were also the subsequent directors of Marl and fully aware of the agreements they made prior to incorporation. After an agreement is made, the corporation, once formed, may adopt the contract by accepting its benefits with the knowledge of the contract's provisions; this adoption will bind the corporation to the terms of the preincorporation agreement. *McCrillis v. A & W Enterprises, Inc.*, 270 N.C. 637, 155 S.E. 2d 281 (1967); *see also Beachboard v. Southern Ry. Co.*, 16 N.C. App. 671, 193 S.E. 2d 577 (1972), *cert. denied*, 283 N.C. 106, 194 S.E. 2d 633 (1973).

In this case, Loy alleged that the agreement entered into by the three defendants was part consideration for his agreement to supervise the restaurant construction and manage it once com-

pleted. Assuming these allegations are true, Loy should be permitted to show that Marl accepted the benefits of the agreement with full knowledge of the agreement's provisions. Loy alleged that he made Port O' Call a successful and going enterprise. He further alleged that Marl benefited by having him supervise the restaurant construction. In all likelihood, Loy would not have agreed to join the defendants' operation without the assurance that he could buy into Marl and share in the rental income paid by Lorm. Without Loy, the Port O' Call Restaurant might not have been a success, and as a result, Marl might not have been able to collect and raise the restaurant's rent over the years.

The pleadings and supporting deposition do raise a material issue of fact as to the existence of an agreement by the three defendants *and* as to the effect of such an agreement on Marl. Given these questions of material fact, the trial court's grant of summary judgment for Marl was in error, and we therefore reverse that judgment.

IV

[6] Because we hold that Loy should be permitted to offer evidence against Marl for breach of contract, he is also entitled to introduce into evidence the tax returns, financial statements and corporate records of Marl. This evidence is highly relevant. It must be introduced in order for Loy to establish damages for breach of contract and to establish the value of the total stock interest held by the three defendants in Marl.

In summary, then, the trial judge committed error in (1) directing a verdict for the three defendants; (2) directing a verdict for Lorm; (3) granting summary judgment in favor of Marl; and (4) excluding from evidence the financial records of Marl.

For these reasons, we

Reverse.

Judge VAUGHN and Judge WELLS concur.

LAWRENCE EDWARD OVERSTREET, JR. AND WIFE, RITA PORTERFIELD OVERSTREET v. BROOKLAND, INCORPORATED

No. 809SC970

(Filed 16 June 1981)

1. **Deeds § 20.7— subdivision restrictive covenant—action against developer—insufficient evidence**

Plaintiffs' evidence was insufficient to be submitted to the jury on the issue of defendant subdivision developer's breach of a covenant restricting use of lots in the subdivision to residential purposes where the basis of plaintiffs' action was a third party's use of a subdivision lot, the restrictive covenants contained no provision imposing a duty upon defendant to enforce the restrictions on behalf of plaintiff against any other landowner in the subdivision, and there was no evidence of any use by defendant of other lots or parcels in the subdivision in violation of the covenants.

2. **Fraud § 12.1— failure to show misrepresentation of subsisting fact**

Plaintiffs' evidence was insufficient for the jury on the issue of defendant subdivision developer's fraud in the inducement of the sale of a residential lot to plaintiffs where it tended to show that defendant promised that a street in front of the lot sold to plaintiffs would remain a dead-end street and that no part of the subdivision would be used for nonresidential purposes, that defendant thereafter sold a lot to a third party which he knew the third party intended to use for access to adjoining property, and that the intended use of the lot would have the effect of making the street in front of plaintiffs' lot a through street, since plaintiffs' evidence failed to show that defendant misrepresented to them a subsisting fact in that their evidence failed to establish that, at the time defendant sold plaintiffs their lot, defendant had no intention of restricting the subdivision to residential use and no intention that the street in front of plaintiffs' lot would continue to be a dead-end street.

3. **Unfair Competition § 1— unfair trade practices in sale of subdivision lot—insufficient evidence**

Plaintiffs' evidence was insufficient for the jury on the issue of defendant subdivision developer's unfair and deceptive trade practices in the sale of a residential lot to plaintiffs where it tended to show only that defendant promised that a street in front of plaintiffs' lot would remain a dead-end street and that no part of the subdivision would be used for nonresidential purposes, that defendant thereafter sold a lot to a third party which it knew the third party intended to use for the nonresidential purpose of access to adjoining property, and that the intended use would have the effect of making the street in front of plaintiffs' lot a through street. G.S. 75-1.1.

4. **Frauds, Statute of § 6.1— promise to construct and maintain road**

Defendant's promise to construct and maintain a road in front of a residential lot sold to plaintiffs did not come within the Statute of Frauds.

Overstreet v. Brookland, Inc.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 24 May 1980 in Superior Court, PERSON County. Heard in the Court of Appeals 9 April 1981.

Plaintiffs' original complaint contains allegations under the headings of First, Second, and Third Cause of Action. In their "First Cause of Action", plaintiffs allege that defendant owns a subdivision known as "Brookland Section A", as described in a plat recorded in the Person County Registry. All of the land in the subdivision is subject to and bound by restrictive and protective covenants recorded in the Person County Registry. Plaintiffs and defendant are bound by said covenants and the covenants provide that the land in the subdivision shall be used for residential purposes only. The covenants were placed on record on 14 June 1977. On 25 May 1978, defendant sold lot number nine in the subdivision to Harry Lee Oakley. Defendant violated the covenants in that it knew Oakley intended to use the property for access to adjoining property, defendant knew that Oakley's access road would create a nuisance and would be annoying to plaintiffs, and defendant knew that Oakley's intended use would violate the plan or scheme of development for the subdivision. Plaintiffs were damaged by defendant's violation of the covenants in that plaintiffs have been harassed and have had to put up with loud vehicles driving back and forth in front of their home at all hours of the day and night and plaintiffs cannot enjoy the planned quiet residential community protected by the covenants. Plaintiffs' home is located on a through road and not on a dead-end private drive as set out on the plat and as contemplated by the plan or scheme of development. Plaintiffs' home has not appreciated in value as it otherwise would have. These matters have damaged plaintiffs in the sum of $5,000.00.

In their "Second Cause of Action", plaintiffs incorporate the allegations set out in their First Cause, and additionally allege that plaintiffs will sustain irreparable harm, damage, and injury unless defendant is permanently restrained and enjoined from "selling property to buyer for forbidden purposes" and that plaintiffs have no adequate remedy at law to prevent the harm and damage which will continue to occur if defendant is "allowed to continue to sell property for purposes forbidden by the restrictive covenants."

In their "Third Cause of Action", plaintiffs incorporate the allegations set forth in their First Cause and additionally allege that defendant contracted with plaintiffs at the time of purchase and sale of lot number ten in the subdivision to provide a two-lane road "to and from" plaintiffs' home made with a "crush and run" base and a gravel surface, that defendant has failed and refused to finish the road according to the contract, and that the minimal cost of surfacing the road according to the contract would be $1,200.00.

Defendant answered admitting ownership of the subdivision, the existence and recording of the plat, the existence and recording of the covenants, the sale of the lot to Oakley, and denying all other essential allegations in the complaint. Following defendant's answer, plaintiffs were allowed to amend their complaint to set out a Fourth and Fifth Cause of Action.

In their "Fourth Cause of Action" plaintiffs incorporate the allegations set out in their First Cause of Action, and additionally allege that defendant represented the subdivision to be residential in nature and fully protected by residential restrictive covenants. Defendant represented that Brunswick Lane would be a residential street ending in front of plaintiffs' home. Defendant knew that Brunswick Lane was going to be used for farm traffic and had made an agreement with Harry Oakley or Frank Oakley, adjoining land owners and farmers, for the extension of Brunswick Lane and for its use as a thoroughfare and access to the Oakley property. The representations of defendant were false and known to be false by defendant when made. Plaintiffs reasonably relied on defendant's representations and bought lot number ten and invested in a home on the lot. Plaintiffs do not have a home located in a residential neighborhood on a dead-end street and have been damaged in the sum of $71,500.00.

In their "Fifth Cause of Action" plaintiffs incorporate the allegations set out in their First and Fourth Causes and additionally allege that defendant, by representing the subdivision to be protected by restrictive covenants and representing Brunswick Lane to be a dead-end residential lane when defendant had made a prior agreement for the use of Brunswick Lane as a farm road and thoroughfare or access road to the Oakley property, was engaging in unfair or deceptive trade practices in viola-

tion of G.S. 75-1.1, to plaintiffs' damage. Plaintiffs sought treble damages and attorney's fees.

Defendant answered the amendment by denial and motion to dismiss.

At trial, plaintiffs presented extensive evidence, which will be dealt with in the body of this opinion. At the close of plaintiffs' evidence, defendant moved for a directed verdict on all counts. Following argument of defendant's counsel on the motion for directed verdict, there ensued lengthy discussion between counsel for both parties and the trial judge. During this episode of the trial, the trial judge first ruled in defendant's favor on plaintiffs' Third Cause of Action, on the grounds that plaintiffs' complaint alleged an oral agreement to build and maintain the road, made prior to plaintiffs' purchase of the lot and that such an agreement would come within the statute of frauds. Plaintiffs then moved that they be allowed to amend their complaint to conform it to evidence produced at trial of a later written agreement. The trial judge denied this motion. The trial judge then ruled in defendant's favor on plaintiffs' Fourth and Fifth Causes of Action. Before ruling on the motion as to plaintiffs' First (and remaining) Cause of Action as to violation of the restrictive covenants, the trial judge stated that it was necessary to determine as a matter of law a question relating to the existence of an old public road near plaintiffs' property. At the request and suggestion of counsel for defendant, the trial judge heard the testimony of several witnesses offered by defendant on *voir dire*—*i.e.*, out of the presence of the jury—on the question of the existence of the old public road. Following the testimony of these witnesses, the trial judge indicated a ruling favorable to defendant. The judgment contains the following entry:

> [T]he Court having reserved its ruling on Defendant's Motion for directed verdict at the close of Plaintiff's [*sic*] evidence as to the remaining issues, and the Defendant having introduced evidence and renewed its Motion for directed verdict at the close of all the evidence as to the remaining issues, and the Court being of the opinion that the Motion should be granted;
>
> AND THE COURT SPECIFICALLY DETERMINING in the light of the evidence most favorable to the Plaintiff, all the evidence disclosed and the Court concludes as a matter of

law that there exists a public road across the lands of the Defendant and through the lands of the adjoining landowner, Frank Oakley; and that the said public road has not been proven abandoned. The Court further finds as a matter of law by the evidence in the light most favorable to the Plaintiff, that the Restrictive Covenants are not applicable to the public road and that this specific finding of fact and conclusion of the law is not intended as a complete set of findings of fact and conclusions of law inasmuch as the directed verdict granted herein is based on all evidence before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing from the Defendant and that this action be dismissed with prejudice at the cost of the Plaintiff.

From entry of the judgment, plaintiffs have appealed.

Watson, King & Hofler, by Wilfred F. Drake and R. Hayes Hofler, III, for plaintiff appellants.

Ramsey, Hubbard & Galloway, by James E. Ramsey, for defendant appellee.

WELLS, Judge.

This appeal presents questions as to whether plaintiffs' evidence was sufficient to go to the jury on any of four causes of action: one, on breach of residential subdivision restrictive covenants, two, on breach of a contract to construct and maintain a residential subdivision street, three, on fraud in the inducement of the sale and purchase of a residential lot, and four, on unfair and deceptive trade practices in selling a residential lot.

Plaintiffs' evidence, viewed in the light most favorable to plaintiffs and giving plaintiffs the benefit of every reasonable inference which can be drawn from it, *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774 (1980), *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980), tends to show the following. Defendant, the owner of the Brookland Subdivision, sold plaintiffs lot number ten on 9 May 1977. Prior to and at the time of agreement to purchase, defendant represented to plaintiffs that the subdivision would be restricted to residential use only and that the land could be used for no other purpose. These restrictions were not included in plaintiffs' deed, but were later

entered into between defendant and plaintiffs, signed by plaintiffs and recorded on 12 August 1977. Before plaintiffs purchased their lot, plaintiff Lawrence Edward Overstreet went with defendant's agents to visit the property. To get to the property, they traveled along a state road for about 1/10 of a mile and then emerged onto an old farm path. Defendant's agents informed Overstreet that the old farm path was being used by the Oakleys to come onto the Brookland property to harvest crops, but that after the crops were out of the fields, the property would be restricted, no more farming would take place and the path would be closed off from the subdivision street so that Brunswick Lane would be a dead-end street. The restrictive covenants include a restriction that "[n]o lot shall be used except for residential purposes" and a provision that "[n]o noxious or offensive trade shall be carried on upon any lot, nor shall any other occupant of any portion of the premises undertake any activity which may be or become any annoyance or nuisance to the neighborhood." The restrictions also included a paragraph as follows:

> Enforcement. If the parties hereto or any of them or their heirs, successors or assigns shall violate or attempt to violate any of the covenants and restrictions herein set forth before June 15, 1997, it shall be lawful for any person or persons owning any other portions of the premises in said development or subdivision to promote any proceeding at law or in equity against the person or persons violating or attempting to violate any such covenants or restrictions, and either to prevent the violator from doing so or to recover damages or other dues for such violation.

After plaintiffs bought their lot, Mr. Overstreet met Harry Lee Oakley, who inquired if plaintiffs had bought lot number ten. When Overstreet replied in the affirmative, Oakley informed him that Oakley's father owned property beside lot ten, that they had a gate there and would like to continue to come through the property. Mr. Overstreet informed Oakley that defendant had agreed that Brunswick Lane would be closed off. Oakley was not satisfied with that, was still determined to come through the area, and intended to talk to defendant about the matter. Approximately three days after plaintiffs bought their lot, Oakley bulldozed a path from the Oakley farm across a corner of plaintiffs' lot into Brunswick Lane. Mr. Overstreet complained to defendant's

agents, who informed him that Oakley had not been given permission by them to come into Brunswick Lane. As Oakley continued to come through plaintiffs' lot, plaintiffs erected a blockade. Later, on 25 May 1978, Harry Lee Oakley purchased lot number nine in the subdivision and subsequently cut a roadway through lot nine to Brunswick Lane. Lot nine lies directly across Brunswick Lane from plaintiffs' lot. Oakley is using the path across lot nine as an access road to his farm property and continues to use Brunswick Lane for farm traffic. When Mr. Overstreet complained about this to defendant's agents, Overstreet was told by defendant's agents that defendant would agree to let Oakley come through the area and they would see how things worked out. Mr. Overstreet stated that he could not agree to these conditions and circumstances, whereupon defendant's agents told him that plaintiffs and Harry Lee Oakley would have to learn to get along.

Defendant orally represented to plaintiffs that it would cut a sixty foot right-of-way to plaintiffs' lot, and would properly ditch, gravel and maintain a road to plaintiffs' lot. After plaintiffs purchased their lot, defendant confirmed their promise to maintain the road in a letter to Home Savings and Loan Association, the lender from whom plaintiffs borrowed the funds to construct their residence. Defendant has not maintained the road as promised, and in bad weather, the road becomes practically impassable for automobile traffic.

[1] We first consider plaintiffs' cause of action for breach of the restrictive covenants. Restrictive convenants such as the ones under consideration here are servitudes imposed on the various lots or parcels of land in the subdivision and as such are treated as easements appendant or appurtenant to the lots or parcels within the subdivision. *Craven County v. Trust Co.*, 237 N.C. 502, 512, 75 S.E. 2d 620, 628 (1953); *Shipton v. Barfield*, 23 N.C. App. 58, 62, 208 S.E. 2d 210, 213, *cert. denied*, 286 N.C. 212, 209 S.E. 2d 316 (1974). The effect of such negative easements created by such covenants is that, in the legal sense, each lot owes to all the other lots in the subdivision the burden of observing the covenants and each of the lots is invested with the benefits imposed by the burdens upon the others. *Craven County v. Trust Co., supra.* The law treats each landowner as a promisor, promising to abide by the restrictions for the benefit of the other landowners in the sub-

division, giving them the right to sue *inter se*, but does not recognize a remedy against the subdivider unless he has expressly or impliedly undertaken responsibility for the enforcement of the various covenants. *Shipton v. Barfield, supra.* There are no provisions in the covenants under consideration here which impose a duty upon defendant to enforce them on behalf of plaintiffs against any other landowner in the subdivision. The evidence presented by plaintiffs shows no use by defendant of other lots or parcels in the subdivision in violation of the covenants. These circumstances compel us to conclude, and we so hold, that the trial court properly granted defendant's motion for a directed verdict as to plaintiffs' First and Second Causes of Action.

[2] We next reach plaintiffs' cause of action based upon defendant's alleged fraudulent acts or representations inducing plaintiffs to buy lot number ten. Plaintiffs' evidence shows that defendant represented to them—promised to them—that the subdivision would be subject to covenants restricting it to residential use, that Oakley's farming operation would not affect Brunswick Lane, that Brunswick Lane would be and remain a dead-end street, and that the old farm path would be closed off. Soon after plaintiffs purchased their lot, the Oakleys started using Brunswick Lane for farm equipment traffic. Harry Lee Oakley later approached Mr. Overstreet and told Overstreet that they (the Oakleys) would like to continue to come through the property. Mr. Overstreet informed Oakley that before plaintiffs had bought their property, defendant had agreed that "the road would be closed off". Overstreet testified that "Oakley was not satisfied with that, was still determined to come through the area, and said he would talk with the realtors", *i.e.*, the defendant's representatives. Soon thereafter, Oakley cut a path from the old farm road to Brunswick Lane. Oakley was in dispute with defendant about his rights to continue to use the old farm path, and about a year later, he purchased lot nine to use for a connector road between his property and Brunswick Lane. Before purchasing lot nine Oakley informed defendant that he would continue to drive on those portions of the old farm path which ran across lot nine. This evidence would establish facts from which a jury could reasonably infer that defendant promised that Brunswick Lane would remain a dead-end street, that no part of the subdivision would be used for non-residential purposes, and that at about a year after these

promises were made, defendant sold a lot to Oakley which they knew he intended to use for non-residential purposes, *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964); *Franzle v. Waters*, 18 N.C. App. 371, 197 S.E. 2d 15 (1973), the intended use of which would have the effect of making Brunswick Lane a through street. It thus becomes clear that plaintiffs have not shown that defendant misrepresented to them a subsisting fact, as distinguished from a representation relating to future prospects. *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E. 2d 494, 500 (1974). Our Supreme Court has held that while the general rule is that mere unfulfilled promises cannot be made the basis of an action for fraud, if a promise is made fraudulently—that is, with no intention to carry it out—such is a misrepresentation of the state of the promisor's mind at the time of the promise, *i.e.*, a pre-existing material fact. *Williams v. Williams*, 220 N.C. 806, 810-811, 18 S.E. 2d 364, 366-67 (1942); *see also, Johnson v. Insurance Co.*, 300 N.C. 247, 255, 266 S.E. 2d 610, 616 (1980) and cases cited therein; *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E. 2d 760, 762 (1961); *Davis v. Davis*, 236 N.C. 208, 211, 72 S.E. 2d 414, 415 (1952). *Cf., Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940); *Whitley v. O'Neal*, 5 N.C. App. 136, 168 S.E. 2d 6 (1969). Plaintiffs' evidence in this case does not establish facts upon which a jury could reasonably infer that at the time defendant sold plaintiffs their lot, defendant had no intent of restricting the subdivision to residential use and purpose or no intent that Brunswick Lane would be and continue to be a dead-end street. The trial judge properly granted defendant's motion for a directed verdict of this cause of action.

[3] We find that our decision as to the issue of fraud in this case is substantially dispositive of plaintiffs' alleged cause of action based upon unfair or deceptive trade practices in violation of G.S. 75-1.1.[1] While our Supreme Court has held that to succeed under G.S. 75-1.1, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception,

1. Methods of competition, acts and practices regulated; legislative policy.—(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). A trade practice is actionable if it is unfair, and "[t]he concept of 'unfairness' is broader than and includes the concept of 'deception'." *Johnson v. Insurance Co., supra*, at 263, 266 S.E. 2d at 621. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller, supra*, at 548, 276 S.E. 2d at 403. We do not find that plaintiffs have shown that defendant's acts in this case meet any of these criteria, and therefore, we hold that the trial judge properly granted defendant's motion for a directed verdict on this cause of action.

[4] Finally, we consider plaintiffs' cause of action for breach of defendant's promise to properly construct and maintain a road to plaintiffs' lot. As indicated in the factual summary, the trial court dismissed this cause on the grounds that defendant's promise came within the statute of frauds,[2] that it was not in writing when plaintiffs purchased their lot, and that the written confirmation of the promise having been made subsequent to plaintiffs' purchase, it was a separate agreement which would not sustain the original oral agreement. We hold that the trial court erred in this aspect of the case. The pleadings disclose that plaintiffs alleged and defendant admitted that plaintiffs' deed contained a reference to the subdivision plat on which Brunswick Lane is shown as a street and that subdivision plat was duly recorded in the Person County Registry. Thus, plaintiffs obtained an easement in the streets shown on that plat leading to plaintiffs' lot, *Wofford v. Highway Commission*, 263 N.C. 677, 683, 140 S.E. 2d 376, 381 (1965), *cert. denied*, 382 U.S. 822, 86 S.Ct. 50, 15 L.Ed. 2d 67 (1965); *Realty Co. v. Hobbs, supra*, at 421, 135 S.E. 2d at 35-36, and it is clear that plaintiffs are not seeking through the promise

2. G.S. 22-2. Contract for sale of land; leases.—All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

as to maintenance of the road to establish or enforce an easement, which would of course fall within the statute of frauds, but are seeking only to enforce defendant's promise to construct and maintain the road, which does not involve a contract to sell or convey land or any interest in land. Defendant's promise to construct and maintain the road does not come within the statute of frauds. *See, Baucom v. Bank*, 203 N.C. 825, 167 S.E. 72 (1933). Plaintiffs' evidence was clearly sufficient to take this cause of action to the jury. On this cause, the judgment of the trial court allowing defendant's motion for a directed verdict is reversed. Our decision makes it unnecessary to reach plaintiffs' argument that the subsequent written memorandum (letter) was sufficient to meet the requirement of the statute of frauds.

Affirmed in part, reversed in part.

Judges VAUGHN and CLARK concur.

MARIE MORRISON, AS GUARDIAN AD LITEM OF BARBARA ANN MORRISON, AN INFANT, AND ARCHIE MORRISON v. CONCORD KIWANIS CLUB, PHIL W. WILSON, AND MELANIE WESTBROOK

No. 8019SC895

(Filed 16 June 1981)

1. Master and Servant § 33— respondeat superior—negligence of employee required

When an injured party seeks damages from an unincorporated association on the theory of respondeat superior, the unincorporated association cannot be held liable in tort for negligence without a jury finding of negligence on the part of an employee of the unincorporated association while acting as such and within the scope of his employment; therefore, the jury verdict that defendant club's employees were not negligent negated any liability of defendant club to plaintiffs on the theory of respondeat superior.

2. Negligence § 30.2— camp for handicapped children—defendant's negligence not proximate cause of injury

In an action by the minor plaintiff to recover for injuries sustained while she was at a camp for handicapped children operated by defendant club, the trial court properly entered judgment n.o.v. for defendant where the evidence did not show that any negligence on the part of defendant was a proximate cause of plaintiff's slipping from the seat of a swing onto its floorboard and

any resulting injuries, and there was no evidence that the accident would not have occurred if defendant club had followed the customary standards for operating camps for handicapped children in N.C. in 1976.

APPEAL by plaintiffs from *Seay, Judge.* Judgment entered 14 March 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 2 April 1981.

This is a civil action wherein plaintiffs seek to recover of defendants damages for injuries suffered by Barbara Ann Morrison while at a camp run by defendant Concord Kiwanis Club. In a complaint filed 19 April 1978 and amended 20 June 1978, plaintiff Marie Morrison, the mother of and the duly appointed guardian ad litem for Barbara Ann Morrison, and plaintiff Archie Morrison, the father of Barbara Ann Morrison, alleged the following: Barbara Ann Morrison, who has "physical disabilities resulting from the fact that she has had cerebral palsy since birth," was invited to attend the annual health camp for disabled children to be held by defendant Concord Kiwanis Club (hereinafter "Kiwanis Club") from 1 August to 7 August 1976 at Camp Spencer, located in Cabarrus County; defendants Phil W. Wilson and Melanie Westbrook were acting as agents and employees of defendant Kiwanis Club at the camp; Barbara Ann Morrison was brought to the camp by her mother on 5 August 1976; while in the care of defendants, who knew of Barbara's disabilities, including her "lack of balance control," Barbara was placed by one of the individual defendants "unsupported" on a "swing glider which was then placed in motion," whereupon Barbara fell from the "swing glider," incurring serious injury; and Barbara's injury was proximately caused by the negligence of defendants in failing to exercise due care for Barbara's safety, in failing to properly supervise their agents and employees, and in failing to "use properly qualified individuals to look after the kinds of disabled children, like Barbara Ann Morrison, who attended the health camp." Plaintiff Marie Morrison, guardian ad litem, sought damages for pain and suffering while plaintiff Archie Morrison sought damages for medical expenses he incurred in the treatment and care of Barbara following the accident.

Defendants filed answer 19 June 1978, admitting that the health camp was conducted by defendant Kiwanis Club at Camp Spencer on the dates indicated, that Barbara was brought to the

camp on 5 August 1976, and that defendants Wilson and Westbrook knew that Barbara "suffered from some disabilities," but denying the other material allegations of the complaint. Defendants Wilson and Westbrook further averred that the accident was unavoidable and all answering defendants alleged contributory negligence on the part of plaintiffs for failing to "properly advise the defendants sufficiently as to Barbara Ann Morrison's condition. . . ."

In an order on final pre-trial conference filed 3 March 1980, defendants stipulated *inter alia* as to certain medical expenses and also that defendants Wilson and Westbrook were acting as agents and employees of defendant Kiwanis Club.

Plaintiffs offered evidence at trial tending to show the following:

Barbara Ann Morrison, age nine, has had cerebral palsy since birth, and she had generally been confined to a wheelchair prior to the incident in question, although she was "walking some with a walker . . . with someone holding on to her and helping her." Barbara had been diagnosed in 1969 as "nonambulatory, a moderate to severely involved cerebral palsy spastic quadriplegic" with lack of normal motor control in all four limbs, and she had undergone treatment, including hospitalization in 1973 and 1974, under the care of a physical therapist. With the aid of surgery, Barbara was able to make significant progress in learning to walk with a walker, but because of her problems with movement and balance, Barbara was never able to transfer herself in and out of her wheelchair. When she would attempt to climb into the chair and start to slip and fall, she would go into a "startled reaction" which would prevent her from catching herself. Nevertheless, her attitude in 1974 was described as "enthusiastic," and up to the time of the incident in question, she retained a positive attitude about walking.

The Morrisons had another daughter, Deborah, who was classified as a "borderline retarded child." The Morrisons' first contact with defendant Kiwanis Club's camp at Camp Spencer was a letter inviting Deborah for a week session especially for non-handicapped children. The Morrisons accepted and Mrs. Morrison met defendants Wilson and Westbrook when she took Deborah to the Concord Boys Club, where a bus was to take

Deborah to the camp. Mrs. Morrison gave them a letter from the Division for Disorders in Development and Learning at the University of North Carolina at Chapel Hill which evaluated both Deborah and Barbara. Thereafter, Barbara was invited to defendant Kiwanis Club's camp for handicapped children to be held the week beginning 1 August 1976. This camp was free, as defendant Kiwanis Club paid for all expenses.

Mrs. Morrison did not bring Barbara to the camp until 5 August 1976 because Barbara had a cold. After being greeted by defendant Westbrook, the Morrisons met some of the other children at the camp and then Mrs. Morrison explained Barbara's problems with balance control to defendant Westbrook. Mrs. Morrison detailed certain problems they had had with Barbara in the bathtub, and told defendant Westbrook not to let Barbara "go up and down the ramp by herself." Defendant Westbrook did not ask for Barbara's camp registration form which had already been partially filled out by Mrs. Morrison, and the form was not discussed. Also, a medical evaluation of Barbara was not requested by defendant Kiwanis Club or anyone at the camp.

Later on the evening of 5 August 1976, after the Morrisons had returned home, plaintiff Archie Morrison was informed by his brother that Barbara had been taken to the hospital following an accident at the camp. The accident occurred when Barbara fell off of a "swing glider" at the camp. This "swing glider" was similar to one the Morrisons had at home. As a result of the injuries suffered in the accident, Barbara was in the hospital in traction for "approximately four or five weeks" and thereafter underwent extensive therapy.

Plaintiffs also offered the testimony of Mr. Bill Kissam, tendered to and accepted by the court as an expert in "the customary usage and practice of camps in North Carolina in 1976 dealing with disabled children" as to the customary standards for the operation of such camps in several areas including the following: registration and intake procedures at such camps; obtaining medical information on prospective campers; procedures upon arrival at the camp; procedures when a camper arrives without a camp application or medical history; camp organization and training for staff, especially with respect to recognition of physical limitations of individual campers; and accident procedures.

Kissam also testified, in answer to a hypothetical question, that the procedures used by defendant Kiwanis Club did not meet the customary standards. Kissam further testified that the fact that a person has gained experience in working at a camp for the handicapped does not necessarily mean that such a person is properly trained to work with handicapped children.

At the close of plaintiff's evidence, defendants moved for a directed verdict in favor of defendants but the court reserved its ruling on the motion. Defendants then offered evidence tending to show the following:

Defendant Kiwanis Club, a civic organization located in Concord, North Carolina, has conducted a free annual one-week camp for handicapped children at Camp Spencer for approximately 25-30 years. Activities at the camp included typical summer camp activities, such as swimming, boating, playing ball, and arts and crafts, as well as special activities like field trips. Without considering the time put in by members of the Kiwanis Club, the approximate cost of conducting one of the annual camps is $2,000, which is raised through various projects of the organization. The Camp Spencer facilities were provided free of charge by the Concord Boys Club, which maintained the facilities. In 1976, defendant Kiwanis Club had no established procedures for operating the camp. No medical information from a camper's doctor was required, nor were any doctors or nurses on hand at the camp, since the camp was not designed to deliver medical services to the children. Rather, the purpose of the camp was to provide for children who could not afford to go elsewhere "the opportunity to experience things they had never experienced." Defendant Kiwanis Club also did not provide any formal training for the camp staff in how to deal with disabled campers, since the club felt that the staff at the camp had the necessary experience.

The camp staff in 1976 consisted of defendant Wilson, who was the Director, defendant Westbrook, and several others. Defendants Wilson and Westbrook were in charge of planning all the camp's activities. Defendants Wilson and Westbrook were both qualified lifeguards and water safety instructors. Defendant Wilson, a junior high school teacher, became Director of the camp in 1974. In 1976, he had worked at fourteen of the annual one-week camps, and had seen a wide range of physical handicaps:

"hydroencephalitis to muscular dystrophy, cerebral palsy, multiple sclerosis, polio, children who were blind and deaf." He was also qualified as an Emergency Medical Technician. Defendant Westbrook, a kindergarten teacher, had been a counselor at the camp for eight of the annual one-week sessions. Defendant Westbrook is the sister of defendant Wilson.

Members of the camp staff were observed nearly every day by members of defendant Kiwanis Club who stated that the staff did "an excellent job in giving these children the tender, loving care that they need at this camp." The staff and the campers did everything together as a "close-knit group" and a "good rapport" existed between campers and counselors. None of the staff, however, had ever received any formal professional training in dealing with disabled children.

Defendant Westbrook first met Mrs. Morrison when Deborah was brought for the camp for the non-handicapped. Barbara, in her wheelchair, had accompanied her mother, and in the course of the conversation between Westbrook and Mrs. Morrison, Westbrook told Mrs. Morrison that she thought Barbara would enjoy the "week of handicap camp." Neither Mrs. Morrison nor her husband made any further inquiries as to the nature of this camp or the qualifications of its staff personnel. Thereafter, Barbara was sent an invitation to attend this camp for the week beginning 1 August 1976. The letter inviting Barbara contained a narrative explaining that the purpose of the camp was to provide activities for enjoyment and the letter was accompanied by a registration form. Neither the narrative nor the questions on the registration form indicated that the camp would provide any curative or therapeutic services for the child; instead, the information sought was "how do you treat your child in the home," such that the camp could imitate that situation.

Defendant Westbrook called Mrs. Morrison on 4 August 1976, after the camp had begun, inquiring as to whether Barbara would be coming to the camp. Mrs. Morrison explained that Barbara had had a cold, but was feeling better, and when Westbrook said that Barbara could still come for the remainder of the week, and that Deborah could come as well, Mrs. Morrison said they would come in the morning. The next morning, Westbrook greeted Mrs. Morrison when Mrs. Morrison, Barbara, and Deborah arrived at the

camp. Westbrook did not ask Mrs. Morrison for the registration form, but instead asked her "the major concerns" of the form, since she felt she "could understand more" with a verbal conversation. No written statement from Barbara's doctor was obtained, and when Westbrook inquired of Mrs. Morrison as to any special needs or problems for Barbara, Mrs. Morrison mentioned only that Barbara had difficulties when going to the bathroom in that "you have to either hold her up while she pulls her pants up, or while she props up, you pull her pants up." Nothing was said in reference to a balance problem. Westbrook told Mrs. Morrison that the campers "don't just sit around" but play ball, go canoeing, and go swimming. Mrs. Morrison said Barbara would enjoy all these things and said something to Barbara about riding in a boat, and Barbara said she would. Westbrook asked if that was all, and Mrs. Morrison said "yes." Mrs. Morrison then left.

That morning, during some activities in the dining hall, Westbrook escorted Barbara to the bathroom, where Barbara had no difficulty in sitting on the commode. After lunch and a rest period, the campers, including Barbara, went canoeing. Barbara sat on the floor of the canoe. While the others then went swimming, Barbara sat on the pier, talking with defendants Wilson and Westbrook. Barbara was facing a swing set located nearby and she asked if she could go swing. Wilson and Westbrook "tried to put her off," but Barbara kept begging to swing. Wilson and Westbrook continued to refuse, since they did not want to leave the rest of the campers, but Barbara kept wanting to go to the swing. Wilson asked Barbara if she had been on a swing before, and Barbara said she had. To corroborate this, Wilson then asked Deborah if Barbara had been on a swing before, and Deborah said Barbara had. Wilson then carried Barbara over to the swing, a "little stagecoach-like glider," and placed Barbara in it. Westbrook accompanied them and went to the opposite side of the swing from Wilson.

The swing was "real low to the ground." Barbara sat with her hands to the side, holding on to the seat of the swing. Wilson asked if it would not be better to hold the little bars at the side, but Barbara seemed to think it would be more comfortable to hold the seat, so Wilson let her. Barbara did not appear to have any trouble with her balance. Satisfied that Barbara was secure and comfortable, Wilson pulled the swing back "a few inches" and

let it go. Westbrook was standing, "close enough to get hit," beside the glider seat on the side opposite to Wilson. The swing "went up once and back slightly" and at that point Barbara "slid from the little seat area onto the floorboard, the little sections on the bottom of the glider." Neither Wilson or Westbrook had time to catch Barbara. One of Barbara's legs touched the sand underneath, and her foot caught one of the slats in the glider, but her legs were not twisted in any way.

Barbara began crying, complaining that her leg was hurting. Wilson and Westbrook began trying to contact Mrs. Morrison, but they could not locate her. Wilson was later able to contact an aunt and he told her he would take Barbara to the hospital. Barbara was then taken to the emergency room.

Defendants also offered testimony that the glider swing was in good condition both before and after the accident. In addition, several other persons testified to the effect that Wilson, Westbrook and the other staff members handled the disabled children at the camp in a careful manner and that the care given was adequate in all respects.

At the close of all the evidence, defendants renewed their motion for a directed verdict, but the court again reserved its ruling on the motion. Plaintiff moved to amend the pleadings to conform with the evidence, which was allowed.

The following issues were submitted to an answered by the jury as indicated:

1. Was the minor plaintiff Barbara Ann Morrison injured or damaged by the negligence of Phil W. Wilson? *No*

2. Was the minor plaintiff Barbara Ann Morrison injured or damaged by the negligence of the defendant Melanie Westbrook? *No*

3. Was the minor plaintiff Barbara Ann Morrison injured or damaged by the negligence of the defendant Concord Kiwanis Club? *Yes*

4. What amount, if any, is the minor plaintiff Barbara Ann Morrison entitled to recover for personal injuries? *$10,000.*

5. What amount, if any, is Archie Morrison entitled to recover for personal injuries received by Barbara Ann Morrison? *$10,000.*

Defendants then moved for judgment notwithstanding the verdict with respect to defendant Kiwanis Club. From a judgment notwithstanding the verdict in favor of the defendant Kiwanis Club, plaintiffs appealed.

Helms, Mullis & Johnston, by W. Donald Carroll, Jr., for the plaintiff appellants.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines and Aimee A. Toth, for the defendant appellees.

HEDRICK, Judge.

Plaintiffs first contend that the court erred in allowing defendants' motion for judgment notwithstanding the verdict as to defendant Kiwanis Club. Plaintiffs argue there was substantial evidence presented to support the jury's verdict that defendant Kiwanis Club negligently operated its 1976 camp for handicapped children. We disagree.

A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. *Hunt v. Montgomery Ward and Co., Inc.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981).

[1] An unincorporated association like defendant Kiwanis Club can certainly be held liable in tort for its own active negligence if such negligence is the proximate cause of the injury giving rise to damages. If, however, the injured party is proceeding upon the theory of *respondeat superior*, the unincorporated association could not be held liable in tort for negligence without a jury finding of negligence on the part of an employee of the unincorporated association while acting as such and within the scope of his employment. *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131

(1968); *Hudson v. Gulf Oil Co.*, 215 N.C. 422, 2 S.E. 2d 26 (1939). *See also*, 78 A.L.R. 365, 53 Am. Jur. 2d Master and Servant § 406; 57 C.J.S. Master and Servant § 616.

The jury's verdict that defendant Kiwanis Club's employees, Wilson and Westbrook, were not negligent negates any liability of defendant Kiwanis Club to plaintiffs on the theory of *respondeat superior*. Thus, the only question remaining is whether the trial court erred in concluding that the evidence was insufficient to support a verdict against defendant Kiwanis Club on the theory that defendant Kiwanis Club's own negligence was a proximate cause of the accident and injury to Barbara Ann Morrison.

[2] Plaintiffs argue that defendant Kiwanis Club was actively negligent in that it failed to comply with the customary standards for operating a camp for handicapped children in North Carolina in 1976, especially in the areas of staff training with respect to recognizing physical limitations of individual campers, obtaining medical information on prospective campers, and registration and intake procedures. Assuming arguendo that the evidence does disclose that defendant Kiwanis Club was negligent in one or more of these areas, we conclude that the evidence does not show that any such negligence on the part of defendant Kiwanis Club was a proximate cause of Barbara's slipping from the seat of the swing onto the floorboard, and any resulting injuries. There is no evidence in this record that the accident would not have occurred if defendant Kiwanis Club had followed the customary standards for operating camps for handicapped children in North Carolina in 1976 as presented by plaintiff's evidence. Therefore, the trial court did not err in entering judgment notwithstanding the verdict for defendant Kiwanis Club.

Plaintiffs also have brought forward several assignments of error based upon exceptions to rulings by the trial court with respect to the admission and exclusion of evidence. We have carefully considered all the excluded evidence and find that such evidence does not tend to show that the conduct of defendant Kiwanis Club was a proximate cause of the accident and resulting injury. Such evidence, therefore, could not have affected the result, and these assignments of error are meritless.

The judgment appealed from is

Affirmed.

Judges ARNOLD and WEBB concur.

CITY OF CHARLOTTE AND COUNTY OF MECKLENBURG v. LITTLE-McMAHAN PROPERTIES, INC. (FORMERLY NEW SOUTH PROPERTIES, INC.), A NORTH CAROLINA CORPORATION; EARL J. RODMAN, AGENT; EDWIN R. JOHNSON, TRUSTEE; AND JAMES G. JOHNSTON, SARAH P. JOHNSTON, SARAH P. JOHNSTON, CUSTODIAN FOR ROBERT MIDDLETON JOHNSTON UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT, AND SARAH P. JOHNSTON, CUSTODIAN FOR SUSAN MIDDLETON JOHNSTON UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT

No. 8026SC1111

(Filed 16 June 1981)

1. Taxation § 25— ad valorem taxes—obligation of property owner to pay

Property itself serves two purposes in the scheme of ad valorem taxation under the laws of N.C.: one, its value forms the basis for the assessment, and two, the property itself stands as security for the collection of taxes not paid by the owner, who by statutory definition is the "taxpayer"; therefore, when the owner pays the taxes he owes on his property, the tax lien is thereby discharged, and there was no merit to defendant's argument that by paying the tax liens on the property in question and having the liens assigned to it, defendant could thereby pass on the tax obligation to the property itself and, in this case, pass the tax obligation on to the mortgagee under the deed of trust.

2. Taxation § 25— ad valorem taxes—obligation of landowner

Where defendant purchased stock of a corporation, executed promissory notes as payment for purchase of the stock, executed a deed of trust on land which constituted the assets of the corporation to secure the payment of those notes, defaulted on the notes secured by the deed of trust, subsequent to the foreclosure sale, at which the mortgagee purchased the property, paid the city-county tax collector the aggregate of sums due for past due taxes and interest, and had the tax lien for those years assigned to it, there was no merit to defendant's contention that the effect of the trial court's order, which barred it from recovering from the mortgagee any portion of the taxes, interest or costs which it had previously paid, was to make defendant "personally" liable for the unpaid taxes, a result which it argued was erroneous because a tax foreclosure is an *in rem* proceeding which cannot form the basis for a personal judgment against the taxpayer, since defendant was obligated to pay the taxes as they were assessed from year to year; defendant could not transfer its obligation to pay the taxes to the mortgagee; the mortgagee had a right under the deed of trust and pursuant to G.S. 105-386 to look to defendant to pay the taxes due

on the property; and defendant, by paying the taxes due, did only that which it could have, by other proceedings, been required to do.

APPEAL by defendant, Little-McMahan, from *Burroughs, Judge.* Judgment entered 11 August 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1981.

This action was instituted by plaintiffs in May, 1979, to enforce their tax liens for the years 1975 through 1978 on a 46.78 acre tract of land. The complaint named Little-McMahan and Rodman as defendants, alleging their ownership of the land. Rodman answered as agent for James G. Johnston and Sarah P. Johnston individually; and Sarah P. Johnston as custodian for Robert M. Johnston and Susan M. Johnston, minors. The Johnstons were later joined as additional parties defendant. In his answer, Rodman set out a cross-claim against Little-McMahan and Edwin R. Johnson, Trustee. Little-McMahan and Edwin Johnson answered Rodman's cross-claim and in turn, cross-claimed against Rodman. Other pleadings were appropriately filed, including a motion by Little-McMahan, consented to by plaintiffs, that Little-McMahan be substituted as party plaintiff in the action. After the pleadings were joined, affidavits and factual stipulations were filed. The factual background necessary to our decision, as stipulated by the parties, is as follows.

In May of 1973, New South Properties, Inc. (New South), predecessor of Little-McMahan, entered into an agreement with James G. Johnston, Sarah P. Johnston, Sarah Johnston as custodian for Robert M. Johnston and Susan M. Johnston, minors, for the purchase of all of the capital stock of Johnston Southern Corporation. The sole assets of Johnston Southern consisted of the 46.78 acre tract of land, together with an account receivable in the sum of $15,600.00. At the closing of the stock purchase agreement, New South acquired all of the stock of Johnston Southern and executed four promissory notes to the Johnstons as payment for the purchase of the stock. In addition, Johnston Southern executed a deed of trust on the 46.78 acre tract of land to secure the payment of those notes. Pursuant to the terms of the deed of trust, and as a result of the payment by New South of the sum of $92,380.00 ($107,980 less $15,600 owed by the Johnstons to Johnston Southern), 9.1 acres of the 46.78 acres were released to

New South free of the deed of trust. Soon thereafter, Johnston Southern was liquidated and the property was deeded to New South, subject to the deed of trust. The only payment made by New South on the notes secured by the deed of trust was in the sum of $7,425.00. In February 1979, foreclosure proceedings were instituted pursuant to the power of sale contained in the deed of trust. On 20 April 1979, Rodman, as agent for the Johnstons, purchased the property, excluding the 9.1 acre tract which had been released from the deed of trust. The notice of sale and the report of foreclosure noted that the sale was subject to taxes. From 25 May 1973, the date of the transfer of Johnston Southern's stock, through the tax year 1979, the entire 46.78 acres were shown and designated as a single tax parcel in the Mecklenburg County Tax Office. The parcel was duly listed for taxation for the years 1975 through 1979 inclusive and a tax levy was duly made for each year. In August 1979, Little-McMahan paid the City-County Tax Collector the sum of $26,855.81, that sum representing the aggregate of sums due the City and County for past due taxes and interest for the years 1975 through 1978 in the amount of $24,414.37, plus legal fees in the amount of $2,441.44 and court costs in the sum of $40.00, in exchange for which the City-County Tax Collector delivered the tax receipts to Little-McMahan for the years 1975 through 1978. The Tax Collector and Little-McMahan entered into an assignment agreement, assigning the tax lien for those years to Little-McMahan. In 1980, Little-McMahan paid the Tax Collector the sum of $8,416.77, said sum representing the aggregate of monies due the City and County for past due taxes and any interest for the year 1979 in the sum of $7,915.77, plus legal fees and costs in the amount of $501.00, in exchange for which the Tax Collector delivered the tax receipt for the year 1979 to Little-McMahan. The Tax Collector and Little-McMahan entered into a second assignment agreement, assigning the tax lien for 1979 to Little-McMahan. The tax scrolls were noted to reflect these assignments of tax liens on the property to Little-McMahan. The value of the 9.1 acre tract owned by Little-McMahan free of the deed of trust, and the proceeds of a sale thereof, would exceed the total sum of taxes, interest, legal fees and costs which were due the City and County on the property (the entire 46.78 acre tract) for the years 1975 through 1979 inclusive. The value of that portion of the property less the 9.1 acre tract would exceed the total sum of taxes, interest, legal fees and

costs due the City and County on the entire property for the years 1975 through 1979 inclusive.

On 11 August 1980, the trial court entered its order, the pertinent portions of which are as follows:

> THE COURT, having considered and reviewed the pleadings, stipulations, affidavits and other matters of record and arguments of counsel, does hereby make and enter the following:
>
> CONCLUSIONS OF LAW
>
> 1. There is no genuine issue as to any material fact.
>
> 2. As between the defendants Rodman and Johnston and the defendant Little-McMahan, the defendant Little-McMahan is liable for the taxes, costs and interest sought by the plaintiffs for the years 1975 through 1979.
>
> 3. Within the subject 46.78-acre tract, the 9.1-acre tract located therein, owned and held by the defendant Little-McMahan free of the "Johnston" deed of trust, is primarily liable for the taxes, costs and interest sought by the plaintiffs for the years 1975 through 1979 inclusive.
>
> 4. The payments by the defendant Little-McMahan, the party responsible therefor, to the City-County Tax Collector for ad valorem taxes for the City of Charlotte and County of Mecklenburg for the years 1975 through 1979 inclusive acted to pay said taxes of said governmental bodies assessed against the entire 46.78-acre tract for said period fully and finally.
>
> 5. The assignments entered into between the defendant Little-McMahan to the City-County Tax Collector did not effectively assign to Little-McMahan the statutory lien rights available to the City of Charlotte and County of Mecklenburg against said 46.78-acre tract for the years 1975 through 1979.
>
> 6. But for the defendant Little-McMahan's prior payments to the plaintiff of the amounts involved, the defendants Rodman and Johnston would be entitled to Judgment as a matter of law on their cross-claim against the defendant Little-McMahan to be secured by a lien on said 9.1-acre tract

in an amount equal to any sums paid by the defendants Rodman and Johnston to the plaintiff or realized from a tax sale of the remainder of the subject 46.78-acre tract. However, since the defendant Little-McMahan has now paid the amounts involved to the plaintiff, this action and the cross-action of the defendants Rodman and Johnston against the defendant Little-McMahan have been rendered moot.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

1. The Motion of the defendant Little-McMahan for substitution as plaintiff in this action be and it is hereby denied and the action of the plaintiffs against the defendants Rodman and Johnston be and it is hereby dismissed and forever barred as moot.

2. The Motion of the defendant Little-McMahan Properties, Inc., and defendant Edwin R. Johnson, Trustee, to dismiss the cross-claims of the defendants Rodman and Johnston and the cross-claim of the defendant Little-McMahan against the defendants Rodman and Johnston be and they are hereby denied and dismissed.

3. The defendant Little-McMahan be and it is hereby forever barred from recovery from the defendants Rodman and Johnston of all or any portion of the taxes, interest or costs which have heretofore been paid by the defendant Little-McMahan to the City-County Tax Collector for the years 1975 through 1979.

4. The defendant Little-McMahan be and it is hereby forever barred from enforcing any lien for taxes assessed against the subject 46.78-acre tract for the years 1975 through 1979 and the notation of the assignment of said liens to the defendant Little-McMahan on the tax records of the plaintiffs be and it is hereby stricken and canceled.

5. The Motion for Summary Judgment in favor of the defendants Rodman and Johnston against the defendant Little-McMahan be and it is hereby denied and dismissed as moot due to the payment of the amounts involved to the plaintiff by the defendant Little-McMahan, the party primarily responsible therefor, and the action heretofore taken in

this Order and Judgment favoring the defendants Rodman and Johnston against the defendant Little-McMahan.

Defendant Little-McMahan has appealed from the trial court's order.

Farris, Mallard & Underwood, P.A., by David B. Hamilton, for defendant-appellant, Little-McMahan Properties, Inc.

Hartsell, Hartsell & Mills, P.A., by William L. Mills, III, for the defendant-appellees Earl J. Rodman, Agent, and James G. Johnston, Sarah P. Johnston, Sarah P. Johnston, Custodian for Robert Middleton Johnston Under the North Carolina Uniform Gifts to Minors Act, and Sarah P. Johnston, Custodian for Susan Middleton Johnston Under the North Carolina Uniform Gifts to Minors Act.

WELLS, Judge.

Little-McMahan (defendant) asserts three basic aspects of error in the trial court's order: one, that the trial court erred in concluding that the assignment of the tax liens did not give defendant the right to enforce those liens against the entire 46.78 acre tract; two, that it was error for the trial court to conclude that the 9.1 acre tract owned by defendant free of the deed of trust was primarily liable for enforcement of the tax liens against the entire 46.78 acre tract; three, that flowing from the first two erroneous conclusions, it was error to hold defendant personally liable for the payment of the tax liens on the entire property. First, we note that either on a motion to dismiss or a motion for summary judgment, it is not necessary or required for the trial court to enter conclusions of law, and that if such are entered, they are disregarded on appeal. *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E. 2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978). The facts in the case *sub judice* are not in dispute, and our opinion will deal only with the questions of law presented by the ordering portions of the trial court's judgment.

[1] Defendant argues that by paying the tax liens and having the liens assigned to it, defendant may thereby pass on the tax obligation to the property itself, and hence, in this case, pass the tax obligation on to the mortgagee under the deed of trust. This argument implies that under North Carolina law it is the proper-

ty itself which accrues the ad valorem tax obligation, as those taxes are assessed from year to year. Such argument is without merit. It is the property owner who has the obligation to pay the taxes assessed against his property. The property itself serves but two purposes in the scheme of ad valorem taxation under the laws of North Carolina: one, its value forms the basis for the assessment; and two, the property itself stands as security for the collection of taxes not paid by the owner, who by statutory definition, is the "taxpayer".[1] We, therefore, hold that when the owner pays the taxes *he* owes on *his* property, the tax lien is thereby discharged. Defendant's argument that G.S. 105-372 makes specific provision for the assignment of a tax lien to the "taxpayer" is also without merit. We find similar lack of merit in defendant's alternate argument that at the time it paid the taxes due on the subject property, it was no longer the "taxpayer" because as to the portion of the property still subject to the deed of trust (46.78 acres, less the 9.1 acres released), its equity of redemption had previously been "foreclosed".

[2] Defendant also argues that the effect of the trial court's order is to make defendant "personally" liable for the unpaid taxes, a result which it argues is erroneous because a tax foreclosure is an *in rem* proceeding which cannot form the basis for a personal judgment against the taxpayer, *citing Apex v. Templeton*, 223 N.C. 645, 646-47, 27 S.E. 2d 617, 618 (1943), quoted in pertinent part as follows:

> [A] tax collector . . . may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. [Citations omitted.] But in an action to foreclosure a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien *in rem* and the owner of the property is not personally liable for the payment thereof. [Citations omitted.] It is therefore erroneous to

1. G.S. 105-273(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Sub-chapter, has a duty to list property for taxation.

G.S. 105-302(c)(1) provides that the owner of the equity of redemption in real property subject to a deed of trust shall be considered the owner and that the property shall be listed in the name of the owner of the equity of redemption.

> render a personal judgment against the owner or owners of land in an action to foreclose a lien for delinquent taxes.

Recognizing *Apex* as sound law, and recognizing defendant's argument as being totally ingenious, we must nevertheless reject it as being totally without merit. While the taxing authorities could not have obtained a personal judgment against defendant for failure to pay the taxes due against the property subject to the deed of trust, this in no way excused defendant's obligation to pay the taxes as they were assessed from year to year, nor can this limitation on remedies available to the taxing authority be used by defendant as a backdoor method of transferring its obligation to pay the taxes to the mortgagee. The deed of trust entered into between Johnston Southern Corporation and the Johnstons, to secure the indebtedness of defendant to the Johnstons, included a provision that "[o]wner shall pay all taxes, charges, or assessments which may become a lien on the property conveyed herein." Aside from and in addition to their rights under the deed of trust to look to defendant to pay the taxes due on the property, the Johnstons, as the lien holders under the deed of trust had a statutory remedy which, upon payment by them of the taxes on the property, would have entitled them to proceed *in personam* against defendant for the monies so paid.[2] It thus becomes clear that under the facts of this case, defendant has, by paying the taxes due, done only that which it could have, by other proceedings, been required to do.

Defendant also argues that under the provisions of the note evidencing its indebtedness to the Johnstons, the sole remedy available to the Johnstons was foreclosure against the property, thus denying the Johnstons the right to seek payment from defendant of any unpaid taxes. The notes contain the following pertinent language:

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2. G.S. 105-386. Tax paid by holder of lien; remedy.—If any person having a lien or encumbrance of any kind upon real property shall pay the taxes that constitute a lien upon the real property:

(1) He shall thereby acquire a lien upon the real property from the time of payment, which lien shall be superior to all other liens and which may be enforced by an action in the appropriate division of the General Court of Justice of the county in which the real property is situated.

(2) He may, by an action for moneys paid to the use of the owner of the real property at the time of payment, recover the amount paid.

> Provided, however, in the event Borrower shall default in the full and punctual payment of any installment of principal and interest hereof when and as the same is due and payable hereunder, the holder hereof shall have the right to proceed against the security for this Note described above for the collection in full of all such principal and interest and any other interest, charges, fees and expenses permitted by law; provided, however, in any suit upon this Note, or in any foreclosure or other action against such security or substituted security, the recovery of such holder shall be limited to such security, no deficiency judgment shall be entered and Borrower shall have no personal or additional liability hereunder whatsoever.

Defendant argues that since the foreclosure by the Johnstons was "subject to taxes", the foreclosure cut off the Johnstons' right to recover the unpaid taxes from defendant. We cannot agree. Where a third party purchases at a foreclosure sale subject to taxes due, it may be assumed that the third party's bid was made at a level to allow for the payment of taxes due as a part of his bargain, *i.e.*, he expects to pay the taxes due as a part of the purchase price, in addition to his bid price. The situation is quite different, of course, where the purchaser at foreclosure is the lien holder, because under the provisions of G.S. 105-386, had the Johnstons paid the taxes, they would have gained a statutory lien for those sums, giving them, as we noted above, a separate remedy from that available under the terms of the note.[3] The trial

3. The following statement appears in *King v. Lewis*, 221 N.C. 315, 318, 20 S.E. 2d 305, 306-307 (1942), in support of which the Court cites Consolidated Code, sec. 3706, which was the predecessor to G.S. 105-409, which was replaced by present G.S. 105-386 by enactment of Ch. 806 of the 1971 Session Laws:

> The taxes assessed were a lien upon the land, and when the mortgagee bought at the sheriff's sale he purchased only an encumbrance, the cost of which he is entitled to have added to the debt secured by the mortgage, and it is therefore an additional lien upon the land. The mortgagee could have paid the taxes and acquired a lien upon the land to the extent of the amount so paid by him. The Code, sec. 3706 (Revisal, sec. 2858). . . .
>
> . . . .
>
> "It is very generally conceded that the holder of a mortgage is entitled for the protection of his interest to pay taxes assessed against the mortgaged premises in the event of failure by the mortgagor to discharge them, and that he has a right to add the sums so paid to the mortgage debt . . . ."

court correctly concluded that when defendant paid the taxes, this argument was rendered moot. *Accord, Redic v. Bank*, 241 N.C. 152, 84 S.E. 2d 542 (1954).

Defendant argues that the decisions of our Supreme Court in *Orange County v. Wilson*, 202 N.C. 424, 427-28, 163 S.E. 113, 115 (1932), *Exum v. Baker*, 115 N.C. 242, 243, 20 S.E. 448, 449 (1894), and *Wooten v. Sugg*, 114 N.C. 295, 19 S.E. 148 (1894) do not stop at recognizing the right of a mortgagee to pay taxes due and thereby acquire a lien, but also *require* the mortgagee to take such action in order to preserve his right. Those cases all involve the question of priority of lien between unpaid taxes and an unsatisfied mortgage, holding that the tax lien has priority; and those cases must be distinguished from the case *sub judice* because in this case, defendant paid the taxes, thereby making it unnecessary for the Johnstons to take the action allowed under the provisions of G.S. 105-386.

We hold that the payment by defendant of the tax liens disputed in this case discharged those liens, that the purported assignments of those liens to defendant following payment are nullities, and that the judgment of the trial court is hereby affirmed.

Defendant additionally argues that the conclusions of law numbered 3 and 6 in the trial court's order are erroneous. We need not reach those questions, as the challenged conclusions are not necessary to support the judgment of the trial court, and are disregarded on appeal. *Mosley v. Finance Co., supra.* The test here is whether on the pleadings or other materials before the trial court, either judgment is justified. We have found that the judgment of the trial court was correct and should be affirmed.

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

SIGMOND W. HOLCOMB AND WIFE, LAURA C. HOLCOMB v. UNITED STATES FIRE INSURANCE COMPANY

No. 8017SC878

(Filed 16 June 1981)

1. **Insurance § 143.1— all risk insurance—gutter downspout as part of plumbing system**

A gutter downspout is, as a matter of law, a part of the plumbing system of a home within the meaning of an "all risk" policy provision covering loss from accidental discharge or overflow of water from within a plumbing system.

2. **Insurance § 144.1— all risk insurance—loss caused by earth movement—jury question**

In an action to recover under an "all risk" policy for damages resulting from the collapse of a basement wall in plaintiff's home allegedly caused by the failure of a gutter downspout which allowed an abnormally large amount of water to be deposited adjacent to the wall, the evidence on motion for summary judgment presented an issue of fact as to whether plaintiff's loss was excluded from coverage under the terms of the policy on the ground that earth movement caused or contributed to the collapse of the wall.

3. **Insurance § 143.1— all risk insurance—construction of exclusion for water damage**

Where a policy of "all risk" insurance provided coverage for "accidental discharge, leakage or overflow of water . . . from within a plumbing . . . system" and excluded coverage for loss caused or contributed to by "surface water" or "water below the surface of the ground," the exclusion was intended to relate only to damage from water not emanating from the plumbing system.

APPEAL by plaintiffs from *Kivett, Judge.* Judgment entered 15 July 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 31 March 1981.

In the early morning hours of 3 September 1978, during an unusually heavy rainstorm a portion of the east basement wall of plaintiffs' home collapsed and fell into the basement causing considerable damage to the structure and to the contents of the basement. At the time of this partial collapse and the resulting damage, the plaintiffs had in effect an "all risk" insurance contract with the defendant insurance company, which included the following language under the caption "Perils Insured Against":

"COVERAGE A — DWELLING . . . against all risks of physical loss to the property covered . . . except as otherwise excluded or limited.

. . . .

13. Collapse of buildings or any part thereof, but collapse does not include settling, cracking, shrinkage, bulging or expansion.

. . . .

15. Accidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance but excluding loss to the appliance from which the water or steam escapes. This peril does not include loss caused by or resulting from freezing."

This insurance contract between the plaintiffs and the defendant insurance company also included the following language under the heading of "Additional Exclusions":

"This policy does not insure against loss:

. . . .

1. caused by, resulting from, contributed to or aggravated by any of the following:

a. flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

b. water which backs up through sewers or drains; or

c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors.

. . . .

2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; . . ."

Plaintiffs brought this action against the defendant insurance company alleging that the damage to plaintiffs' home was an insured risk under the contract of insurance with the defendant company, contending that the loss was covered under Items 13 and 15 of the "Perils Insured Against" as above set forth, in that the partial collapse of plaintiffs' east basement wall was caused by an "accidental discharge, leakage or overflow of water . . . from within a plumbing system . . . ." Specifically, plaintiffs contend that during the unusually heavy rainstorm on the morning of the loss, there occurred a failure of a gutter downspout in the area adjacent to the east basement wall, which allowed an abnormally large amount of water to be deposited adjacent to plaintiffs' east basement wall, and that the weight of this water resulted in excessive hydrostatic pressure that caused the partial collapse of the plaintiffs' east basement wall.

The defendant insurance company generally denied plaintiffs' factual allegations, and further alleged the damage to the plaintiffs' home was caused by "flood or surface waters or water below the surface of the ground including that which exerts pressure on or flows, seeps, or leaks through foundations, walls, basement or other floors or through any other opening in foundations, walls, or floors" or was caused by "earth movement, landslide, mud flow, earth sinking, rising or shifting."

The defendant insurance company then moved for summary judgment and submitted in support thereof affidavits generally setting forth the insurance contract between the parties and supporting the defendant's contention that the basement wall collapsed as a result of excessive hydrostatic pressure caused by the weight of the clay soil adjacent to the wall when saturated by water.

The plaintiffs, in opposition to defendant's motion for summary judgment, submitted opposing affidavits to the effect that the failure of plaintiffs' east basement wall was caused by excessive hydrostatic pressure which resulted from the failure of the gutter downspout at the 90° elbow connecting the downspout with the underground drainage pipe, and that when the gutter failed it dumped over three tons of water on a small area of previously saturated soil adjacent to the east basement wall resulting in excessive hydrostatic pressure and causing the col-

lapse of the east basement wall. Plaintiffs' affidavits were to the effect that the failure of the east basement wall was not caused by a gradual shift of clay or any earth movement. Also, plaintiffs' affidavits show that plumbers normally do guttering work and that installation of that portion of the guttering system consisting of an elbow joint connecting with drainage lines from the elbow joint leading away from the structure of a house or into a sewage system requires a licensed plumber.

The court, after hearing arguments, granted defendant's motion for summary judgment.

Finger, Park and Parker by Daniel J. Park and Raymond A. Parker, II, for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice by Daniel W. Donahue and Keith A. Clinard for defendant appellee.

CLARK, Judge.

Summary judgment is a drastic measure, and it should be used with caution. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979). On such motion the court is required to view the record in the light most favorable to the party opposing the motion. *Hinson v. Jefferson*, 20 N.C. App. 204, 200 S.E. 2d 812 (1973); *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976). We must accept, therefore, as the trial court was required to do for purposes of this motion, plaintiffs' forecast of evidence that the collapse of the east basement wall was caused by the failure of the downspout which dumped approximately three tons of water on a small area of already saturated soil and that it was the weight of this water that caused the east basement wall to collapse and not the shifting of clay or any earth movement.

Based on these facts, which plaintiffs' affidavits forecast, and which a jury could believe if presented as evidence at trial, we see two issues of law which if either were resolved against plaintiffs, would warrant entry of summary judgment in defendant's favor. The first is whether as a matter of law, a gutter downspout is part of the plumbing system of a home so as to bring damage resulting from "discharge, leakage or overflow" therefrom within Peril 15 of the insurance policy. The second is whether the damage to plaintiffs' home is expressly and unambiguously ex-

cluded from coverage under the policy by language of Additional Exclusions 1 or 2.

[1] With regard to the first issue, we must construe the word plumbing in light of the generally accepted rule in this jurisdiction that where the meaning of a word is capable of more than one reasonable interpretation, doubts will be resolved against the insurance company and in favor of the insured. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). "If such a word has more than one meaning in its ordinary usage and if the context does not indicate clearly the one intended, it is to be given the meaning most favorable to the policyholder, . . . since the insurance company selected the word for use." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). Construction of the term "plumbing system" to include gutter downspouts would clearly favor the insured in this case. The surrounding language does not establish whether the parties intended the term to include downspouts and the record does not indicate that the term was defined in the policy. We must turn, therefore, to the ordinary meaning of the term to determine whether any usage of the term "plumbing system" could encompass the gutters and downspouts on the outside of a building.

We believe there can be no doubt that the ordinary meaning of the term "plumbing system" includes the gutters and downspouts designed for the disposal of rainwater. *Accord Schumacher v. Lumbermens Mutual Casualty Co.*, 154 So. 2d 637 (La. App. 1963). We note that the *Schumacher* court found evidence of the ordinary meaning of the term "plumbing" in the articles of two well-known encyclopedias in general use today. From the Encyclopedia Britannica, the *Schumacher* court quotes:

> "Scope of plumbing—*plumbing systems include roof drains*, area drains, swimming pools, sprinkling systems, standpipes and hose connections for fire protection, sprinkling systems and hose connections for watering gardens and lawns . . . ."

Id. at 640. The court also quotes the Collier's Encyclopedia's similar definition of the scope of plumbing:

> "*The scope of plumbing* goes beyond the design and installation of water pipes and drains. The work of the plumber also involves: gas piping for house heating, hot water production,

> and kitchen stove; hot water or steam heating systems; vacuum and compressed air piping systems; sprinkler and standpipe connections for fire fighting; *rainwater roof drain piping;* apparatus for individual water supplies (filters and softeners); swimming pools; and the special plumbing equipment used in industrial buildings."

Id. While we believe this alone establishes plaintiffs' construction of the term as *one reasonable reading* of the policy language, we find even more persuasive authority upon which to base our holding.

The North Carolina Building Code Council and the North Carolina Department of Insurance, who jointly publish the State Building Code, define plumbing as follows:

> "*Plumbing.* Plumbing is the practice, materials, and fixtures used in the installation, maintenance, extension, and alteration of all piping, fixtures, appliances, and appurtenances in connection with any of the following: Sanitary drainage or *storm drainage facilities,* the venting system and the public or private water-supply systems, within or adjacent to any building, structure, or conveyance; also the *practice and materials used in the installation, maintenance, extension, or alteration of stormwater,* liquid-waste, or sewerage, and water-supply *systems of any premises to their connection with any point of public disposal or other acceptable terminal.*"

NORTH CAROLINA STATE BUILDING CODE, Vol. II, *Plumbing* § 301 at 3-6 (1980) (emphasis added). We note, too, that the Code contains an entire chapter (Ch. XV) devoted to the regulation of storm drains. Chapter XV prescribes the conductors and connections that a plumber may use (§ 1504), specifies the manner of constructing roof drains (§ 1505), and includes tables specifying the size of vertical leaders (defined in § 301, at 3-5 of the Code as downspouts) and gutters for various roof sizes up to 29,000 square feet (§§ 1506.1, 1506.3). We believe such extensive treatment of storm drainage systems, in the major source of regulation of buildings in this State (see G.S. 143-135.1 to -143), and in a separate volume of that regulatory Code devoted exclusively to plumbing, renders defendant's contention "that 'plumbing system' should not be construed to include gutters or roof drains" without

merit. We hold that, as a matter of law, Peril 15 of the insurance policy covered any loss to plaintiff attributable to water discharged from his gutters and downspouts.

We turn then to the second issue: whether plaintiff's loss is expressly and unambiguously excluded from coverage. The insuring provisions of the policy extend coverage only, "except as otherwise excluded or limited." Appellee contends that, even if the gutters and downspouts are a part of the plumbing system of plaintiffs' house, coverage under the policy for plaintiffs' loss is expressly excluded by the language of the policy. The applicable exclusions provide:

> "This policy does not insure against loss:
>
> . . . .
>
> 1. caused by, resulting from, contributed to or aggravated by any of the following:
>
> a. flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
>
> b. water which backs up through sewers or drains; or
>
> c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors.
>
> . . . .
>
> 2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; . . ."

[2] Exclusion 2 can be dismissed out of hand. It is not a legitimate ground for summary judgment. The affidavit of Larry R. Absher, Sr., a licensed professional engineer, was to the effect that he "inspected the soil around the manholes, fence post, and fire hydrants in the general area of Mr. Holcomb's home and found absolutely no evidence of any earth movement around these objects." Absher further stated that in his professional opinion

"the failure of the east basement wall was not a result of a gradual shift of clay or earth movement." These statements were sufficient to create an issue of fact as to whether any earth movement caused or contributed to the collapse of the east basement wall. Summary Judgment is not to be entered on a controverted issue of material fact. *Wall v. Flack*, 15 N.C. App. 747, 190 S.E. 2d 671 (1972).

[3] Exclusion 1 requires more extended analysis. On its face Exclusion 1 would appear to exclude plaintiffs' loss from coverage under the policy. Although the affidavits fail to conclusively establish whether the water from the downspout sank into the ground or accumulated on the surface, the language of the Exclusion extends to both "surface water" and "water below the surface of the ground." The water would have to fit one of these categories, and it is this fact that disturbes us. Any water discharged from the guttering system would by definition become either surface water or ground water. Would it thereby lose its character as water discharged from a plumbing system? We think not.

Appellee cites cases decided upon similar fact situations holding that when water discharged from a plumbing system settles upon the surface of or into the ground, that water is brought within the language of Exclusion 1. *Krug v. Millers' Mutual Insurance Ass'n.*, 209 Kan. 111, 495 P. 2d 949 (1972); *Park v. Hanover Insurance Company*, 443 S.W. 2d 940 (Tex. Civ. App. 1969). Both cases concerned coverage provisions similar to Peril 15 and exclusions similar to Exclusion 1. We find more appealing, however, the logic of the cases which have held to the contrary, that damage caused by water discharged from a plumbing system covered under provisions similar to Peril 15 does not fall within Exclusion 1. *World Fire & Marine Ins. Co. v. Carolina Mills Dist. Co.*, 169 F. 2d 826 (8th Cir. 1948); *Hartford Accident and Indemnity Co. v. Phelps*, 294 So. 2d 362 (Fla. App. 1974); *King v. Travelers Insurance Company*, 84 N.M. 550, 505 P. 2d 1226 (1973).

As those cases point out, if we construe the language of Exclusion 1 as appellee would have us to do, then we are faced with one provision that says plaintiffs' loss is covered; one that says it is not. As has been noted:

" 'If the excepting clause be construed as applying to the state of facts in this case, as appellant contends, an irreconcilable conflict must exist between its meaning and the insuring clause, with the result that the contract must be found to be ambiguous. In that event the contract will be construed favorable to the insured who did not prepare it. The application of the latter rule of construction would lead to striking down the excepting clause . . . .' "

King v. Travelers Insurance Co., 84 N.M. 550, 555, 505 P. 2d 1226, 1231 (1973), *quoting, World Fire & Marine Ins. Co. v. Carolina Mills Dist. Co.*, 169 F. 2d 826 (8th Cir. 1948). While we agree that appellee's proposed construction of Exclusion 1 creates an apparent contradiction, we do not believe it necessary to strike the exclusion. It is the rule in our State that each clause in a policy of insurance is to be given effect if this can be done by reasonable construction. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). "The object of interpretation should not be to find discord in differing clauses, but to harmonize all clauses if possible." *Peirson v. Insurance Co.*, 249 N.C. 580, 583, 107 S.E. 2d 137, 139 (1959). One reading of the two clauses that would give meaning to both would be to construe Exclusion 1 as excepting from coverage all water damage not expressly and unambiguously insured against in the coverage provisions of the policy. This is the reading that we adopt.

In so holding we note that following the language of coverage in Peril 15 and *within the same clause* the insurer specifically excluded "loss to the appliance from which the water or steam escapes" and went on to note that "This policy does not include loss caused by or resulting from freezing." Defendant has shown by this language that it was capable of clearly and unambiguously stating circumstances to which the coverage under Peril 15 would not extend. We believe it should have specifically stated any additional exception limiting plaintiffs' recovery for loss caused by water discharged from within a plumbing system within Peril 15 if it wished to apply the exclusion to losses occurring thereunder. While we believe that broad, general provisions for coverage under a policy may properly be limited by specific exclusions, we have extreme difficulty endorsing broad, general exclusions which seek to render illusory narrow and specific provisions of coverage. This view is supported by the accepted rule of construc-

tion that exceptions from liability are not favored, and will be strictly construed against the insurer. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967); *Thompson v. Accident Association*, 209 N.C. 678, 184 S.E. 695 (1936); and *Womack v. Insurance Co.*, 206 N.C. 445, 174 S.E. 313 (1934).

Our holding then is indentical with the holding of the Florida Court of Appeals in *Hartford Accident and Indemnity Co. v. Phelps*, 294 So. 2d 362, 363 (Fla. App. 1974):

> "When we consider the terminology used in the exclusion clause in pari materia with the affirmative statement of coverage from leaks in the plumbing system, we conclude that the exclusion was intended to relate only to damage from water not emanating from the plumbing system."

It was thus a question for the jury whether the three tons of water dumped on the small area of soil adjacent to the east basement wall was in fact the efficient and proximate cause of the wall's subsequent collapse. *See Wood v. Insurance Co.*, 245 N.C. 383, 96 S.E. 2d 28 (1957); *Harrison v. Insurance Co.*, 11 N.C. App. 367, 181 S.E. 2d 253 (1971).

Reversed and remanded.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. HARVEY OLIVER

No. 8018SC1029

(Filed 16 June 1981)

1. Criminal Law § 96— withdrawal of hearsay testimony—defendant not prejudiced

Defendant in a homicide prosecution was not prejudiced by hearsay testimony that defendant "stomped" the deceased in the face with his shoes and hit the deceased with a kitchen pot, since the court withdrew the testimony and instructed the jury to disregard it, and several of the State's other witnesses gave consistent testimony that during the day following the killing defendant made statements in their presence concerning the alleged murder.

2. Homicide § 21.7— second degree murder—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for second degree murder where there was ample circumstantial evidence from which the jury could infer that the deceased was unlawfully killed by being hit on the head with a heavy blunt object and that defendant perpetrated this crime by striking the deceased on the head with a heavy metal pot.

3. Criminal Law § 114.2— jury instructions—no expression of opinion

There was no merit to defendant's contention that the trial court erroneously expressed its opinion by misstating an evidentiary point in its instructions at the close of all the evidence where the court's misstatement of the witness's testimony was inadvertent; defendant did not object to the misstatement before the verdict; and the court specifically cautioned the jury that they should rely entirely on their own recollection as to what the evidence was.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 6 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 March 1981.

Defendant was charged with the crime of murder in the second degree as defined in G.S. 14-17.

At trial, the state's evidence tended to show the occurrence of the following: On 27 October 1979, at approximately 1:00 a.m., the deceased Walter Sawyer, his brother Ronnie Sawyer, and Ronnie's girl friend went to the home of Mattie Johnson. Mattie Johnson's house was described as a "bootleg house". Defendant Buck Whitley, and Doc Lyons were drinking in the kitchen of the Johnson house when the deceased and his party arrived. Buck Whitley made some insulting remarks to Ronnie Sawyer's girl friend causing Ronnie Sawyer to hit Whitley with his fist. At this point the deceased grabbed Whitley and a general fight ensued between the groups in the kitchen. After several minutes of scuffling in the kitchen, Mattie Johnson halted the fight and told the participants to go outside. Defendant grabbed a metal pot from the kitchen as he left. Once outside, defendant hit Ronnie Sawyer on the back of the head with the pot. The blow dazed Sawyer and he staggered from the scene to get help. Meanwhile, the fighting continued in the rear yard of the "bootleg house". Defendant inflicted several blows to the deceased's head with the pot resulting in the deceased's death. Defendant also kicked or "stomped" the deceased in the face.

Defendant's evidence tended to show that he had participated in the fighting which occurred in the kitchen of the "bootleg house", and that he had grabbed a pot and gone outside where he hit Ronnie Sawyer on the head. Defendant saw the deceased run behind the house. However, he did not follow. Defendant never approached the side or rear of the house, and did not strike the deceased with the pot.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Assistant Public Defender Frederick G. Lind for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends in his first assignment of error that the trial court erred by admitting hearsay testimony over his strenuous objection. The alleged hearsay testimony was given by defense witness Jerome Miller. Miller testified that Buck Whitley had told him that defendant "stomped" the deceased in the face with his shoes and hit the deceased with the pot. Defendant insists that the allowance of this hearsay was highly prejudicial to his case, and that the statement did not fall within any of the exceptions to the hearsay rule.

The circumstances preceding the allowance of this testimony are important to an understanding of why the trial court mistakenly let it in. On direct examination, the witness Miller stated that defendant told him that he had stomped the deceased in the face and beat him on the head with a pot. On cross-examination Miller retreated somewhat from his earlier statement. Miller testified on cross-examination that defendant told him that he hit *someone* with the pot, but he did not name the person he hit. Miller was not sure to whom defendant was referring when he made this statement. This implied that defendant could have been referring to Ronnie Sawyer instead of the deceased when he told the witness he hit someone on the head with the pot. Subsequently, on redirect examination Miller reversed his former testimony on both direct and cross-examination, and stated that Buck Whitley, not defendant, was the one who had told him that defendant had stomped the deceased in the face and hit deceased with the pot. It was at this point on redirect ex-

amination that defendant made several objections to the witness's testimony. The court overruled them. The court apparently was confused upon hearing this testimony, because it concerned the same topic as testimony already given and properly admitted, and yet, the witness, when repeating the testimony for the third time, changed the key fact of the identity of the speaker who gave him the information.

Although this testimony was hearsay, any prejudice to defendant's case was cured and any error rendered harmless by the court's immediate withdrawal of the testimony and instructions to the jury to disregard it. Following defendant's motion to strike Miller's statement, the court instructed the jury as follows:

> THE COURT: Ladies and gentlemen, disregard anything that this witness has said that was attributed to Whitley. In trying to make my ruling, it was my understanding that he had been asked about what Mr. Lind's client had said. And it was my view and thinking that he was trying to answer that question; and Mr. Lind continued to object. Apparently he was attempting to quote somebody else. It would be improper for you to consider what he said, as to what Whitley had made a statement with respect to. Do not consider that.

Where the trial court withdraws incompetent testimony and instructs the jury not to consider it, any prejudice is ordinarily cured. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

> When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony. Lacking other proof . . . a jury is presumed to be rational. . . .

State v. McGraw, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980).

Nor is this a case in which the circumstances surrounding the admission of the improper statements were such that the probable prejudicial influence of the statements upon the jury could not be erased by the court's cautionary instructions. The court very clearly instructed the jury to disregard this testimony. Several of the state's other witnesses gave consistent testimony that during the day following the killing defendant made statements in their presence concerning the alleged murder.

Witnesses Minnie Sellers, Brenda Dunlap, and Mary Thomas all testified that they heard defendant say that he had beaten a man with a pot. The consistency of this testimony from various witnesses makes it highly unlikely that the jury would have given excessive weight to the improperly admitted statements of Buck Whitley. There was no prejudicial error in the court's allowance and withdrawal of witness Miller's statement.

Ancillary to this argument, and as his second assignment of error, defendant insists that the court erred by denying his motion for mistrial. Defendant moved for a mistrial immediately following the court's instructions to disregard the hearsay testimony of Jerome Miller just discussed. He contends that the prejudicial nature of the witness's statement coupled with the court's undue admonishment of defense counsel in the presence of the jury resulted in such prejudice as should require a new trial.

> Ruling on a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

State v. McGraw, supra, at 620, 268 S.E. 2d at 179; *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977). The incident of which defendant complains was not of such a nature as to render a fair and impartial trial impossible. We have already held that the error resulting from the court's admission of the hearsay testimony was rendered harmless by the court's instructions to disregard the testimony.

Nor do we think that the court's admonishments to defense counsel at this juncture in the trial were sufficient to convey to the jury a judicial leaning against defendant thereby prejudicing his case. The record shows that defense counsel made three objections, all overruled, to the admission of the hearsay testimony of Jerome Miller. The court's admonishments to defense counsel at these points were not unnecessarily long or harsh. The witness's statements were given in answer to the state's question in which it asked what defendant had told the witness concerning the killing. The state did not ask the witness what Buck Whitley had told him. The state was trying to reconcile the witness's testimony on direct and cross-examination. The court obviously did not realize that the witness was not responding directly to the state's question. When the court realized its mistake in over-

ruling these objections, it very clearly explained to the jury why it had made this error. The court's admonishments to defense counsel standing alone do not impart a sense of any judicial leaning against defendant. Furthermore, the court's explanatory instructions cured any possible prejudice to defendant. Consequently, we find no abuse of discretion, and no error in the denial of defendant's motion for mistrial.

[2] Next, defendant contends that the court should have allowed defendant's motion to dismiss due to the insufficiency of the evidence. Defendant argues that the evidence presented against defendant was entirely circumstantial and that the evidence when viewed in the light most favorable to the state did not show that defendant was the perpetrator of the homicide.

We disagree. The question presented by the motion to dismiss, in legal significance, the same as a motion for nonsuit, is whether the evidence is sufficient to warrant the submission of the case to the jury and to support the verdict of guilty. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). Well-established principles apply. All the evidence favorable to the state, whether competent or incompetent must be considered. This evidence must be deemed true and considered in the light most favorable to the state. The state is entitled to every inference of fact which may reasonably be deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). There must be substantial evidence of the elements of the crime charged, and that the defendant was the perpetrator of the crime.

Nonsuit should be denied where there is sufficient evidence either direct, circumstantial, or both that the defendant committed the offense charged. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Russell*, 15 N.C. App. 277, 189 S.E. 2d 800 (1972). The state's case may be based on circumstantial evidence. When a motion to dismiss or motion for nonsuit is based upon the sufficiency of circumstantial evidence, the question for the court becomes whether a reasonable inference of defendant's guilt of the crime charged can be drawn from the circumstances. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Paschal*, 6 N.C. App. 334, 170 S.E. 2d 95 (1969). Here there was ample circumstantial evidence from which the jury could infer that the deceased was unlawfully killed by being hit on the head with a

heavy blunt object, and that defendant perpetrated this crime by striking the deceased on the head with a heavy metal pot. Dr. Tate, a medical examiner for the state, and qualified expert, testified that it was his opinion that the deceased's death was caused by a "blunt-force" injury to the head and brain. He also testified that a blow to the head with a pot such as that put into evidence by the state would have caused the death. Other evidence tended to show that defendant had been involved in a fight with the deceased at Mattie Johnson's house on the morning of the deceased's demise. During this fight defendant had been wielding a pot. Defendant hit Ronnie Sawyer on the head with the pot. Jerome Miller testified that he heard what sounded like thumps come from behind the Johnson house. These thumps sounded like a heavy object being blunted against something. The deceased's body was later discovered behind the Johnson house. Upon hearing the thumps, Miller walked to the side of the house and called to those in the rear. Whereupon, Doc Lyons followed by defendant came walking out from the side of the house. Defendant was carrying the pot. The pot was later found by the authorities in defendant's possession.

Witnesses Minnie Sellers, Brenda Dunlap, and Mary Thomas testified that later the same day defendant said in their presence that he had beaten the "dude" with a pot.

Considering all of this evidence, along with other evidence appearing in the record, it is clear that the case was properly submitted to the jury.

[3] Defendant contends that the trial court erroneously expressed its opinion in violation of G.S. 15A-1232 by misstating an evidentiary point in its instructions at the close of all of the evidence. Defendant objects to the court's recapitulation of Jerome Miller's testimony as follows:

> And that he saw Warnella Whitley coming from the side of the house; and Big Toe Joe, or Harvey Oliver, coming from an area to the rear of the house, walking along beside the house, or at the side of the house, and that he had a pot in his hand at that time; and that the defendant and others left.

It is true, as defendant alleges, that the witness did not directly state that he saw defendant come from the rear of the

house where the deceased's body was subsequently found. However, the witness testified that he saw defendant come from the side of the house, and the witness had just been at that side of the house and seen no one. Previously, the witness had heard noises to the rear of the house. The natural inference to be drawn from this testimony was that defendant had come from the rear of the house.

The misstatment by the trial court was a slight inadvertence. Defendant did not object to the misstatement before the verdict, yet he now contends that it was material error. Our Supreme Court has held, "that an inadvertence in recapitulating the evidence must be called to the attention of the court in time for correction and that an objection after verdict comes too late. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Cornelius*, 265 N.C. 452, 144 S.E. 2d 203 (1965); *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608 (1950)." *State v. Davis*, 291 N.C. 1, 16-17, 229 S.E. 2d 285, 295-96 (1976).

Furthermore, the court specifically cautioned the jury as follows: "You are absolute judges of the facts. Consequently, if I, in making my summary of the evidence to you, should state . . . that something is in the evidence that differs from your rememberance as to what the evidence is, to that extent disregard what I will have to say about it . . . and rely entirely on your own recollection, you being the sole judges of the fact."

We are convinced that the court's misstatement of the witness's testimony was inadvertent and did not amount to a statement by the court of its opinion of defendant's case in violation of the statutory prohibition. Nor do we think that the court's inadvertence influenced the jury's verdict. Therefore, this assignment of error is overruled.

For similar reasons defendant contends that the court committed prejudicial error by stating in its instructions that state's witness Miller heard defendant say on the morning after the incident, "that he stomped and beat a man with a pot the night before." Defendant alleges that the facts in evidence do not support this statement. Instead, he argues, that the witness's testimony shows that all he heard defendant say was, "that the defendant hit the man with a pot."

Witness Miller testified on direct that defendant told him, "[t]hat he stomped Jap [deceased] in the face, and beat him in the head with the pot." On cross-examination the witness changed his testimony and said that defendant did not mention whom he hit with the pot, but he just said "that he hit the man with the pot." Then on redirect examination defendant altered his testimony once again and said that Buck Whitley, rather than defendant, had told him all of these things, and the testimony was withdrawn by the judge. The witness's testimony as to what he overheard defendant say was definitely confused.

The court's alleged misstatement will be considered in context. The court charged:

> This witness later heard the defendant say, at a house on Cable Street, in a statement that was made not only in his presence, but in the presence of Minnie Sellers, Dianne Adams Dunlap, or Dianne Dunlap, also known as Dianne Adams, and Mary Thomas, that he stomped and beat a man with a pot the night before, . . ."

The witness's testimony is unclear as to what he actually heard defendant say on Saturday morning, if he heard anything. However, Mary Thomas did testify that on Saturday morning defendant said, "that he stomped him in the face, and hit him in the head with the pot." This tends to explain what caused the court to make its slight overstatement.

The court's misstatement was not material when considered along with the testimony of Mary Thomas, and Dr. Tate's testimony as to the cause of death. Dr. Tate testified that it was his opinion that deceased's death was caused by the "blunt-force" injury to the top of defendant's head. The injuries caused by a foot or a fist to deceased's neck, shoulders, and face were not the cause of death. Therefore, for the purposes of this trial whether defendant stomped or kicked the deceased was immaterial. The blow to the top of the head with the "blunt-force" object caused the death, and all of the witnesses cited in the court's instructions testified that defendant told them he had beaten the "dude" with the pot.

As in the previously discussed assignment of error, defendant failed to object to the court's misstatement in its instructions

before the jury rendered its verdict. Having found that the court's misstatement was not material, under the previously cited authority and rule that an objection to the court's recapitulation of the evidence after the verdict comes too late, we find no error.

Defendant has cited several other assignments of error in his brief, but has not argued them. Under Rule 28(a), N.C. Rules Appellate Procedure, those assignments of error are deemed abandoned.

For the reasons discussed above, we find that defendant received a fair trial free from any prejudicial error.

No error.

Judges MARTIN (Robert M.) and HILL concur.

STATE OF NORTH CAROLINA v. NEAL EDWARD HALL

No. 8018SC802

(Filed 16 June 1981)

1. **Narcotics § 6— forfeiture of vehicle—time of seizure**

Defendant's vehicle was properly seized pursuant to G.S. 90-112 where officers observed defendant use his car to conceal, convey, or transport a one pound paper sack of marijuana, and the seizure of the vehicle was not rendered invalid because it was not accomplished until four weeks after the commission of the unlawful acts which made the vehicle subject to forfeiture, since G.S. 90-112(f) does not restrict the time within which a vehicle may be seized after a violation of the controlled substances law has been observed.

2. **Searches and Seizures § 11— inventory of contents of impounded vehicle—opening of closed container improper**

A search by police officers of a closed medicine bottle found in defendant's car exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle where the same officers who observed the illegal drug sale on 12 March 1979 arrested defendant and seized his vehicle on 9 April 1979; defendant, accompanied by one of the officers, drove the car to the basement of the sheriff's department where it could have been locked and secured; once it was parked and locked, those same officers apparently rushed defendant upstairs to an interview room and then returned almost immediately, within three minutes, to inventory the automobile's contents; in the course of that inventory, they opened an opaque brown plastic bottle, listed its contents, and then sent the pills found therein to the lab for chemical analysis; and the of-

ficers were thus using the inventory procedure as a pretext concealing an investigatory police motive, rather than performing the mere ministerial act of an inventory designed to protect the legitimate interests of both defendant and the police against the possible event of a theft.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 3 April 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 January 1981.

Defendant was convicted of felonious possession of LSD. The court imposed a three-year split sentence, ordering defendant to serve four months in the county jail and placing him on probation, upon certain conditions, for five years.

The facts of this case are briefly summarized as follows. Defendant was present at the Carolina Circle Mall on 12 March 1979, when Gary Jackson sold one pound of marihuana to Officer S. E. Nelson, a vice and narcotics detective of the Guilford County Sheriff's Department. Another detective, G. T. Johnson, who observed the entire transaction from a short distance away, had seen defendant open the door to his Ford station wagon and reach behind the driver's seat to pick up a large paper sack which he handed to Jackson. Jackson then delivered this sack to Officer Nelson who paid $355.00 for it. The contents of the sack were subsequently analyzed and determined to be marihuana.

After the consummation of this drug sale, Officer Johnson maintained a surveillance of defendant and his vehicle at 1323 Winstead Place between 12 March and 9 April 1979. Officer Johnson then appeared before the district court on 9 April 1979 to procure a warrant of seizure for defendant's vehicle pursuant to G.S. 90-112. Judge Hatfield granted the State's motion and entered the following ex parte order:

> "[I]t appearing to the Court that Neal Edward Hall is charged with feloniously possessing and delivering the controlled substance Marihuana on March 12, 1979, and that Neal Edward Hall used a 1970 Ford license number REF-305, registration number ON74Y138330 to facilitate the transportation for delivery and possession of the Marihuana, and that NC GS 90-112(b) authorized the seizure of the automobile.
>
> It is therefore ordered, adjudged and decreed that the 1970 Ford License number REF-305 Registration #ON74Y138-

330 be seized by the Guilford County Sheriffs Department and held in accordance with law until further orders of the Court."

Officers Johnson and Nelson went to defendant's residence later that same day and served the order of seizure for the vehicle and arrested defendant, pursuant to duly issued warrants, for felonious possession with intent to sell and deliver marihuana and delivery of marihuana on 12 March 1979. Defendant, accompanied by Officer Nelson, drove his car to the Sheriff's Department and parked it in the basement. The vehicle was locked, and defendant was escorted to an interview room in the building. Officers Johnson and Nelson, together with Officer Barnes, then returned to the car within three minutes (from the time it had been parked), unlocked it and began an inventory of its contents in accordance with standard departmental policy. In the course of that inventory, the officers discovered an open cigar box, without a lid, on the front seat of the car which contained a varied assortment of items, including some raffle tickets and a small brown plastic medicine bottle. The officers opened the medicine bottle and found 22 purple tablets which were subsequently determined to be LSD pills. The officers filed the following inventory form of the vehicle's contents after the search:

"(1) 1970 Ford license number REF-305, VIN ON74Y138330

(2) Brown plastic bottle contained 22 purple tablets, 2 blue tablets, 1 yellow tablet

(3) One motorcycle fender, blue in color

(4) One set Fat bob tanks for Harley Davidson motorcycle, black in color

(5) One ice scraper

(6) One umbrella

(7) One yellow waste basket

(8) One bottle Prell Shampoo

(9) One bottle Wella Balsam Conditioner

(10) One box of Heavy Duty shop towels

(11) Four (4) empty white cardboard boxes

(12) One Notebook Composition book

(13) One Pack Eckerd playing cards

(14) One pair Arrow sports glasses

(15) One brown Citadel Notebook

(16) One box of assorted yellow Freedom Sportsman Club raffle tickets

(17) One silver case knife

(18) One First aid kit

(19) One bundle paper sacks

(20) One box of sacks and plastic ties

(21) One air cool cushion

(22) One inspection certificate in the name of Neil Edward Hall 1323 Winstead Place, Greensboro, N.C. on a 1970 Ford VIN ON74Y138330

(23) One receipt in the name of Neal Hall dated 3-18-79"

On 4 June 1979, defendant was charged in four bills of indictment with possession with intent to sell and deliver marihuana and delivery of marihuana on 12 March 1979 and possession with intent to sell and deliver LSD and possession of valium on 9 April 1979. Defendant entered pleas of not guilty to all of these charges. When the cases were called for trial on 13 August 1979, defendant moved to suppress the evidence supporting the LSD and valium charges. The State, with defendant's consent, elected to proceed with defendant's trial on the marihuana charges pending the outcome of the court's ruling concerning the evidence in the other two cases. The jury found defendant not guilty of the marihuana offenses. Judge Kirby subsequently denied defendant's motion to suppress on 30 December 1979. In the meantime, defendant had also moved to dismiss the charges for lack of a speedy trial on 22 October 1979. Judge Wood later denied this motion on 23 January 1980, whereupon defendant was tried for possession with intent to sell and deliver LSD. That trial resulted in a mistrial because the jury was unable to reach a verdict. At defendant's retrial on 1 April 1980, however, the jury found defendant guilty of felonious possession of LSD.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, and Associate Attorney John F. Maddrey, for the State.

John F. Comer, for defendant appellant.

VAUGHN, Judge.

The dispositive issue brought forward by defendant in this appeal is whether the trial court erred in denying defendant's motion to suppress the evidence of the LSD tablets at trial. In this respect, defendant believes his conviction must be reversed on either of the following two theories: (1) that his vehicle was improperly seized on 9 April 1979, thereby rendering any subsequent search of its contents invalid and unreasonable or (2) that the officers' search of a closed medicine bottle exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle. We reject defendant's first theory for reversal; nevertheless, we accept his secondary position and reverse his conviction on that ground.

[1] In the first instance, we believe defendant's vehicle was duly seized in the precise manner authorized by G.S. 90-112. The vehicle was unquestionably "subject to forfeiture" on the basis of Officer Johnson's observations, at the Carolina Circle Mall on 12 March 1979, that defendant had used his car "to unlawfully conceal, convey, or transport" a controlled substance, the one pound paper sack of marihuana. G.S. 90-112(a)(4). Defendant, nevertheless, argues that the subsequent seizure was invalid because it was not accomplished until four weeks after the commission of the unlawful acts which made the vehicle subject to forfeiture. We disagree.

To support the foregoing contention, defendant relies on G.S. 90-112(f) which provides that "[a]ll conveyances subject to forfeiture under the provisions of this Article shall be *forfeited* as in the case of conveyances used to conceal, convey, or transport intoxicating beverages." (emphasis added). In this respect, we note that G.S. 18A-21 does seem to require the contemporaneous seizure of a vehicle used to transport illegal intoxicants whenever the officer catches a person "in the act" of such unlawful transportation. *See State v. Vanhoy*, 230 N.C. 162, 165, 52 S.E. 2d 278, 280 (1949). We are not, however, persuaded that G.S. 90-112(f)

imposes a similar requirement of contemporaneity for the seizure of vehicles subject to forfeiture under G.S. 90-112(a)(4) for two reasons.

First, G.S. 90-112(f), by its express terms, addresses the forfeiture process and does not refer to the initial act of seizure. The statute merely mandates that the actual forfeiture proceeding, instituted for a violation of the controlled substance law, be conducted in a manner consistent with the procedures employed in similar forfeiture actions concerning illegal intoxicants, whereby legal title to the property is removed from its owner and becomes vested in the State. We, therefore, conclude that G.S. 90-112(f) does not restrict the time within which a vehicle may be *seized* after a violation of the controlled substances law has been observed. Second, and more particularly, G.S. 90-112 includes a specific provision outlining the precise method by which vehicles are to be seized. G.S. 90-112(b) states that "[a]ny property subject to forfeiture under this Article may be seized by any law-enforcement officer upon process issued by any district or superior court having jurisdiction over the property. . . ." The plain effect of subsection (b) is to circumscribe the authority of law enforcement officers to seize vehicles unless they first obtain "process" from a neutral judicial officer. There is, however, no requirement in G.S. 90-112 that the officers must apply for an order of seizure immediately after they have observed the proscribed criminal activity.[1]

In the instant case, Judge Hatfield duly entered an order of seizure, under the express authority of G.S. 90-112(b), because "it

1. To fix a definite time within which officers must act to seize a vehicle after they have seen an illegal drug transaction might seriously hinder the effectiveness of large scale undercover drug investigations in which the officers are trying to find the big drug dealers through various smaller operators. If a vehicle must be seized immediately, or very soon after the commission of a crime, it is likely that the detective's cover would be destroyed, resulting in increased danger to that officer if he continues to work in the investigation or, if he must then drop out of the operation, the waste of his special efforts, requiring much training and planning, whereby he was enabled to make effective contact with those involved in illegal drug trafficking. Thus, though a situation may arise where the length of time, elapsing between the commission of a crime and the later issuance of an order of seizure, is too unreasonable to be sustained, it suffices to say that we are not confronted with such a case here because the process was served within a month after the officer saw the violation occur. *See also State v. Salem*, 50 N.C. App. 419, 274 S.E. 2d 501, 506 (1981), (discussing the legitimacy of pre-indictment delay caused by the State's efforts to protect "an ongoing undercover operation from exposure").

appear[ed]" from Officer Johnson's application therefor that defendant had used his car to transport marihuana. We thus hold that defendant's vehicle was properly seized pursuant to legal process and that such seizure authorized a subsequent routine inventory search of the vehicle to safeguard its contents. This being so, the only question that remains is whether the officers, during their inventory of the car, had the authority to open a closed, opaque[2] container and seize its contents without a warrant.

We note at the outset that a critical premise of the Fourth Amendment is that a governmental search of private property or effects without prior judicial approval is *per se* unreasonable unless the search fits into a well-delineated exception to the warrant requirement and is conducted under circumstances that are, in fact, exigent. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). Thus, whenever the State has engaged in any kind of a warrantless search, it must demonstrate, with particularity, how the intrusion was exempted from the general constitutional demand for a warrant before evidence of the fruits of such a search may be admitted in a criminal prosecution. *See Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). It necessarily follows then, that when a vehicular search is based upon the inventory search exception, rather than probable cause, the State bears an especially heavy burden to show that the inventory procedure was authorized by a lawful seizure of the car, performed in a reasonable manner and not used as a pretext to bypass the rigorous demands of the Fourth Amendment. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed. 2d 1000 (1976); *see, e.g., State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979); *State v. Vernon*, 45 N.C. App. 486, 263 S.E. 2d 340 (1980). The State cannot fulfill this burden in the instant case.

2. The State conceded, on oral argument, that the contents of the bottle were not plainly visible without opening the bottle itself. We have, therefore, disregarded that portion of the State's brief, inconsistent with its oral concession, which attempts to justify the admission of the evidence under the "plain view" exception to the warrant requirement by arguing that the officers had a right "to seize what appeared to be contraband lying in plain view." *See also State v. Francum*, 39 N.C. App. 429, 250 S.E. 2d 705 (1979) (holding, in part, that the contents of a paper bag in a wrecked car were not within an officer's plain view and that his inspection of its contents at the scene of an accident constituted a search).

[2] Here, the *same* officers who observed the illegal drug sale on 12 March 1979 arrested defendant and seized his vehicle on 9 April 1979. Defendant, accompanied by Officer Nelson, drove the car to the basement of the Sheriff's Department where it could have been locked and secured. Once it was parked, and locked, those same officers apparently rushed defendant upstairs to an interview room and then returned almost immediately (within three minutes) to inventory the automobile's contents. In the course of that inventory, they opened the brown plastic bottle, listed its contents, "22 purple tablets, 2 blue tablets, 1 yellow tablet", and then sent the pills to the lab for chemical analysis. The officers did not, however, exercise the same diligence with respect to counting the number of "assorted" raffle tickets also located in the open cigar box. Such action certainly would have been more consistent with the State's contention that a search of the bottle was necessary to protect the police department against claims of theft. In these circumstances, we conclude that the officers were using the procedure as a "pretext concealing an investigatory police motive," rather than performing the mere ministerial act of an inventory designed to protect the legitimate interests of both defendant and the police against the possible event of a theft. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed. 2d 1000 (1976). A warrantless inventory is authorized under the Fourth Amendment only because it is "premised upon its being a benign, neutral, administrative procedure designed primarily to safeguard the contents of lawfully impounded automobiles." *State v. Phifer*, 297 N.C. 216, 220, 254 S.E. 2d 586, 588 (1979).

Clearly, the caretaking function of an inventory would have been properly fulfilled in this case by simply listing on the inventory sheet "one, brown plastic bottle." *See State v. Daniel*, 589 P. 2d 408 (Alaska 1979). Thus, we agree with defendant that this inventory search was unreasonable in its scope and are compelled to hold that, though the officers were authorized to inventory the vehicle's contents, they were not further empowered, without first obtaining a warrant, to go beyond the mere surveying and accounting of items, in terms of whole units, and search a closed container, whose contents were not in plain view, ostensibly for the sake of safeguarding its contents. *See generally*, Annot., "Lawfulness of 'Inventory Search' of Motor Vehicle Impounded by Police," 48 A.L.R. 3d 537, 546 (1973). Moreover, even if probable

cause had existed to believe that the bottle contained contraband, there were no exigent circumstances which made it impractical for the officers to obtain a warrant. *See State v. Vernon*, 45 N.C. App. 486, 263 S.E. 2d 340 (1980); *State v. Gauldin*, 44 N.C. App. 19, 259 S.E. 2d 779 (1979), *review denied*, 299 N.C. 333, 265 S.E. 2d 399 (1980).

We would further comment that, though the State did not cite nor rely upon it in its brief, the United States Supreme Court decision in *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967), does not command a different result. In *Cooper*, the Court specifically upheld the warrantless search of a vehicle seized in connection with a violation of the state narcotics law, to be used "as evidence in a forfeiture proceeding," for the police department's own protection. *Cooper* does not, however, stand for the proposition that law enforcement officials have a "blank check" under the Fourth Amendment to conduct warrantless searches of cars lawfully impounded under forfeiture statutes for drug violations, without any limitation as to their scope and purpose. Rather, the Court merely sustained the particular search in *Cooper* as being a reasonable inventory, under the circumstances, even though it was "conducted in a distinctly criminal setting." *South Dakota v. Opperman*, 428 U.S. 364, 373, 96 S.Ct. 3092, 3099, 49 L.Ed. 2d 1000, 1007-08 (1976). *Compare United States v. Chadwick*, n. 5, 433 U.S. 1, 10, 97 S.Ct. 2476, 2482-83, 53 L.Ed. 2d 538, 547 (1977) (referring to the "noncriminal" nature of inventory searches). Moreover, the Court recognized in *Cooper* that the reasonableness of *each* search and seizure must be decided on a case-by-case basis. 386 U.S. at 59, 87 S.Ct. at 790, 17 L.Ed. 2d at 732. We, therefore, believe that it is entirely consistent with *Cooper* for us to conclude, after an analysis of the peculiar facts before us, that the police intrusion into the closed, opaque, plastic bottle exceeded the permissible scope of an inventory search.

Our holding is also consistent with the logic of the United States Supreme Court in analogous cases involving warrantless searches of luggage containers, wherein the Court has emphasized that once an item is under the exclusive control of the police, exigent circumstances no longer exist, and a warrant must first be obtained before a search of its contents will be deemed reasonable. *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97

S.Ct. 2476, 53 L.Ed. 2d 538 (1977). Moreover, several other state courts have specifically held that a police search of a closed container, during an inventory of a seized vehicle, is unreasonable under the Fourth Amendment. *See State v. Miller*, 420 A. 2d 181 (Del. Super. 1980) (search of a locked glove compartment); *State v. Daniel*, 589 P. 2d 408 (Alaska 1979) (briefcase); *People v. Grana*, 185 Colo. 126, 527 P. 2d 543 (1974) (search of a zippered compartment within a closed flight bag found in the trunk); *State v. Keller*, 265 Or. 622, 510 P. 2d 568 (1973) (closed fishing tackle box); *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P. 2d 84 (1971) (unlocked suitcase). *See also United States v. Ross*, 49 U.S.L.W. 2702-03 (D.C. Cir. 1981), where the Court stated that *Arkansas v. Sanders, supra*, did not establish a "worthy container" rule protecting some kinds of containers but not others, and thus held that a closed, but unsealed, paper bag was "cloaked" by the protection of the Fourth Amendment; *State v. Goff*, 272 S.E. 2d 457 (W. Va. 1980), where the Court noted that the police only have the right to secure an impounded vehicle, by rolling up the windows and locking the doors, and that an inventory search is unreasonable unless items of personal property are first sighted in the car; *State v. Downes*, 285 Or. 369, 591 P. 2d 1352 (1979), holding that the officers illegally searched a cosmetic bag, found inside a closed, unlocked trunk, without a warrant, even though they properly stopped, searched and seized defendant's car.

In addition, the result we reach in the instant case reflects the sound public policy that an exception should not be allowed to swallow up the general rule, especially where constitutional protections are involved. To prevent inventories from becoming a convenient method to bypass the preference of the Fourth Amendment for a warrant and thereby permit officers to search freely for evidence in impounded vehicles, the reasonableness of each inventory search must be strictly construed. For, we are persuaded that just as "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), the word "inventory" does not provide officers with sweeping authority to conduct extensive and overzealous searches of seized vehicles without a warrant, particularly where sealed containers are involved. *See* Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32

Hastings L.J. 127, 147-52 (1980). *See also State v. Phifer*, 297 N.C. 216, 220, 254 S.E. 2d 586, 588 (1979), where our Supreme Court noted that "[s]ince an inventory search may be undertaken without a warrant or probable cause, it is potentially subject to abuse by police officers intent upon ferreting out evidence of criminal activity."

In sum, we hold: (1) defendant's vehicle was properly seized pursuant to G.S. 90-112; (2) this lawful seizure permitted the officers to perform a standard inventory of the vehicle's contents; (3) the authority of the officers to conduct this inventory did not, however, include the right to search a small, closed bottle and seize its contents, which were not in plain view, absent a warrant duly issued by a neutral magistrate upon probable cause shown.

Our decision renders moot the questions raised by defendant with reference to the denial of a speedy trial and the judge's delay in ruling on his motion to suppress.

The order denying defendant's motion to suppress is reversed, and the judgment, based on the admission of that evidence, is arrested.

Judgment arrested.

Chief Judge MORRIS and Judge BECTON concur.

BEULAH STONE JONES AND HUSBAND, ROLAND JONES, AND EULA STONE HAYES v. DAVID S. STONE AND WIFE, LUCILLE M. STONE

No. 8011SC620

(Filed 16 June 1981)

1. Rules of Civil Procedure § 41— refusal to dismiss action for failure to prosecute

The trial court did not abuse its discretion in denying respondent's motion to dismiss petitioners' partition proceeding filed in 1970 for failure to prosecute where petitioners believed that their claim had been lost on the basis of information supplied to them by their original attorney; it was not until 1978 that petitioners found that such information was incorrect; and from that point forward, petitioners undertook diligent efforts to investigate their claim, hire new counsel, and proceed with a hearing of their claim on the merits.

2. Wills § 33.1— inapplicability of Rule in Shelley's case

Where testator devised a life estate in realty to his son with the remainder "to be divided among [the son's] heirs at law," the Rule in Shelley's case did not apply to give the son fee simple title to the realty since the words "to be divided among" showed testator's intention to divide his property among his children's children not in accordance with the laws of intestate succession but rather as tenants in common and members of the same class.

APPEAL by respondents from *Britt, Judge.* Judgment entered 23 April 1980 in Superior Court, LEE County. Heard in the Court of Appeals 29 January 1981.

In a special proceeding to partition land, filed 3 July 1970, petitioners, Beulah Stone Jones and Eula Stone Hayes, allege that they are tenants in common with the respondent, David S. Stone, of approximately 19.28 acres in Lee County.[1] The property in question is part of a 145-acre tract owned by Neil A. Stone at the time of his death on 15 June 1937. Beulah Jones and Eula Hayes are the sisters of David Stone, and their claim to be tenants in common with David Stone arises under the Last Will and Testament of their grandfather, Neil A. Stone.

In Item Two of his Will, Neil A. Stone devised a life estate in his property to his wife, Nannie Catharine Stone. In Item Five of his Will, Neil A. Stone provided as follows:

> I give, devise and bequeath to my son Samuel Temus Stone, to take effect after the death of my said wife, one-tenth in value, of all my real property to have and to hold the same during his natural life and after his death, the same *to be divided among his heirs at law.* (Emphasis added.)

In Items Three, Six, Seven, Eight, Nine, Ten and Twelve of his Will, Neil A. Stone used the same language he used in Item Five to devise a one-tenth interest in his property to seven of his nine other children, except he inserted the additional word "equally." Consequently, the remainder provision in Items Six, Seven, Eight, Nine, Ten and Twelve reads "and after [that child's]

1. Roland Jones, the husband of Beulah Stone Jones, is listed as a petitioner in this proceeding; Lucille M. Stone, the wife of David S. Stone, is listed as a respondent in this proceeding.

death the same to be equally divided among his [her] heirs at law."[2]

In July 1949, after the death of Nannie Catharine Stone, a special proceeding seeking an actual division of Neil A. Stone's real property was instituted before the Clerk of Lee County Superior Court. As a result of this special proceeding, Neil A. Stone's land was divided into ten separate tracts. The land allotted to Samuel Temus Stone in the partition proceeding of July 1949 consisted of 19.28 acres.

Samuel Temus Stone died on 15 May 1970 leaving, as his sole heirs, his daughters, the petitioners herein, and his son, the respondent herein. To the petition alleging that Beulah Jones and Eula Hayes are equal tenants in common with him, David Stone filed an Answer asserting that under the Last Will and Testament of his father, Samuel Temus Stone, he was devised a fee simple interest in said land. David Stone contends that his father, prior to his death in 1970, was vested with fee simple title to said land by virtue of the Rule in Shelley's case.

The petition to partition was filed by petitioners' original attorney on 3 July 1970. On 1 June 1979 petitioners filed a Notice of Substitution of Counsel. On 11 June 1979 the respondent filed a motion to dismiss for failure to prosecute pursuant to Rule 41(b) of the Rules of Civil Procedure. The motion was denied at the 28 January 1980 civil session of Lee County Superior Court. This case was heard by the court without a jury at the 21 April 1980 civil session of Lee County Superior Court. From the court order concluding that Beulah Jones, Eula Hayes and David Stone were "equal tenants in common of said 19.28 acre tract of real property, each of said persons owning one-third undivided interest in and to said real property" and further finding that petitioners were entitled to a partition sale as prayed for in their petition, respondent appealed.

2. Neil A. Stone also devised a life estate to his two other children in Items Four and Eleven of his Will, but the remainder in Item Four was to be equally divided among Neil A. Stone's other children, and the remainder in Item Eleven was to go to the named son who took care of the infirmed life tenant.

Love & Wicker, P.A., by Jimmy L. Love, for respondent appellants.

Randall, Yaeger, Woodson, Jervis & Stout, by Robert B. Jervis, and McCain and Moore, by Grover C. McCain, Jr., for petitioner appellees.

BECTON, Judge.

I

[1] Respondent first contends that the trial court erred in refusing to grant his motion to dismiss for failure to prosecute pursuant to G.S. 1A-1, Rule 41(b). We disagree.

Under the North Carolina Rules of Civil Procedure, Rule 41(b), a petitioner's claim can be dismissed with prejudice if the petitioner fails to prosecute the action. Indeed, courts have inherent power to dismiss stale actions on their own motion. *Link v. Wabash Railroad Company,* 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386, *reh. denied,* 371 U.S. 873, 9 L.Ed. 2d 112, 83 S.Ct. 115 (1962). However, a "mere lapse of time does not justify dismissal if the plaintiff [petitioner] has not been lacking in diligence." *Green v. Eure,* 18 N.C. App. 671, 672, 197 S.E. 2d 599, 600 (1973). Courts are, and should be, primarily concerned with trial of cases on their merits. "Dismissal for failure to prosecute is proper only [when] the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion." *Id.* at 672, 197 S.E. 2d at 601.

In this case, the affidavit of the petitioner Beulah Jones discloses that she believed her claim, and the claim of her sister, had been lost based on information supplied to her by her original attorney. It was not until Ms. Jones heard of a similar action filed in the fall of 1978 that she had reason to believe that the information supplied to her by her original attorney was incorrect. From that point forward, petitioners undertook diligent efforts to investigate their claim, hire new counsel, and proceed with a hearing of their claim on the merits. The record does not suggest that petitioners deliberately proceeded in dilatory fashion. It was after petitioners filed a motion for substitution of counsel and after they requested that the case be set for trial that respondent came forward with the motion to dismiss for failure to prosecute.

Dismissal under Rule 41(b) is within the discretion of the trial court. The trial court heard the testimony of the original attorney and reviewed the affidavit of Ms. Jones, and upon that evidence it failed to find that petitioners were delaying this action or otherwise attempting to thwart its progress toward trial. The decision of the trial court, denying respondent's motion, should therefore not be disturbed.

II

[2] Respondent next contends that the Rule in Shelley's case gave his father, Samuel Temus Stone, a fee simple estate and that he, David Stone, owns all of the land by virtue of his father's conveyance to him.

This year marks the 400th anniversary of the formal pronouncement of the Rule in Shelley's case (Rule).[3] The Rule is a vestige of feudal law and takes its name from an old English case, *Wolfe v. Shelley*, 1 Co.Rep. 93(b), 76th Eng. Rep. 206 (CB 1581). In North Carolina, the Rule is most often stated as follows:

> When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

Jones v. Whichard, 163 N.C. 241, 243, 79 S.E. 503, 504-05 (1913); *White v. Lackey*, 40 N.C. App. 353, 355, 253 S.E. 2d 13, 15, *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979). A shorter, and perhaps easier to grasp, explanation of the Rule is set forth in *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928):

> If an estate of *freehold* be limited to A, with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor.

3. The principle, however, was part of the common law of England long before 1581. "The principle known as the Rule in Shelley's Case had its origin as early as the reign of Edward II, in 1324." Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C. L.Rev. 3, 4 n. 4 (1966).

Id. at 429, 142 S.E. at 313.

Although the original objective of the Rule became outdated when feudal tenures were abolished in the seventeenth century, the Rule enjoyed prominence until the twentieth century. The Rule was abolished in England in 1925; it has never been repealed in North Carolina, however. Indeed, one year after the Rule was abolished in England, the North Carolina Supreme Court said:

> Today, the rule serves quite a different, but no less valuable, purpose, in that it prevents the tying up of real estate during the life of the first taker, facilitates its alienation a generation earlier, and at the same time, subjects it to the payment of the debts of the ancestor.

Benton v. Baucom, 192 N.C. 630, 632, 135 S.E. 629, 630 (1926).

In order for the Rule to apply, all of the following factors must exist:

> (1) there must be an estate of freehold in the ancestor; (2) the ancestor must acquire that estate in the same instrument containing the limitation to his heirs; (3) the words 'heirs' or 'heirs of the body' must be used in the technical sense meaning an indefinite succession of persons, from generation to generation; (4) the two interests must be either both legal or both equitable; and (5) the limitation to the heirs must be a remainder in fee or in tail.

White v. Lackey, 40 N.C. App. at 356, 253 S.E. 2d at 15-16. *See also Benton v. Baucom; Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501 (1922).

When all of the required elements are present, the Rule applies regardless of the intent of the testator, the Rule being "one of law and not one of construction." 184 N.C. at 16, 113 S.E. at 502.

In applying the Rule, courts have not always been bound by the words "to A for life, remainder to A's heirs" or similar words. Indeed, much of the litigation under the Rule concerns the courts' attempts to ascertain the paramount intent of testators who use the word "heirs." The Rule at times

> overrides even the expressed intention of the grantor, or that of the testator, as the case may be. But when this is said, it should be understood as meaning that only the particular intent is sacrificed to the general or paramount intent. It is not the estate which the ancestor takes that is to be considered so much as it is the estate intended to be given to the heirs. . . . 'The true question of intent would turn not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body.' The first question, then, to be decided is whether the words 'heirs' or 'heirs of the body' are used in their technical sense; and this is a preliminary question to be determined, in the first instance, *under the ordinary principles of construction without regard to the rule in Shelley's case*. Not until this has been ascertained by first viewing the instrument from its four corners (*Triplett v. Williams*, 149 N.C., 394), and determining whether the heirs take as descendants or purchasers, can it be known in a given case whether the facts presented call for an application of the rule. . . . The meaning or sense in which the words 'heirs' or 'heirs of the body' are employed, whether technical or other, is denominated the general or paramount intent, and this is to be the controlling factor. (Emphasis added.)

Id. at 16-17, 113 S.E. at 502.

In an old Kentucky case, *Prescott v. Prescott*, 49 Ky. (10 B. Mon.) 56, 58 (1849), the court said:

> It is true, the words 'heirs of the body,' are appropriate words of limitation . . . [b]ut it is also well settled by numerous decisions, that not only heirs of the body, but the more general word 'heirs,' or the more specific terms 'heirs male, or heirs female of the body,' or of 'two bodies,' may be used and operate as words of purchase. It is a question of intention whether these words are used to denote the whole line of heirs of the sort described to take in succession as such heirs, or to denote only a particular person, or a class of persons who are to come under that description at the time. When used in the former sense, they are words of limitation, defining or limiting the previous estate to which they apply. When used in the latter sense, they operate merely as

designatio personoe, or *personarum*, and are held to be words of purchase, giving a new estate to the persons designated.

We must determine in this case if the testator, Neil A. Stone, intended the words "heirs at law" to mean the indefinite succession of persons from generation to generation taking as if by intestacy. If he did, the Rule applies because those words would be "words of limitation" as contra-distinguished from "words of purchase." Webster, *supra*, at 11. If, however, Neil A. Stone used the words "heirs at law" to designate certain individuals who are only a part, and not all, of the heirs of the first taker or used the words to describe heirs of the first taker at a particular time, then the Rule does not apply. Neil A. Stone would not have been using the words "heirs at law" in the technical sense, and therefore the heirs would take a per capita remainder interest in the property by "purchase" as tenants in common. *Welch v. Gibson*, 193 N.C. 684, 138 S.E. 25 (1927); *Gilmore v. Sellars*, 145 N.C. 283, 59 S.E. 73 (1907); *Faison v. Odum*, 144 N.C. 107, 56 S.E. 793 (1907); *Jenkins v. Jenkins*, 96 N.C. 254, 2 S.E. 522 (1887); *Mills v. Thorne*, 95 N.C. 362 (1886); *White v. Lackey*.

In determining the preliminary question—Neil A. Stone's intent—we are guided by "the ordinary principles of construction [in will cases] without regard to the [R]ule," *Hampton v. Griggs*, 184 N.C. at 16, 113 S.E. at 502. It has long been the rule that the intent of a testator is to be ascertained, if possible, based on a consideration of his Will from its four corners; that to effectuate the intention of the testator, the court may disregard or supply punctuation, as well as transpose words, phrases or clauses; and that words, phrases or clauses will be supplied in the construction of a Will when the sense of the phrase or clause in question, as collected from the context, manifestly requires. *Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205 (1950); *House v. House*, 231 N.C. 218, 56 S.E. 2d 695 (1949); *Cannon v. Cannon*, 225 N.C. 611, 36 S.E. 2d 17 (1945); *Williams v. Rand*, 223 N.C. 734, 28 S.E. 2d 247 (1943). As stated in the case of *Coppedge v. Coppedge*, 234 N.C. 173, 66 S.E. 2d 777 (1951):

> [i]n construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled and effect given where possible to every clause or phrase and to every word. 'Every part of a will is to be considered in its

> construction, and no words ought to be rejected if any meaning can possibly be put upon them. Every string should give its sound,' [citations omitted]. But, where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it. *Snow v. Boylston*, 185 N.C. 321, 117 S.E. 14 [1923]; *Tucker v. Moye*, 115 N.C. 71, 20 S.E. 186 [1894]; . . .

234 N.C. at 176, 66 S.E. 2d at 779.

Having discussed the required elements for application of the Rule; the technical meaning of the words "heirs at law"; and the standards established by our courts in construing a Will, we now apply these rules to Neil A. Stone's use of the words "heirs at law."

In Item Five of his Will, Neil A. Stone gave a life estate to his son, Samuel Temus Stone, and provided that the remainder was "to be divided among [Samuel Temus Stone's] heirs at law." We believe the superadded words—"to be divided among"—are sufficient to take the devise out from under the Rule.

Professor Webster in his article on the Rule states it differently:

> To evade the possibility of running afoul of the Rule in Shelley's Case, all that is needed is some slight contextual language in the dispositive instrument that will indicate to the court that the words 'heirs' or 'heirs of the body' mean less than the whole body of heirs who would take in indefinite succession.

Webster, *supra*, at 13.

The court and Professor Webster find support in *Welch v. Gibson*, 193 N.C. 684, 138 S.E. 25 (1927), in which our Supreme Court distinguished the English rule from the North Carolina rule with regard to the superadded words "equally to be divided" or "share and share alike":

> It has been held in England, ever since the leading case of *Wright v. Jesson*, in the House of Lords, 2 Bligh., 2, which overruled *Doe v. Wright*, in the King's Bench, 5 M. and S., 95, that the words 'equally to be divided,' or 'share and share

> alike,' superadded to the limitation to the heirs, or to heirs of the body, do not prevent the application of the rule, and such was declared to be the law of this State in *Ross v. Toms*, 15 N.C., 376, a case decided prior to the Act of 1784, now C.S., 1734. But in *Ward v. Jones*, 40 N.C., 400, decided in 1848, and expressly followed with approval in *Mills v. Thorne*, 95 N.C., 362, *Gilmore v. Sellars*, 145 N.C., 283, and *Haar v. Schloss*, 169 N.C., 228, it was held "that in all devises of land, made since that time (1784), the words 'to be equally divided' prevent the application of the rule in *Shelley's case*, and that the first taker has only an estate for life."

193 N.C. at 689, 138 S.E. at 27. This premise in *Welch v. Gibson* is so well established that respondent concedes had the additional word "*equally*" been used in Item Five of Neil A. Stone's Will the Rule would not apply. Our reading of the North Carolina cases suggests that the words "to be divided among," even without the word "equally," defeat the application of the Rule. Indeed, in *Mills v. Thorne*, 95 N.C. 362 (1886), the North Carolina Supreme Court, citing as authority, H. Theobald, A Concise Treatise on the Law of Wills, (2d ed. 1881), said: "It is laid down that words of division or distribution, such as '*to be divided*,' or '*equally*,' or '*between*,' or '*amongst*,' or '*share*,' *or similar words*, make a tenancy in common." *Mills v. Thorne*, 95 N.C. at 365. When heirs take as tenants in common rather than as heirs in the line of succession, the Rule does not apply.

In addition to the superadded words which constitute "slight contextual language in the dispositive instrument" indicating that the words "heirs at law" were not used in a technical sense, Neil A. Stone's entire scheme of distribution suggests that the words "heirs at law" were merely *descriptio presonarum* of those persons who were to receive a remainder interest in the property after the death of Samuel Temus Stone. The entire Will of Neil A. Stone incorporated a per capita division and distribution of his estate. After the death of Nannie Catharine Stone, each of the children of Neil A. Stone was given a lifetime interest in one-tenth of his real property. Upon the death of each child, their one-tenth interest was to be divided among their heirs at law. Neil A. Stone used the word "equally" in every item of his Will except Item Five. Thus respondent concedes that the words "heirs at law" as used by Neil A. Stone in the Third, Sixth, Seventh,

Eighth, Ninth, Tenth and Twelfth Items of his Will were not intended by the Testator to be used in their technical sense as is required for application of the Rule. Respondent relies heavily upon the absence of the word "equally" in the Fifth Item of the Will to support his position. In doing so, respondent completely misses the point which was established by *Mills v. Thorne*, and *Welch v. Gibson*. It is not the presence or absence of one particular word in one particular paragraph of the Will which determines whether the Rule will apply, but rather it is the intent of the testator in his use of the word "heirs," gleaned from the entire dispositive instrument and considered in the light of the superadded words which are present to disclose that intent.

The trial court's finding that the word "heirs" should be interpreted consistently throughout the Will as words merely *descriptio personarum*, and that therefore the Rule has no application, is entirely proper under the decisions of our court in *Williams v. Rand; Cannon v. Cannon; Elmore v. Austin; House v. House;* and *Coppedge v. Coppedge*. We hold that the superadded words "to be divided among" are sufficient to prevent the operation of the Rule, and are consistent with Neil A. Stone's design to divide his property among his children's children not in accordance with the laws of intestate succession, but rather as tenants in common and members of the same class. Therefore, the judgment appealed from is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

McBride v. Tractor Co. and Odell v. Tractor Co.

CHARLIE A. McBRIDE v. JOHNSON OIL AND TRACTOR COMPANY AND ROBERT LEWIS DALTON

AND

WILLIAM F. ODELL v. JOHNSON OIL AND TRACTOR COMPANY AND ROBERT LEWIS DALTON

No. 8022SC1036

(Filed 16 June 1981)

Reformation of Instruments § 7; Torts § 7.1— personal injury action—releases—reformation for mutual mistake

In an action to recover for personal injuries and property damage sustained in an automobile accident between plaintiffs' truck and defendant's station wagon where defendant alleged that its agent, who was driving the station wagon, turned into the path of plaintiffs' vehicle in an effort to avoid colliding with a motorcycle driven by the individual defendant and that plaintiffs had executed releases which forever discharged the individual defendant and "any and all other persons, firms, and corporations of and from any and all actions, causes of action, claims or demands . . . [arising out of the subject accident]," the trial court erred in entering summary judgment for defendant on the basis of the releases, since plaintiffs alleged that the parties to the releases never intended to release anyone other than the individual defendant, his insurance company, and his representatives and plaintiffs offered affidavits to support their allegation of mutual mistake.

APPEAL by plaintiffs from *Collier, Judge.* Judgments entered 8 July 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 29 April 1981.

Plaintiffs filed separate complaints against Johnson Oil and Tractor Company seeking to recover for personal injuries and property damage incurred in an automobile accident on 4 May 1975. They alleged that plaintiff Odell was the driver and plaintiff McBride was the passenger in a pickup truck which was struck head on by a station wagon owned by the defendant and operated by one Jan Coppley Johnson as agent of the defendant. Defendant answered, alleging among other defenses that Johnson turned into the path of plaintiffs in an effort to avoid colliding with a motorcycle which one Robert Lewis Dalton drove in front of her from an intersecting street. Defendant also pleaded as a bar certain releases executed by the plaintiffs on 29 July 1977.

Defendant invoked discovery to establish that the plaintiffs executed the releases and received certain sums of money in con-

sideration therefor. The releases assert that the plaintiffs "release, acquit and forever discharge ROBERT LEWIS DALTON and any and all other persons, firms and corporations of and from any and all actions, causes of action, claims or demands . . . [arising out of the subject accident]."

Defendant moved for summary judgment, relying upon the releases. Plaintiffs filed affidavits from themselves, their attorney and Dalton's attorney. These affidavits, which are reviewed in more detail below, tend to show that the parties to the releases never intended to release anyone other than Dalton, his insurance company and his representatives. Plaintiffs also moved to amend their complaints in order to add Robert Lewis Dalton as a defendant and to pray for reformation of the releases. The amendments, which were allowed by order of the trial court, each allege that the plaintiff orally agreed to release the defendant Dalton, that the critical phrase quoted above was inserted in each release through mutual mistake of the parties, and that the release does not express the oral agreement between the parties thereto. Defendant Dalton filed answers, generally denying the allegations of mistake.

A hearing was held upon the summary judgment motions of defendant Johnson Oil and Tractor Company and defendant Dalton's motions to dismiss for failure to state a claim against him. The motions were allowed. Plaintiffs appeal.

Wilson, Biesecker, Tripp & Wall, by Roger S. Tripp, for plaintiff appellants.

Caudle, Underwood & Kinsey, by C. Ralph Kinsey, Jr., and Hal C. Spears, for defendant appellee Johnson Oil and Tractor, Inc.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr., for defendant appellee Robert Lewis Dalton.

HILL, Judge.

Defendant Johnson Oil and Tractor Company relies upon *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E. 2d 97 (1975), *cert. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976), to support the summary judgments herein. The *Battle* case involved an automobile accident in which the plaintiff filed a complaint against defend-

ants Stallings, Clanton and Joyner. Plaintiff settled his claims against defendants Clanton and Joyner and executed a release. This instrument released Clanton and Joyner and "*all other* persons, firms, or corporations who are or might be liable, from *all* claims of *any kind* or character which I have or might have against it, him or them . . .." The trial court then allowed summary judgment dismissing plaintiff's claim against defendant Stallings on the basis of this release, and plaintiff appealed. This Court affirmed, holding "that the subject release, by its express terms, provided for the discharge and release of all other tortfeasors from all other claims resulting from the subject release on 10 August 1974, including both the defendant Stallings and his insurer, Nationwide Mutual Insurance Company." *Id.* at 621, 220 S.E. 2d at 100. The plaintiffs in the present case urge us to overrule *Battle* in favor of "the modern trend of decisions in other jurisdictions." This we refuse to do. We reaffirm the holding of *Battle*. We agree, however, with the plaintiffs' alternative argument to the effect that the present case is distinguishable from *Battle*.

The plaintiff in *Battle* argued that the release therein was not intended to release anyone other than Clanton and Joyner and that the critical phrase quoted above was "mere surplusage." In the present case, the plaintiffs have amended their complaints in order to allege that the critical phrase was inserted in the releases through mutual mistake, and they have prayed for reformation of the releases in order to delete the phrase. Further, they have presented affidavits in support of their allegations of mutual mistake. No such issue of reformation was presented in the *Battle* case.

An instrument which fails to express the true intention of the parties may be reformed to express such intention when the failure is due to the mutual mistake of the parties, to the mistake of one party induced by fraud of the other, or to mistake of the draftsman. *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E. 2d 570 (1973). Such a mutual mistake of the parties may be one relating to the legal effect of the instrument. Where, by reason of an error of expression or mistake as to the force and effect of the language used, an instrument fails to express the intent of the parties, equity will afford relief. *Trust Co. v. Braznell*, 227 N.C. 211, 41

S.E. 2d 744 (1947); 13 Williston on Contracts, § 1585 (3rd ed. 1970); 66 Am. Jur. 2d, Reformation of Instruments § 19 (1973).

In *Trust Co. v. Braznell, supra*, two of the defendants conveyed a building to the third defendant by a deed which included a provision purporting to protect the leases of existing tenants, including the plaintiff. The new owner thereafter refused to recognize plaintiff's lease, and plaintiff sued. The evidence at trial tended to show that it was understood and agreed that the deed should protect the tenants' leasehold rights but that this intention was inadequately expressed. Judgment was entered for the plaintiff and the Supreme Court found no error. The Supreme Court wrote:

> A bare, naked mistake of law affords no grounds for reformation. This, however, is the general rule, qualified by many exceptions. [Citations omitted.]
>
> Where the error of law induces a mistake of fact, that is, where, by reason of an error of expression or mistake as to the force and effect of the language used, the contract fails to express the intent of the parties, equity will afford relief. [Citations omitted.]
>
> "The phrase 'mutual mistake' means a mistake common to all the parties to a written instrument and usually relates to a mistake concerning its contents or its legal effect." [Citation omitted.] "It is wholly immaterial whether . . . the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." [Citations omitted.]
>
> All the parties conceived that the language used adequately protected the outstanding leases. This was a mistake of law. They intended to include in the deed a provision which would fully protect plaintiff and other tenants. By reason of the use of language mistakenly believed to be, but which was not, sufficient to accomplish the common purpose, such provision does not appear in the deed. They intended the deed to include what it does not include. This constitutes a mistake of fact justifying reformation.

Id. at 214-15, 41 S.E. 2d at 746-47.

In *Durham v. Creech*, 32 N.C. App. 55, 231 S.E. 2d 163 (1977), this Court dealt with a conveyance of land in which the parties in-

tended to reserve a life estate for the grantors but the instruments as executed failed to do so. In reversing a directed verdict for the defendant-grantees, this Court wrote:

> When, due to the mutual mistake of the parties, or perhaps a mistake by their draftsman, the agreement expressed in a written instrument differs from the agreement actually made by the parties, the equitable remedy of reformation is available. . . .
>
> . . . .
>
> It is immaterial whether the mistake arose out of the attorney's ignorance. This is not a case where reformation is sought of a bare mistake of law. A bare mistake of law generally affords no grounds for reformation. *Trust Company v. Braznell*, 227 N.C. 211, 41 S.E. 2d 744 (1947). There is evidence that the parties agreed and intended to reserve a life estate. The instrument purporting to reserve the life estate, executed along with the deed, was ineffectual, which may be a mistake of law as to the legal efficacy of the transaction. However, the failure to accomplish the intention of the parties, to reserve a life estate, was a mistake of fact which will afford reformation. See, *Trust Company v. Braznell*, supra.
>
> Evidence which tends to show the draftsman's error also tends to show that the parties were mistaken in their beliefs. The evidence would support a finding of mutual mistake by the parties.

Id. at 59-60, 231 S.E. 2d at 166-67. *Accord, Phillips v. Woxman*, 43 N.C. App. 739, 260 S.E. 2d 97 (1979), *cert. denied*, 299 N.C. 545, 265 S.E. 2d 404 (1980).

More recently, this Court decided *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981). In *Cunningham* plaintiff-husband was operating a motorcycle on which plaintiff-wife was a passenger. The motorcycle collided with a vehicle driven by the defendant, and plaintiffs sued. The defendant moved for summary judgment as to plaintiff-wife's claim in reliance upon a release executed by her. This instrument provided that plaintiff-wife released her husband and "any other person, firm or corporation charged or chargeable with responsibility or liability" in connec-

tion with the accident. Plaintiff-wife filed an affidavit in opposition to summary judgment in which she asserted that an adjuster from her husband's insurance company notified her that certain money was available from his insurance policy to pay for her medical expenses and lost wages and that she became worried about paying the expected medical expenses and contacted the insurance company about the money. A second adjuster visited plaintiff-wife in her home and produced a check and a document for her signature. The adjuster asked whether plaintiff-wife intended to sue the other party to the accident, she answered that it was none of his business, and he stated that their dealings "would not affect that anyway." Plaintiff-wife signed the document, but she regarded it as a receipt for the check and she had no intention of releasing the defendant. At the hearing on defendant's motion for summary judgment, the trial court excluded plaintiff-wife's affidavit on grounds of the parol evidence rule and allowed defendant's motion. On appeal, this Court held that the affidavit should have been considered since the parol evidence rule does not preclude admission of extrinsic evidence when one is seeking to prove that a written agreement was executed under circumstances amounting to fraud or mutual mistake. This Court went on to hold that plaintiff-wife's affidavit raised genuine issues of fact as to fraud and mutual mistake in connection with execution of the release and that the trial court had therefore erred in granting summary judgment.

In light of the above authorities, we turn to the documents before the trial court at the summary judgment hearing in the present case. Defendant Johnson Oil and Tractor Company relied upon the releases executed by the plaintiffs. The plaintiffs presented affidavits from themselves and from the attorneys involved in the negotiation and execution of the releases. The affidavits submitted by the plaintiffs tended to show that they had reached a settlement of their claims against Robert Lewis Dalton, that they had signed releases releasing Dalton, that they at no time intended to release anyone other than Dalton and his insurance company and his representatives, that nothing was mentioned about Johnson Oil and Tractor Company during the settlement negotiations except that they would be reserving their rights to sue Johnson Oil and Tractor Company, that they never negotiated for settlement of their claims against Johnson Oil and

Tractor Company, and that any release purporting to release anyone other than Dalton and his insurance company and representatives was in error and does not reflect the intent and meaning of the settlement agreements. Plaintiffs' attorney asserted by his affidavit that he reached a settlement of plaintiffs' claims against Dalton and releases were executed, that no negotiations were had to settle the plaintiffs' claims against Johnson Oil and Tractor Company and no consideration was paid on behalf of Johnson Oil and Tractor Company, that the settlement agreement concerned only Dalton and his insurance company and his representatives, that the settlement agreement and the releases were not intended to discharge Johnson Oil and Tractor Company, and that any paperwriting purporting to release anyone other than Dalton and his insurance company and his representatives is in error and does not reflect the true intent and meaning of the settlement agreement. Dalton's attorney asserted by his affidavit that he reached a settlement of plaintiff's claims against Dalton and releases were executed, that he did not represent Johnson Oil and Tractor Company, that the intent of the parties was to release Dalton and his insurance company and his heirs and representatives, and that the releases were not intended to discharge Johnson Oil and Tractor Company. Johnson Oil and Tractor Company directed interrogatories to Dalton concerning the denial of a mistake which he made in his answers to the amended complaints; and although Dalton's answers to the interrogatories were filed late, they were apparently considered at the summary judgment hearing. The answers are, in pertinent part, as follows:

> By way of further clarification, the Defendant [Dalton] is informed that Plaintiff's counsel did at one time mention to the Defendant's [Dalton] counsel that the Plaintiff did intend to proceed with a lawsuit against Johnson Oil and Tractor Company. After negotiation between my counsel and counsel representing the Plaintiff, a settlement of the claims of William F. Odell and Charlie A. McBride against me were reached. I understand that in order to complete the settlement, my counsel, using standard releases provided by the liability insurance carrier, forwarded releases to be executed by Mr. McBride and Mr. Odell to the Plaintiff's counsel along with the settlement consideration. The purpose of the

releases was to conclude the claims of William F. Odell and Charlie A. McBride against me from any and all actions, causes of actions, and claims. My counsel did not represent Johnson Oil and Tractor Company, either in the negotiation of the settlement or the drafting of the release, and the release was not intended to discharge Johnson Oil and Tractor Company. My counsel did intend to forward the standard release sent to and executed by the Plaintiff.

We conclude that the plaintiffs sufficiently supported their claims for reformation. Their showing at the summary judgment hearing presented a genuine issue of material fact, and the trial court erred by entering summary judgment for the defendant Johnson Oil and Tractor Company. *See Cunningham v. Brown, supra; Cameron v. Cameron*, 43 N.C. App. 386, 258 S.E. 2d 814 (1979).

The trial court also dismissed the claims against defendant Dalton which were stated in the amended complaints. These rulings must be reversed. The plaintiffs have sufficiently alleged claims for reformation of the releases, *see Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976); and the defendant Dalton is a necessary party to the actions for reformation, *cf. Kemp v. Funderburk*, 224 N.C. 353, 30 S.E. 2d 155 (1944).

The orders appealed from are

Reversed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

JAMES E. CARTER v. COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY

No. 8026DC679

(Filed 16 June 1981)

1. Insurance § 50— accident insurance—accident as exclusive cause of injuries—triable issue of fact

In an action to recover under an accident policy for injuries to plaintiff's hip allegedly sustained when plaintiff fell from a ladder, the evidence on motion for summary judgment presented a triable issue of fact as to whether

plaintiff's accident was the independent and exclusive cause of his injuries or whether a degenerative joint disease resulting from a football injury some 40 years earlier contributed to plaintiff's injuries where plaintiff testified by affidavit that at the time of the accident he suffered immediate and severe pain; he nearly blacked out and could not walk; prior to the fall from the ladder he had experienced no pain in his hip except when he had suffered the football injury some 40 years before; prior to the fall he was active and participated in hard physical labor; and after the fall he was totally disabled for a period of approximately six months.

2. Evidence § 14.1— deposition of attending physician—authority of trial court

Under G.S. 8-53 only the judge presiding at the trial on the merits may grant a motion to take depositions of the physicians who attend a party.

APPEAL by plaintiff from *Black, Judge.* Judgment entered 23 May 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 February 1981.

Plaintiff alleged in his complaint that he was insured under defendant's policy numbered 1126-27485 against accidental bodily injury.

On 1 March 1978, plaintiff allegedly sustained a bodily injury when he fell from a ladder approximately ten feet to the ground. He suffered severe damage to his left hip. As a result of the fall and injury plaintiff was hospitalized and underwent surgery resulting in a total hip replacement.

It is not disputed that the policy of insurance was in force at the time the accident occurred; that plaintiff properly notified defendant of his claim for benefits under the insurance policy; and that defendant refused to pay plaintiff anything under the terms of the insurance policy. Plaintiff alleged that defendant's refusal to pay constituted a breach of its contract, and he was, therefore, entitled to recover payments for total disability, hospital fees, and physicians's fees as provided by the policy. In addition, plaintiff asked for an award of interest and attorney's fees.

Defendant's answer averred that the surgery and the concomitant medical expenses did not result exclusively from the accident as required for recovery under the terms of the coverage of its policy. With regard to coverage the policy stated:

The Company will pay the benefits named in this Section for any loss resulting directly, independently and exclusively of

all other causes from bodily injuries effected solely through external and accidental means whether such injuries occur in the course of any occupation or employment, or otherwise.

Defendant contended that a degenerative joint disease from which plaintiff had suffered since his youth when he sustained a football injury contributed to the consequences of plaintiff's fall from the ladder.

Based upon the limited coverage of its policy and its averment that defendant's fall was not the exclusive cause of the resulting surgery, defendant made a pretrial motion for summary judgment pursuant to G.S. 1A-1, Rule 56. The court reviewed the pleadings, depositions of Dr. David N. DuPuy and Dr. John L. Ranson, the affidavit of plaintiff, and heard and considered the arguments of plaintiff and defendant. The court found that there was no genuine issue of material fact and allowed defendant's motion for summary judgment, from which plaintiff appeals.

Williams, Kratt and Parker, by Neil C. Williams, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and James M. Stanley, Jr., for defendant appellee.

MORRIS, Chief Judge.

[1] Plaintiff questions the propriety of the court's granting defendant's motion for summary judgment. After examining all of the evidence in the record, we think that all of the materials presented to the court disclosed a triable issue of fact which rendered the court's order of summary judgment improper.

On being deposed by defendant, Dr. DuPuy testified as follows:

My name is David N. DuPuy. I am a Board Certified Orthopedic Surgeon licensed to practice medicine in the State of North Carolina. I first saw Mr. Carter on April 3, 1978, when he was referred by Dr. Ranson. Mr. Carter described how he had fallen on his hip, and that it kept bothering him and he was getting worse, and that is the reason he went to see Dr. Ranson and was put in the hospital. Carter's history taken on that day revealed that he had had a long history of

problems with the left hip. His history to me was that he had "dislocated his hip while playing football back in high school," which would have been—I'm guessing, at least thirty years before this time. Carter said that he was treated with traction and that from then on, as a teenager, he had trouble with his hip.

I had x-rays taken of Mr. Carter's left hip, which showed a complete and total destruction of the left hip. There was no cartilage in the joint. The head, was not round, but was completely destroyed. This would not have possibly have occurred since the fall he described.

I do not have an absolute opinion satisfactory to myself as to the cause of the disability of Mr. Carter's left hip. The disability was definitely from his hip, and when we saw him, his hip was hurting too much to work. As to the cause of the disability the fall aggravated this, but the answer is pre-existing degenerative arthritic hip from the time he was a teenager. It is something that keeps getting worse and worse, and finally you just can't continue with it.

I do have an opinion satisfactory to myself whether the fall could or might have caused his disability exclusively and independent of any other problems that he had. My opinion is that if it were not for the pre-existing problem with the hip, the fall would not have caused the disability, but I think that the fall was the straw that broke the camel's back. The hip was degenerating all along, and it finally just made it so bad that he couldn't continue in his normal activities. If the jury should find that Mr. Carter had this fall, my opinion is that the fall was not the exclusive cause of his degenerative joint disease.

The relationship of physician-patient existed between Ed Carter and me at all times.

My opinion is the Ed Carter could have continued without having to have a total hip replacement if he had not fallen. At his age of 52, and the fact that he was active running the restaurant, he could have gone not more than 5-10 years at most, or more likely 3-5 years, but the hip would have allowed him to get around without crutches. Ed Carter was 52

when I treated him. I guess that he was 16 to 18 years old when his football injury occurred. As far as I know he had gotten along 34 to 36 years without medical attention for that problem and had never had an x-ray. He gave a history that he had not even consulted another doctor about his hip, except Dr. Ranson, after his fall.

Dr. Ranson's deposition further sustained Dr. DuPuy's.

My name is Dr. John L. Ranson. I am licensed to practice medicine in North Carolina, and specialize in internal medicine.

On March 30, 1978, I took a history from Mr. Carter. He gave the history that he had had weakness and disability from a football injury in high school when he was 17 years old. He had had difficulty and limitation of motion of the left hip and that prior to his visit on March 30, 1978, he became worse and had been using crutches. He said that he had always had a limp, that his left leg was shorter and that he had never been able to walk normally.

My opinion is that Mr. Carter has this old injury, which was the basic problem. Mr. Carter did not mention having fallen prior to March 30, 1978.

I considered Ed Carter to be my patient. I saw him for the first time on March 30, 1978, and put him in the hospital on April 3. Dr. Rich had seen Ed Carter previously in 1975 for a physical exam. According to Dr. Rich's 1975 notes Mr. Carter did have an injury to his left hip playing football in high school, walked with a limp, and had the left leg shorter than the right.

I do not have an opinion as to whether a fall from a height of ten feet onto a hard surface March 1, 1978, could or might have caused the need for a total hip replacement. I do not feel qualified to answer that question. It's just out of my field.

If the jury should find that Mr. Carter had a fall, I don't think the fall that he had could have caused that much damage, because he had the trouble before anyway. It's a chronic disease thing; it's something that could be aggravated, but it could have caused that.

Plaintiff offered his own affidavit in response to defendant's motion, in which he stated:

> 1. I am the Plaintiff in the above-entitled action, and I have personal knowledge of the matters herein referred to and make this Affidavit in opposition to Defendant's Motion for Summary Judgment.
>
> 2. On or about March 1, 1978, I was working on a one-story building near the intersection of Interstate Highway 85 and Little Rock Road in Mecklenburg County, North Carolina. The building under construction was to be used for my "Hickory House" Barbecue Restaurant. I had been working on the building for some time prior to March 1, 1978, lifting, sawing, carrying materials, climbing ladders, and participating generally in the construction.
>
> 3. On or about March 1, 1978, while working on the building I fell from a ladder about ten feet to the ground, landed on my hip on some building materials which were scattered on the ground; I suffered immediate and severe pain in the injuries to my left hip; and I almost blacked out. At the time of the fall, I was alone and could not stand or walk; consequently, I crawled to my truck and drove a short distance to my home, where my wife helped me into the house.
>
> 4. After the fall, I had severe and constant pain in my left hip, could not walk without crutches or assistance, and when my condition did not improve, I consulted Dr. John L. Ranson about April 1, and Dr. Ranson hospitalized me at Mercy Hospital from April 3 to April 7, 1978, for observation. Dr. Ranson summoned Dr. David N. DuPuy for an orthopedic consultation. Dr. DuPuy hospitalized me at the Orthopedic Hospital of Charlotte from May 8 to May 19, 1978, and performed a total hip replacement on me on May 10, 1978.
>
> 5. Prior to my fall from the ladder on or about March 1, 1978, I had experienced no pain in my left hip, except about forty years earlier when I had a high school football injury. Since high school, about forty years ago, my left hip had not kept me from doing anything I wanted to do and had not kept me from doing the activities of a normal, healthy person, including dancing and participating in sports. Prior to my fall, I

had always been active and performed hard, physical labor. After high school, I had not consulted any doctor or received any medical attention for my left hip, until I saw Dr. Ranson about one month after my fall.

6. For the treatment of my left hip after the fall, I incurred expenses of One Hundred Twenty Dollars ($120.00) from Dr. Ranson, Two Thousand Three Hundred Thirty-Seven Dollars and 00/100 ($2,337.00) from Dr. DuPuy, Four Hundred Sixty-Three Dollars and 60/100 ($463.60) from Mercy Hospital and Four Thousand Forty-Seven Dollars and 70/100 ($4,047.70) from the Orthopedic Hospital of Charlotte.

7. Because of my fall, I was totally disabled from March 1, 1978 until September 1, 1978.

Defendant contends that the depositions of Dr. Ranson and Dr. DuPuy are conclusive evidence as to the non-exclusivity of plaintiff's injury. He argues that plaintiff's affidavit is insufficient, as a matter of law, to refute the opinion of his doctors. As support for this theory defendant relies on *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965). *Gillikin* is distinguishable from the case *sub judice*. In *Gillikin* the plaintiff attempted to establish that a blow from a car door was the cause of her ruptured disc. The issue before the Supreme Court was whether the plaintiff's evidence was sufficient to show that the blow from the car door had caused this injury. Plaintiff's evidence, including that of her medical expert, failed to show any causal relationship between the condition and the accident upon which she based her suit. Therefore, the Supreme Court held that the trial court had improperly denied defendant's motion for nonsuit. Its holding was based upon the plaintiff's failure to show proximate cause. Justice Sharp, later Chief Justice, stated:

> In this record there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the accident on June 12, 1962. "If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness (expert) so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be

admitted and, if admitted, should be stricken." *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541, 545.

263 N.C. at 324, 139 S.E. 2d at 759.

Our courts have held that lay testimony is competent to establish the cause of either injury or death. *See Gilliken v. Burbage*, supra; *Jordan v. Glickman*, 219 N.C. 388, 14 S.E. 2d 40 (1941); *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E. 2d 491, *cert. denied*, 276 N.C. 728, --- S.E. 2d --- (1970); *Batten v. Duboise*, 6 N.C. App. 445, 169 S.E. 2d 892 (1969).

In the instant case plaintiff testified by affidavit that at the time of the accident he suffered immediate and severe pain. He nearly blacked out and could not walk. Prior to the fall from the ladder he had experienced no pain in his hip except when he had suffered the football injury approximately 40 years before. Prior to the fall he was active and participated in hard physical labor. After the fall he was totally disabled for a period of approximately six months.

This evidence is sufficient to raise an issue for the trier of fact as to whether plaintiff's accident was the independent and exclusive cause of his injury. We think in this instance an issue of fact did exist.

[2] Although it is unnecessary to the determination of the outcome of this appeal, we felt it instructive to note that the procedure by which Dr. Ranson and Dr. DuPuy's depositions were taken was possibly improper.

The procedural aspects of the statutory physician-patient privilege established in G.S. 8-53, appears to be qualified. It would seem to be within the discretion of the *trial judge* alone to compel a physician called as a witness to testify for the proper administration of justice as to matters within the physician-patient relationship. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921); *see* 41 N.C.L. Rev. 627. In *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67 (1964), the Supreme Court held that under G.S. 8-53 only the judge presiding at the trial on the merits may grant a motion to take depositions of the physicians who attended a party. In that opinion, Bobbitt, J., later C.J., set out clearly and concisely the reasons for the Court's conclusion that only the trial judge

should be authorized to compel disclosure by a physician. See also *Gustafson v. Gustafson*, 272 N.C. 452, 158 S.E. 2d 619 (1968).

We are advertent to the fact that when these decisions were rendered, the proviso in G.S. 8-53 provided that "the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." Following these decisions the legislature twice amended G.S. 8-53, first in 1969, 1969 N.C. Sess. Laws Ch. 914, and again in 1977, 1977 N.C. Sess. Laws Ch. 1118. Obviously, in present form G.S. 8-53 no longer contains the phrase "the presiding judge of a superior court". However, this deletion would seem to be inconsequential to the rule of *Lockwood*. G.S. 8-53 allows the judge in his *discretion* to compel a physician to disclose information he obtained while attending his patient. The statute allows the judge to override the physician-patient privilege when he believes the proper administration of justice so requires. In order to protect the privilege from abusive treatment by those not directly involved in a case, it is important that only the trial judge, either at trial or prior to trial, be the one to order disclosure by a physician of privileged information. Only the actual trial judge is so involved in the case as to be able adequately to protect the rights of a party who asserts his privilege.

In the instant case, District Court Judge Walter H. Bennett issued the order of 30 November 1979 permitting defendant to take the depositions of Dr. Ranson and Dr. DuPuy. Judge Larry T. Black considered the evidence and granted defendant's motion for summary judgment on 23 May 1980. This procedure violated the rule of *Lockwood* in that the judge who rendered judgment in this matter and who was to preside at trial was not the one who ordered the taking of these depositions pursuant to G.S. 8-53.

Having found that the granting of defendant's motion for summary judgment was in error, the judgment of the court is reversed and the case is remanded for trial.

Reversed and remanded.

Judges VAUGHN and BECTON concur.

NAOMI WOODLEY GREEN v. WELLONS, INC., T/A ROSE MANOR SHOPPING CENTER

No. 8011SC705

(Filed 16 June 1981)

Negligence § 57.10— rocks in front of shopping center—fall of patron— sufficiency of evidence

In an action by plaintiff to recover damages for personal injuries she sustained when she fell on rocks from defendant's rock garden which had become scattered on the sidewalk of defendant's shopping center, the trial court erred in granting summary judgment for defendant where plaintiff alleged that defendant breached its duty to maintain the premises in a reasonably safe condition and alleged breach of duty to warn of hidden danger or unsafe condition and that rocks remained on the sidewalk for so long a time that defendant knew or should have known of the danger they presented to customers; defendant's own evidentiary material contained testimony from which a jury could find that the unsafe condition had existed for such time that defendant should have known of it; the production of an at the scene experiment deposition, during which defendant forced plaintiff to place the object or objects over which she fell in the location in which she fell and then to trace and retrace her steps and actions on the day of the fall in an effort to elicit testimony that on the day of the experiment she could see the objects when she looked for them, did not automatically entitle defendant to summary judgment, as plaintiff continued to insist that she did not see the rocks on the day of her fall until it was too late for her to avoid falling on them; and defendant presented no evidence that reasonable, prudent persons would have acted differently from plaintiff under the circumstances.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 28 April 1980, in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 February 1981.

Plaintiff filed an action to recover damages for personal injuries she sustained on 29 July 1977 when she fell on rocks from defendant's rock garden which had become scattered on the sidewalk of defendant's shopping center in front of Woodall's Department Store. Plaintiff alleged defendant breached its duty as premises owner to business invitees in several respects, and that defendant's negligence proximately caused her injuries.

Defendant denied plaintiff's allegations of negligence and pleaded her contributory negligence as a bar to plaintiff's claim. Defendant filed a motion for summary judgment supported by plaintiff's deposition and the affidavit of an employee of Woodall's

Department Store. Plaintiff filed the affidavit of another Woodall employee in response.

In summary plaintiff's deposition reveals the following concerning the events on the day of her fall. On 29 July 1977 plaintiff drove to defendant's shopping center and parked her car near the entrance to Woodall's Department Store approximately nine feet from the edge of the sidewalk. Defendant maintained in front of the entrance to Woodall's Department Store a rock garden five feet wide and twenty-seven feet long which contained smooth, light colored pebbles and shrubbery. As plaintiff walked from her car to the sidewalk she looked at the window of Woodall's where she saw a sign advertising a sale. When she got to the curb of the sidewalk, she looked down and stepped up onto the sidewalk. She continued to look down at the sidewalk as she walked toward the store entrance. After she had walked approximately six feet on the sidewalk she slipped and fell. Plaintiff described the incident, stating

> When I got on the sidewalk, I looked down, I always look down. I did not see the rocks. I didn't see the rock [sic] until I was right on top of them.
>
> . . . .
>
> I was looking down as I walked toward the store. The reason I was looking down was I was afraid of falling. I wear glasses and as to whether it is necessary for me to look down, I have bifocals and I have to look. On the day of the accident, when I got up on the curb, I was looking the entire time down at the sidewalk as I walked toward the store. . . . As to why I was unable to see the rocks until right before I stepped on them, they were the color of the sidewalk, they just blended in and I just did not see them until my foot was right on them. I tried to avoid them and my foot slipped and that is why I fell. I tried to avoid the rock.

Plaintiff suffered a hip fracture which required extensive medical treatment.

Defendant offered the affidavit of Ricky Vann Tart, an employee of Woodall's who was not present on the day of plaintiff's fall. He testified that shopkeepers swept the sidewalks in front of their stores approximately three times per week.

Children occasionally sprinkled the stones from the garden on the sidewalk, and he would place them back in the garden. Tart "felt the rocks and the sidewalk were similar in color but said he personally never had trouble seeing the rocks which were sprinkled on the sidewalk." He did not know of previous accidents or complaints involving maintenance or condition of the sidewalk in front of Woodall's.

Plaintiff filed the affidavit of another Woodall employee, Dwayne Batten. He testified that the rocks in defendant's garden in front of Woodall's were "tannish in color, causing them to blend into the sidewalk and [to become] difficult to see." He remembered having seen the rocks on the sidewalk throughout the month of July, 1977. He swept the sidewalk about once a week at the request of his employer but did not remember sweeping it the week of plaintiff's fall. Batten "noticed rocks on the sidewalk almost every day and felt the placement of the very long garden directly in front of the store caused some people to walk through the garden instead of around it, thereby scattering the rocks on the sidewalk." He saw people walk through the garden almost every day and saw children play in the garden. Batten never saw an employee of defendant sweep the sidewalk.

The trial court granted summary judgment for defendant. Plaintiff appeals.

Mast, Tew, Nall and Lucas, P.A., by George B. Mast, for plaintiff appellant.

Johnson, Patterson, Dilthy and Clay, by Ronald C. Dilthy and Alene M. Mercer, for defendant appellee.

WHICHARD, Judge.

The sole question presented is whether the trial court erred in granting summary judgment for defendant. The courts of this jurisdiction have stated repeatedly that summary judgment rarely is appropriate in cases involving negligence or contributory negligence. *See Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978) *review denied* 296 N.C. 736, 254 S.E. 2d 178 (1979); *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). In *Gladstein* the court stated, "The jury has generally been

recognized as being uniquely competent to apply the reasonable man standard. . . . Because of the peculiarly elusive nature of the term 'negligence', the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case." 39 N.C. App. at 174, 249 S.E. 2d at 829. *See also Page*, 281 N.C. at 706, 190 S.E. 2d at 194; *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979) (wherein the court admonished trial courts passing upon summary judgment in negligence cases to "remember that the purpose of summary judgment is not to provide a quick and easy method for clearing the docket").

The law places the burden on a movant for summary judgment to show (1) that no genuine issue of material fact exists, and (2) that the movant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Page*, 281 N.C. at 704, 190 S.E. 2d at 193. On motions for summary judgment, all pleadings, affidavits, answers to interrogatories, depositions, and other materials offered must be viewed in the light most favorable to the nonmovant. *Page*, 281 N.C. at 706, 190 S.E. 2d at 194. Once defendant moved for summary judgment, it had to establish, *first*, the absence of genuine issues of material fact. G.S. 1A-1, Rule 56. Defendant accepted as true, for purposes of the summary judgment motion, the facts revealed by a review of the materials before the court in the light most favorable to plaintiff. *Second*, defendant had to establish its right to judgment as a matter of law, either by demonstrating the non-existence of an essential element of each of plaintiff's claims of negligence or by presenting a defense to plaintiff's claims as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979); *Tolbert v. Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). Until defendant met its burden, plaintiff had no burden of producing a forecast of evidence in support of its claims. *Moore*, 296 N.C. at 470, 251 S.E. 2d at 422; *Durham*, 40 N.C. App. at 568, 253 S.E. 2d at 319; *see* 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Phillips Supp. 1970). *See also* Gordon, *The New Summary Judgment Rule In North Carolina*, 5 Wake Forest Intramural L. Rev. 87 (1969).

Application of the foregoing principles to the evidentiary matter presented demonstrates that defendant did not meet its burden and that the court thus erred in granting summary judgment. Defendant, as owner of the shopping center, had a duty to exercise ordinary care to maintain its premises in a reasonably

safe condition and to warn its business invitees of any hidden dangers or unsafe conditions of which it knew or in the exercise of reasonable supervision should have known. *Morgan v. Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877 (1966). Plaintiff alleged defendant breached its duty to maintain the premises in a reasonably safe condition in that it (1) constructed and maintained the rock garden in question, which garden constituted a dangerous obstruction of the passageways of defendant's shopping center; (2) filled the garden with rocks identical or similar in color to the surrounding sidewalk; (3) failed to fence the garden; (4) failed to construct a concrete walkway through the rock garden; (5) failed to inspect the sidewalk frequently; and (6) failed to sweep the sidewalk frequently. She alleged breach of the duty to warn of hidden danger or unsafe condition in that rocks remained on the sidewalk for so long a time that defendant knew or should have known of the danger they presented to customers. Absent a showing by defendant of lack of an essential element of each potential claim of negligence, or a showing by defendant of a defense as a matter of law to each, these allegations were sufficient to withstand the motion for summary judgment. *Tolbert*, 22 N.C. App. 491, 206 S.E. 2d 816.

The deposition of plaintiff filed by defendant tends to show that plaintiff was injured when she fell over stones on defendant's sidewalk. Defendant contends that plaintiff's injuries did not result from defendant's negligence. Defendant admits that it owed a duty to plaintiff, but asserts that it did not breach its duty. Defendant argues that there was no evidence before the trial court to show how the stones got on the sidewalk or whether the unsafe condition had existed for such time that defendant by the exercise of reasonable supervision should have known of its existence.

We note initially that upon defendant's motion for summary judgment, the burden was not on plaintiff to present evidence until defendant as movant produced its evidentiary material which tended to show that it was entitled to judgment as a matter of law. The burden was on defendant to produce evidence that the unsafe condition was not caused by its failure to use ordinary care. Defendant produced no evidence to refute plaintiff's allegations that the construction and maintenance of the rock garden, or the use of light colored stones, or the failure to fence the

garden or to construct a walkway through it constituted failure to use ordinary care to keep its premises safe. Defendant produced no evidence that it inspected its sidewalks or swept them frequently, or that its failure to do so did not amount to lack of ordinary care. The affidavit of Mr. Tart, filed by defendant, tends to show that rocks were frequently scattered on the sidewalk from the rock garden. Thus defendant's own evidentiary material contains testimony from which a jury could find that the unsafe condition had existed for such time that defendant should have known of it. The testimony of plaintiff, Mr. Tart and Mr. Batten indicated that the rocks upon which plaintiff fell came from defendant's rock garden. In summary, defendant failed to establish the absence of an essential element of any of plaintiff's negligence claims.

Defendant also argues that plaintiff's deposition testimony indicated plaintiff's contributory negligence as a matter of law. Plaintiff had the duty to exercise that care for her own safety which a reasonable and prudent person would exercise under the same circumstances. *See Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967). Defendant argues plaintiff breached her duty as a matter of law because she stated in her deposition, which was taken at the scene of plaintiff's fall under similar weather conditions at approximately the same time of year, that after she had picked out several rocks, had placed them on the sidewalk approximately where they were when she fell, had walked from the rocks to the place where she had parked her car on the day she fell and had looked back to the place where she had placed the rocks, she could *on that occasion* see the rocks. Evidence from experiments such as the one conducted by defendant while taking plaintiff's deposition are admissible if the conditions of the experiment correspond in all substantial particulars with those existing at the time and place of the disputed event. *Caldwell v. R.R.*, 218 N.C. 63, 10 S.E. 2d 680 (1940); *Arrowood v. R.R.*, 126 N.C. 629, 36 S.E. 151 (1900); *Cox v. R.R.*, 126 N.C. 103, 35 S.E. 237 (1900); *see* 1 Stansbury, N.C. Evidence § 94 at 304 (Brandis revision 1973). The credibility, probative force, and weight of such evidence is a matter for the jury to determine, however. *Arrowood*, 126 N.C. at 632, 36 S.E. at 152; 1 Stansbury, N.C. Evidence § 8 at 17 (Brandis revision 1973). On this ground alone the evidence should have gone to the jury. The production of an at the scene experiment

deposition, during which defendant forces the plaintiff to place the object or objects over which she fell in the location where she fell and then to trace and retrace her steps and actions on the day of the fall in an effort to elicit testimony that *on the day of the experiment* she can see the objects when she looks for them, will not automatically entitle defendant to summary judgment. Plaintiff here continued to insist that she did not see the rocks *on the day of her fall* until it was too late for her to avoid falling on them. This testimony raised a genuine issue of material fact.

Further, defendant presented no evidence that reasonable, prudent persons would have acted differently than plaintiff did under the circumstances. In fact, the only evidence as to how reasonable persons would have acted was the testimony of plaintiff. She stated that, while looking where she walked and watching out for her safety because she was afraid of falling, she was unable to see the rocks until she was almost on top of them; and that when she did see them she tried to avoid them. It remains for the jury to apply the standard of the reasonable, prudent person to determine whether plaintiff breached her duty to exercise ordinary care for her own safety. We cannot say *as a matter of law* that plaintiff did not act reasonably. *See Ballenger*, 38 N.C. App. 50, 247 S.E. 2d 287. Thus defendant did not meet its summary judgment burden by producing a defense to its negligence as a matter of law.

There is, then, evidence upon which reasonable persons could differ concerning whether each of the parties exercised reasonable care under the circumstances. Plaintiff thus is entitled to have the issues of defendant's negligence and her contributory negligence determined by a jury.

Reversed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

JAMES R. TAYLOR AND WIFE, EVA LOUISE TAYLOR v. WILLIAM G. BRIGMAN AND WIFE, FLOSSIE S. BRIGMAN; BEATRICE M. ALLEN AND HUSBAND, A. B. ALLEN; SEIVWERS CLONTZ, A/K/A SEIVWERS CISZEWSKI

No. 8028SC741

(Filed 16 June 1981)

1. **Rules of Civil Procedure § 56.5— summary judgment—findings of fact**

In ruling on a motion for summary judgment, the trial judge does not make findings of fact, since summary judgment is improper if findings of fact are necessary to resolve an issue as to a material fact.

2. **Adverse Possession § 17.1; Easements § 6.1— perscriptive easement—color of title—deeds not in defendants' chain of title**

In an action to establish a prescriptive easement in a right-of-way across defendants' lands, deeds relied on by plaintiffs to establish color of title to the right-of-way which were not in defendants' chain of title did not sufficiently afford defendants notice of plaintiffs' claim of right to the easement so as to overcome the presumption of permissive use and warrant the trial court's granting of summary judgment for plaintiffs as a matter of law.

APPEAL by defendants from *Griffin, Judge.* Judgment entered 20 May 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 March 1981.

Plaintiffs alleged in their complaint that defendants William G. Brigman and wife, Flossie S. Brigman, were owners of a certain tract of land in Limestone Township in Buncombe County, more particularly described as Lots Numbers 31 and 85, Ward 19, Sheet 45 of the tax records of Buncombe County. Plaintiffs claimed that they were entitled to a sixteen-foot right-of-way across the northern portion of defendants Brigman's property by virtue of record title. In the alternative plaintiffs alleged that they were entitled to continued use of this right-of-way over defendants Brigmans' property by virtue of a prescriptive easement.

Plaintiffs' complaint makes no mention of defendants Allen and Clontz except to say that each of those defendants owned specifically described separate parcels of land in the Limestone Township of Buncombe County, and that the disputed roadway also infringed upon defendants Allen and Clontz's land.

In October 1979 defendants Brigman filed an offer of judgment pursuant to G.S. 1A-1, Rule 68 in which they offered to

allow plaintiffs the portions of the disputed right-of-way which touched upon their property. The record does not reveal any notice of acceptance by plaintiffs of the Brigmans' offer of judgment.

Defendants Allen and Clontz answered denying every material allegation of plaintiffs' complaint and asking the court to dismiss the action.

On 7 May 1980 plaintiffs filed their motion for summary judgment alleging there was no genuine issue of material fact. When considering this motion the court had before it the pleadings, the affidavit of one James Dorn, and the stipulations of counsel. The affiant, James Dorn, testified that the disputed right-of-way used by plaintiffs was virtually the same right-of-way which had been used by the original grantee of the right-of-way, Joseph Selby, in 1936. Stipulations of counsel were filed on 12 May 1980.

Among other things, counsel stipulated the following:

> 3. That the Plaintiffs are entitled to a 16-foot right of way extending along the Northern boundary of the property described in Deed Book 469, Page 83, in the Office of the Register of Deeds for Buncombe County, North Carolina, by the following terms and language:
>
> > "This conveyance is made subject to a 16-foot right of way as now used for services of the Joseph Selby 7-acre tract extending along the Northern line of the property herein conveyed."
>
> . . .
>
> 6. No privity of title exists between Taylor—Ciszewski—Allen and Brigman—Ciszewski—Allen.

The court granted plaintiffs' motion for summary judgment. In its order the court made the following conclusions of law.

> 1. That all parties are properly before the Court and the Court has jurisdiction of the subject matter of this action.
>
> 2. That the Plaintiffs are entitled to a 16-foot right of way across the property of the Defendants by virtue of that right of way granted to the Plaintiffs and/or their predecessors in title in those instruments recorded in Deed Book 469, Page

83, and Deed Book 462, Page 487, recorded in the Office of the Register of Deeds for Buncombe County, North Carolina.

3. That the Plaintiffs are entitled to a 16-foot right of way by prescription under color of title by virtue of the aforesaid recorded instruments and the continual utilization of the driveway facilities since the year 1934.

It decreed that plaintiffs were entitled to the sixteen-foot wide right-of-way across defendants' land.

Defendants Allen and Clontz appealed from the court's order granting plaintiffs' motion for summary judgment.

Marvin P. Pope, Jr., for plaintiff appellees.

Lawrence T. Jones for defendant appellants Allen and Clontz.

Erwin, Winner, and Smathers, by James P. Erwin, Jr., for defendant appellees Brigman.

MORRIS, Chief Judge.

[1] The judgment was in the form of a judgment entered after a hearing before the court as a trier of facts. It found facts and based on those findings of fact, made conclusions of law. We have repeatedly called to the attention of trial judges and lawyers that the court does *not* find facts upon a motion for summary judgment. It is completely obvious that if the court must *find* facts in order to make conclusions of law, there must be issues of fact, and the case, therefore, is not one in which summary judgment will lie. Summary judgment will lie only in those cases where there *is no genuine* issue of material fact. Here the court found as a fact that "the utilization of the roadway by the Plaintiffs has not been permissive by the Defendants Beatrice M. Allen and husband, A. B. Allen, and Seivwers Clontz a/k/a Seivwers F. Ciszewski." There was no stipulation to this fact, and it is necessary to decision, the allegation having been denied by defendants.

The wording of the court's judgment is obscure as to what legal concepts it applied in its determination of the appealing defendants' case. The court's second conclusion of law in which it concluded that plaintiffs were entitled to the right-of-way across

defendants' property by virtue of grant to plaintiffs' predecessors in title contained in instruments recorded in Deed Book 469, page 83, and Deed Book 462, page 487, located in the office of the Buncombe County Register of Deeds must be exclusively applied to defendants Brigman. The deeds granting the right-of-way upon which the court based its conclusion are part of the record. These grants are connected only to the chain of title of the Brigman property. There is no evidence whatsoever that any such grants were ever made by the predecessors in title to either the Allen or Clontz properties. Furthermore, counsel for the parties stipulated that no privity of title existed between plaintiffs and defendants Allen and Clontz and defendants Brigman.

[2] The court must have applied the rationale of prescriptive easements to the facts applicable to defendants Allen and Clontz in making its judgment. Therefore, we must determine whether there was a genuine issue of any material fact relative to the question of whether plaintiffs had a prescriptive easement in the right-of-way where it invaded the property of defendants Allen and Clontz. The law with regard to the granting of prescriptive easements was summarized by Justice Huskins in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

> 1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. *Williams v. Foreman*, 238 N.C. 301, 77 S.E. 2d 499 (1953), and cases therein cited.
>
> 2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *Henry v. Farlow*, 238 N.C. 542, 78 S.E. 2d 244 (1954); *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946), and cases therein cited.
>
> 3. The use must be adverse, hostile, or under a claim of right. *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966); *Weaver v. Pitts*, 191 N.C. 747, 133 S.E. 2 (1926); *Mebane v. Patrick*, 46 N.C. 23 (1853). "To establish that a use is 'hostile' rather than permissive, 'it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.' [Citations omitted.] A 'hostile' use is simply a use of such nature and exercised under such circum-

stances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires, supra.* There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. *Boyden v. Achenbach, supra.* A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837 (1958); *Williams v. Foreman, supra.*

4. The use must be open and notorious. "The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence." *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912).

5. The adverse use must be continuous and uninterrupted for a period of twenty years. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946). "The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement." J. Webster, Real Estate Law in North Carolina § 288 (1971). An interruption to an easement for a right-of-way "would be any act, done by the owner of the servient tenement, which would prevent the full and free enjoyment of the easement, by the owner of the dominant tenement. . . ." *Ingraham v. Hough*, 46 N.C. 39 (1853).

6. There must be substantial identity of the easement claimed. *Hemphill v. Bd. of Aldermen*, 212 N.C. 185, 193 S.E. 153 (1937). "To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946).

284 N.C. at 580-81, 201 S.E. 2d at 900-01.

Defendants insist that a question of fact existed as to whether plaintiffs' use of the right-of-way was permissive, or was adverse, hostile or under a claim of right. We agree.

As stated in *Dickinson v. Pake*, supra, the law presumed that a use is permissive unless the contrary appears. *See also, Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837 (1958); *Henry v. Farlow*, 238 N.C. 542, 78 S.E. 2d 244 (1953); *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946). A mere permissive use of a way over another person's land, regardless of the length of time the use continues, cannot ever ripen into an easement by prescription. *Dickinson v. Pake, supra; Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966). Plaintiffs argue that the evidence established beyond question that plaintiffs had a claim of right to the right-of-way. They contend that the evidence of the claim of right was sufficient to overcome the presumption of permissiveness as a matter of law.

Plaintiffs contend that the language of the two deeds recorded in Deed Book 469, page 83, and Deed Book 462, page 487 in the office of the Register of Deeds of Buncombe County gave plaintiffs color of title to the roadway. Plaintiffs take the position that the element of color of title automatically gave them a claim of right to the right-of-way which was sufficient to establish their right to a prescriptive easement.

Plaintiff asks us to hold that where a party allegedly holds an easement under color of title, that in itself conclusively establishes as a matter of law that he holds that easement under a claim of right. This we refuse to do.

Hostile or adverse use is simply the use of an alleged easement under such circumstances as to manifest and give notice that the use is being made under claim of right. *Dickinson v. Pake, supra.* Notice to the owners of the subservient tenement of the existence of the allged easement is crucial to the concept of holding under a claim of right. Notice of a claim of right could be given in many different ways.

Holding under color of title might be one way of establishing such notice. However, it might not always be conclusive evidence, standing alone, that the landowner has received notice of a claim of right, especially in light of the presumption that the use was permissive.

In the present case the question of whether plaintiff held his easement under a claim of right was for the jury. Plaintiff

established his color of title to the right-of-way through two deeds in the chain of title to the Brigman property. There is no evidence of any out conveyances of such an easement in the chains of title of either the Allen or Clontz properties. The general rule with regard to the influence of muniments of title outside of one's own chain of title is as follows:

> A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. *Turner v. Glenn*, 220 N.C. 620, 18 S.E. 2d 197.

Morehead v. Harris, 262 N.C. 330, 340, 137 S.E. 2d 174, 184 (1964). Therefore, in this instance, we do not think that the deeds relied on by plaintiff sufficiently afforded defendants Allen and Clontz the notice of a claim of right that would be necessary to overcome the presumption of permissive use and warrant the court's granting summary judgment for plaintiff as a matter of law.

No other evidence of adverse or hostile use sufficient to show a claim of right is present except for the allegation of plaintiffs' complaint that they had neither asked for nor received permission to use the right-of-way, and that defendants had at times allowed branches and limbs to fall into the lane with the intent to discourage plaintiffs' use of the right-of-way.

In light of the presumption in cases of prescriptive easement that the use is permissive, we think that in this case this was a genuine issue of material fact that would have been best left to the jury. Therefore, we reverse the court's order granting summary judgment for plaintiff and remand this case to the Superior Court for trial.

Reversed and remanded.

Judges MARTIN (Robert M.) and WHICHARD concur.

CORNELIA CRANFORD KNOTT v. ROBERT NATHAN WINFRED KNOTT

No. 8019DC859

(Filed 16 June 1981)

1. Divorce and Alimony § 16.8— dependent spouse—comparison of expenses and income

There was no merit to defendant's contention that the trial court erred in finding plaintiff to be a dependent spouse and in awarding alimony because the evidence showed that plaintiff's income exceeded her expenses, since a mere comparison of plaintiff's expenses and income would be an improperly shallow analysis, and the record was sufficient to support a finding that plaintiff was without means to maintain her accustomed standard of living and thus qualified as a dependent spouse within the meaning of G.S. 50-16.1(3).

2. Divorce and Alimony § 16.9— sale of marital home—division of proceeds not supported by evidence

Where the trial court ordered defendant to pay permanent alimony, the court erred in ordering an unequal division of the net proceeds from the voluntary sale of the home owned by the parties as tenants by the entirety, though evidence introduced by plaintiff tended to show that she made the $10,000 down payment on the house, that defendant did not make any contribution, that the monthly house payment was $670 per month, and that plaintiff always paid $557 of the monthly house payment, since there were no findings of fact or conclusions of law in the judgment which would support an unequal division of the proceeds from the sale of the home; the only finding of fact with regard to the amount of alimony stated that plaintiff wife was in need of and defendant was able to pay $200 per month alimony; and there were no findings of fact or conclusions regarding a property settlement.

3. Divorce and Alimony § 16.9— alimony award—lump sum amount—insufficiency of findings

The trial court erred in granting plaintiff permanent alimony in the lump sum of $4600, which represented the amount of a joint obligation of the parties to a bank, and the lump sum amount of $218, which represented the amount of plaintiff's dental bill, since the awards were not supported by findings of fact or conclusions of law but were in fact contradicted by them.

4. Divorce and Alimony § 18.16— counsel fees—award proper

The trial court did not err in awarding counsel fees to plaintiff where the trial court properly found her to be a dependent spouse, and it was clear from the evidence that plaintiff would have been entitled to alimony pendente lite and, that as a result, counsel fees were properly awarded to her.

5. Divorce and Alimony § 24.1— child support—determination of amount

The trial court did not err in ordering defendant to pay $550 per month for the support and maintenance of the parties' two children, as well as the children's medical and dental expenses, since plaintiff introduced competent evidence which tended to show that she had monthly expenses of $1,628.66,

$591.66 of which was attributable to herself, thus implicitly establishing the children's expenses at $1,037 per month; defendant's expenses were established pretty much as he testified; and the court found and concluded that defendant could pay $550 per month child support, and that plaintiff was entitled to an award for that amount.

APPEAL by defendant from *Grant, Judge.* Judgment entered 21 March 1980 in District Court, RANDOLPH County. Heard in the Court of Appeals 30 March 1981.

The parties were married in 1970. Defendant husband was a widower with two children. To the union of the parties, two children were born. The parties separated in 1979.

In her complaint, wife alleged that defendant husband deserted her on 20 May 1979. Wife further alleged indignities and that husband had failed to support her and the parties' children in the manner of which he was capable. Wife prayed, among other things, for reasonable subsistence for her and the two children pending trial, alimony without divorce, counsel fees, custody of and support for the parties' two children and possession of the parties' home.

The matter was tried on the merits and, at the conclusion of the evidence, the trial court ruled in wife's favor. The trial court found wife to be a dependent spouse and, as permanent alimony, awarded her $200 per month. From the sale of the parties' home $16,306.76 of the $24,306.76 net proceeds was awarded to wife as permanent alimony and, as further alimony, husband was ordered to pay two joint promissory notes and wife's outstanding dental bill. In addition, the trial court ordered defendant to pay $550 per month child support for the parties' two children, as well as all of the children's medical and dental bills. Husband was also ordered to pay $1,200 in attorney fees to wife's attorneys. Defendant appealed from the judgment.

Miller & Miller, by Michael C. Miller, for plaintiff appellee.

Bell & Brown, by Deane F. Bell; and Tate & Bretzmann, by C. Richard Tate, Jr., for defendant appellant.

HILL, Judge.

[1] In his first assignment of error, defendant husband argues that where the evidence shows that wife's income exceeds her ex-

penses, the trial court erred in finding wife to be a dependent spouse and awarding alimony. Husband's argument is without merit.

G.S. 50-16.2 provides that only a "dependent spouse" is entitled to alimony when one of the enumerated grounds in that statute is present. In the case *sub judice*, the trial court found that defendant husband abandoned plaintiff wife. Husband excepted to the finding, but has not brought forth his exception on appeal. The crucial question becomes then whether plaintiff wife is a "dependent spouse."

G.S. 50-16.1(3) states that a spouse is dependent when either he or she is "*actually substantially dependent* upon the other spouse for his or her *maintenance and support* or is *substantially in need* of maintenance and support from the other spouse." (Emphasis added.) Defendant husband argues that because wife has a monthly income of $850 and expenses of only approximately $600 per month she is not dependent. Defendant's argument is without merit.

The Supreme Court in *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), supplies a detailed analysis of the definition of a dependent spouse. The first phrase of G.S. 50-16.1(3) defines a "dependent spouse" as one who is *actually substantially dependent* upon the other spouse for *maintenance and support.* The Court held that the term "actually substantially dependent"

> implies that the spouse seeking alimony must have actual dependence on the other *in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation. Id.* at p. 180.

In order to qualify as a dependent spouse under the first phrase of the statute, plaintiff wife must show that she is "actually without means of providing for . . . her accustomed standard of living." *Id.*

The Court went on to find that the phrase "maintenance and support" "clearly means more than a level of mere economic survival." *Id.*, at p. 181. The phrase "contemplates the economic standard established by the marital partnership" during the years the marriage was intact. "It anticipates that alimony, to the ex-

tent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed." *Id.*

The second phrase of G.S. 50-16.1(3) defines a "dependent spouse" as one who is *substantially in need of* maintenance and support. The determination that a plaintiff wife is dependent under this second phrase requires only that plaintiff establish that she would be unable to maintain her accustomed standard of living, established prior to separation, without financial contribution from defendant husband. *Id.*, p. 181-82.

It is clear then that a mere comparison of plaintiff's expenses and income is an improperly shallow analysis. Instead, we use the analysis set forth in *Williams* in order to determine whether plaintiff is a dependent spouse. Using that analysis, we have reviewed the record and find that plaintiff is without means to maintain her accustomed standard of living and thus qualifies as a dependent spouse under the phrase "actually substantially dependent." *Williams*, at p. 183. *Also see* G.S. 50-16.1(3). Defendant's first assignment of error is without merit and overruled.

Defendant argues in his second assignment of error that in ordering him to pay permanent alimony, the trial court erred in ordering an unequal division of the net proceeds from the voluntary sale of the home owned by the parties as tenants by the entirety and by ordering defendant husband to pay two joint promissory notes and plaintiff wife's dental bill.

[2] We first address the division of proceeds from the sale of the marital home. In paragraph 3(b) of the trial court's award, the court ordered defendant husband to transfer to plaintiff wife all of his interest in the net proceeds from the sale of the home owned by the parties as tenants by the entirety, with the exception of $8,000. The parties stipulated that their home had indeed been sold and that $24,306.76 was available for distribution. Evidence introduced by plaintiff wife *tends* to show that she made the $10,000 down payment on the house; that defendant did not make any contribution that the monthly house payment was $670 per month; and that plaintiff wife has always paid $557 of the monthly house payment.

There are, however, no findings of fact or conclusions of law in the judgment which would support an unequal division of the

proceeds from the sale of the home. The only finding of fact *with regard to the amount of alimony* states that plaintiff wife is in need of, and the defendant is able to pay, $200 per month alimony. There are no findings of fact or conclusions regarding a property settlement although the evidence and pleadings could support such findings and conclusions. Consequently, we remand the case to the trial court for appropriate findings of fact on this point.

[3] We next address defendant's exception to that portion of the trial court's award granting plaintiff wife permanent alimony in the lump sum amount of $4,600. Finding of Fact (6) states that the parties have a joint obligation to the First National Bank in the amount of $4,600. Defendant's evidence that the obligation was incurred for the payment of *family* expenses supports the finding. There are, however, no findings of fact or conclusions of law that would support payment of the $4,600 as permanent alimony. In fact, the trial court's conclusion that $200 per month is "fair and just to both parties at this time" contradicts his award of $4,600 as alimony.

There is evidence that could support findings of fact and conclusions that defendant is responsible for the $4,600 consistent with his duty to support his family. Consequently, we remand the case to the trial court for appropriate findings on this point. *See In re Burrus*, 275 N.C. 517, 535, 169 S.E. 2d 879 (1969); *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759 (1955).

Finally, we address defendant's exception to that portion of the trial court's order granting permanent alimony in the lump sum amount of $218 as payment of plaintiff's dental bill. The award is not supported by the findings of fact or conclusions of law and is in fact contradicted by them. Finding of Fact (6) does support an award to plaintiff, however, on the basis of defendant's duty to support her, and we remand the case on this point with the direction that the award be classified as a reimbursement of expenses rather than as alimony.

[4] In his third assignment of error, defendant argues that the trial court erred in awarding counsel fees to the wife. Defendant's assignment of error is without merit and overruled.

The clear and unambiguous language of G.S. 50-16.3 and G.S. 50-16.4 provide as prerequisites for determination of an award of counsel fees that the spouse requesting the award be dependent, entitled to the relief demanded and have insufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972); *Therrell v. Therrell*, 19 N.C. App. 321, 198 S.E. 2d 776 (1973). We have already stated that the trial court did not err in finding plaintiff to be a dependent spouse. Clearly, defendant was entitled to that which she sought in her complaint.

The only issue that has not been answered is whether plaintiff had insufficient means whereon to subsist *during* the prosecution of the suit *and* to defray the necessary expenses thereof. The findings of fact, which are supported by competent evidence, show that during the prosecution of the suit plaintiff spent $1,628.66 each month to support herself and the parties' two children. Furthermore, plaintiff incurred an obligation to her attorneys of over $1,200. Plaintiff's income during the prosecution of the suit was $850 per month, and there is evidence that she received $200 per month from defendant during the prosecution of the suit. From these facts, we find it to be clear that plaintiff would have been entitled to alimony pendente lite and, that as a result, counsel fees were properly awarded to her.

[5] In his final assignment of error, defendant argues that the portion of the trial court's judgment ordering him to pay $550 per month for the support and maintenance of the parties' two children, as well as the children's medical and dental expenses, is not supported by competent evidence of the children's needs, sufficient findings of fact, or sufficient conclusions of law. Defendant's assignment of error is without merit and overruled.

Plaintiff introduced competent evidence which tended to show that she had monthly expenses of $1,628.66. Of those expenses $1,037 was attributable to the parties' children and classified into such categories as food, clothing, medical and dental expenses, educational expenses, rent, heat and water. Finding

of Fact (7) establishes plaintiff's expenses as $1,628.66 per month, $591.66 of which is attributable to herself, thus implicitly establishing the children's expenses at $1,037 per month. The trial court goes on in its findings of fact to establish defendant's expenses pretty much as he testified; to find and conclude that defendant can pay $550 per month child support; and to conclude that plaintiff is entitled to an award for that amount. The evidence, findings of fact, and conclusions of law are clearly sufficient to support the trial court's award for the support and maintenance of the children.

For the reasons stated above in our discussion of defendant's second assignment of error, the case must be remanded in order that the trial court might strike paragraphs (3)(b) and (c) of its award. The court is instructed to dispose of the items mentioned in those subsections in a manner consistent with this opinion.

Affirmed in part and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

SOUTHERN OF ROCKY MOUNT, INC. v. WOODWARD SPECIALTY SALES, INC.; INGERSOLL-RAND COMPANY; AND EMERSON ELECTRIC COMPANY

No. 8010SC557

(Filed 16 June 1981)

1. Sales § 17.2; Uniform Commercial Code § 12— action for breach of implied warranty—no fatal variance between testimony and allegations

In an action for breach of implied warranty of merchantability and fitness for latent defects in an air compressor which allegedly caused a fire in plaintiff's machine shop, testimony by plaintiff's expert witness that in his opinion the fire originated in the terminal box of the air compressor and resulted from an arc across a broken or separated electrical connection did not constitute a fatal variance from allegations in plaintiff's complaint that the fire originated in the control box of the motor drive unit since plaintiff's allegations of latent defects sufficiently raised the issue of breach of implied warranty, the testimony tended to establish the existence of a latent defect and related to the issue of breach of implied warranty, and it thus did not raise an issue not pleaded.

2. Trial § 3.2— motion for continuance—surprise by testimony

The trial court did not abuse its discretion in the denial of defendant's motion for continuance based on alleged surprise as to the testimony of an expert witness where the testimony related to an issue raised by the complaint, and defendant utilized none of the available methods of discovery to obtain greater specificity from plaintiff regarding its allegations.

3. Uniform Commercial Code § 12— breach of implied warranty of merchantability—elements of proof

To present a prima facie case of breach of implied warranty under G.S. 25-2-314 plaintiff must produce any evidence more than a scintilla (1) that an implied warranty covered the goods in question, (2) that the seller breached the warranty in that the goods were not merchantable at the time of sale, and (3) that the breach proximately caused the injury and loss sustained by plaintiff.

4. Uniform Commercial Code § 13— implied warranty—goods not physically passing from defendant to plaintiff

There was no merit to defendant's contention that no implied warranty arose in the sale of an air compressor to plaintiff because the compressor was shipped to plaintiff's plant directly from the manufacturer's factory and did not physically pass from defendant to plaintiff where the evidence showed that defendant had title to the compressor and that it contracted to pass title to plaintiff, since the implied warranty arose upon a contract for sale, and the fact that the compressor did not pass through defendant's warehouse did not render the transaction something other than a contract for sale. G.S. 25-2-314(1).

5. Uniform Commercial Code § 13— goods not merchantable—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury to find breach of the implied warranty of merchantability of an air compressor sold by defendant to plaintiff where plaintiff's expert witness stated his opinion that there was a defect in the connection of the service wire to the motor wire inside the terminal box of the compressor, which could have been aggravated by the vibration of the machine over a two year period of almost continuous operation, and that the vibration itself could have caused fatigue at any point where two wires connected, and plaintiff offered evidence from several witnesses that the terminal box was a closed system and that no one had tampered with or altered any of the electrical wiring of the compressor between the time of sale and the time the compressor caught on fire.

6. Uniform Commercial Code § 13— breach of implied warranty—proximate cause and resultant loss

In an action for breach of implied warranty for latent defects in an air compressor which allegedly caused a fire in plaintiff's machine shop, plaintiff's evidence was sufficient to show that the defect was the proximate cause of the fire and the resultant loss where an expert witness testified that in his opinion the fire started as a consequence of electrical arcing across a separated or broken connection between the two wires in the terminal box, and that such

broken connection resulted from a defect in the wiring or the vibration of the compressor or both, plaintiff's general manager testified that the fire completely destroyed plaintiff's shop, and plaintiff introduced a list of materials and machinery lost with their values before and after the fire.

7. **Sales § 18; Uniform Commercial Code § 13— action for breach of warranty of merchantability—instruction on abuse of goods by buyer**

In an action for breach of warranty of merchantability of an air compressor, the trial court did not err in refusing to give defendant's requested instruction that the jury could consider evidence that plaintiff had abused the goods and not properly maintained them as a reasonably prudent person would do in determining whether defendant breached its implied warranty of merchantability where there was no evidence that plaintiff had abused the air compressor or that plaintiff failed properly to maintain it.

8. **Sales § 18; Uniform Commercial Code § 13— breach of warranty of merchantability—age of product—no improper comment by court**

In an action for breach of warranty of merchantability of an air compressor in which the jury foreman asked the court whether "there are time limits or any time frame at all attached to an implied warranty," the trial court's response, "In this case there is no applicable time limit and you need not concern yourself with that," did not imply that the jury could not consider the age of the product in determining whether the defect complained of existed at the time of sale.

APPEAL by defendant from *Herring, Judge.* Judgment entered 25 January 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 7 January 1981.

Plaintiff processes peanut oil and cotton seed oil and uses compressed air in its manufacturing process. Defendant Woodward Specialty Sales, Incorporated (hereafter defendant)[1] sells and services industrial air compressors. In June 1974 plaintiff purchased an air compressor from defendant. This air compressor was shipped to plaintiff and placed in operation at plaintiff's place of business in the autumn of 1974. Plaintiff used the air compressor regularly in its business operations until 2 August 1976 when a fire destroyed plaintiff's machine shop and everything in it.

1. Plaintiff also sued defendants Ingersoll-Rand Company, the manufacturer of the air compressor, and Emerson Electric Company, the manufacturer of a component part. Plaintiff voluntarily dismissed its claims against the two manufacturers, and the case went to the jury solely on the issue of Woodward's breach of warranty.

Plaintiff sued defendant for breach of implied warranty of merchantability and fitness and for negligent maintenance of the air compressor. The complaint alleged that latent defects present in the air compressor at the time of sale caused the fire in plaintiff's machine shop. Defendant answered admitting that plaintiff purchased the air compressor from it, denying that the air compressor was covered by implied warranties, and denying that it breached any implied warranties or that the air compressor contained any latent defects at the time of sale which caused the fire complained of. Defendant conducted no discovery.

After plaintiff's evidence defendant moved for directed verdict. The court granted the motion as to the negligence claim but denied it as to the breach of implied warranty claim. Defendant then moved for a continuance, and the court denied the motion. The court also denied defendant's motion for directed verdict at the close of its evidence. The jury returned a verdict for plaintiff on the issue of breach of implied warranty. After denying defendant's motions for judgment notwithstanding the verdict and new trial, the court entered judgment on the verdict. Defendant appeals.

Brenton D. Adams and Blanchard, Tucker, Twiggs, Denson and Earls, by Charles F. Blanchard, for plaintiff appellee.

Harris, Cheshire, Leager and Southern, by Samuel O. Southern, for defendant appellant, Woodward Specialty Sales, Incorporated.

WHICHARD, Judge.

[1] Defendant contends that the testimony of plaintiff's expert mechanical engineer, Dr. Carl F. Zorowski, constituted a material variance from the allegations of plaintiff's complaint and therefore that the court erred in (1) refusing to limit his testimony, (2) denying defendant's motion for continuance, and (3) denying defendant's motions for directed verdict, judgment notwithstanding the verdict, and new trial. Dr. Zorowski testified that in his opinion the fire which destroyed plaintiff's shop originated in the terminal or juncture box of the air compressor and resulted from an arc across a broken or separated electrical connection. Defendant argues that the witness' testimony constitutes a fatal variance from the allegations in plaintiff's com-

plaint that the fire originated in the control box of the motor drive unit of the air compressor.

The enactment of the North Carolina Rules of Civil Procedure, especially Rule 15(b), virtually "destroy[ed] the former strict code doctrine of variance." *Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E. 2d 721, 726 (1972); *see* Note, 12 Wake Forest U.L. Rev. 405 (1976). Rule 15(b) provides for amendment of the pleadings by express or implied consent "[w]hen issues not raised by the pleadings are tried." G.S. 1A-1, Rule 15(b). The need for amendment does not arise, however, unless the evidence raises *issues* not pleaded. Under the notice theory of the Rules, pleadings need not contain detailed factual allegations to raise issues. G.S. 1A-1; Rule 8, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Although plaintiff did allege that the fire originated "in the control box of the motor drive unit for the . . . air compressor," plaintiff also alleged that the air compressor was neither merchantable nor fit for the particular purpose for which plaintiff purchased it, because it contained "latent defects," and "because of the absence of proper safety devices." Under the notice pleading theory of Rule 8(a)(1), plaintiff's allegations of latent defects sufficiently raised the issue of breach of implied warranty. G.S. 1A-1, Rule 8(a)(1); *see Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971); G.S. 25-2-314. Dr. Zorowski's testimony tended to establish the existence of a latent defect. The testimony related to the issue of breach of the implied warranty. It thus did not raise an issue not pleaded, and the court did not err in admitting the testimony or in denying defendant's motion based on material variance.

[2] Rulings on motions to continue rest in the discretion of the trial court and will not be reversed absent abuse of discretion. *Wood v. Brown*, 25 N.C. App. 241, 212 S.E. 2d 690 *review denied* 287 N.C. 469, 215 S.E. 2d 626 (1975). Dr. Zorowski's testimony related to an issue raised by the complaint. Defendant utilized none of the available methods of discovery to obtain greater specificity from plaintiff regarding its allegations. Under these circumstances we find no abuse of discretion in the denial of defendant's motion to continue based on alleged "surprise" as to this testimony.

[3] Defendant contends the court should have granted its motions for directed verdict, judgment notwithstanding the verdict and new trial for one or more of the following reasons: (1) plaintiff failed to show a "sale" by defendant to plaintiff of the air compressor and therefore no implied warranties could have arisen; (2) plaintiff failed to show that a defect existed at the time of sale; or (3) the evidence was too speculative to go to the jury. The court properly denied the motions for directed verdict and judgment notwithstanding the verdict if, when it viewed the evidence in the light most favorable to plaintiff and gave plaintiff the benefit of all reasonable inferences, it found " 'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements." 2 McIntosh, N.C. Practice and Procedure § 1488.15 (2d ed. Phillips Supp. 1970); *see also Gwyn v. Motors, Inc.*, 252 N.C. 123, 127, 113 S.E. 2d 302, 305 (1960). To present a prima facie case of breach of implied warranty under G.S. 25-2-314 plaintiff must produce any evidence more than a scintilla (1) that an implied warranty covered the goods in question, (2) that the seller breached the warranty in that the goods were not merchantable at the time of sale, and (3) that the breach proximately caused the injury and loss sustained by plaintiff. G.S. 25-2-314; 25-2-607(4); *Rose v. Motor Sales*, 288 N.C. 53, 60-61, 215 S.E. 2d 573, 577-578 (1975); *Cockerham v. Ward* and *Astrup Co. v. West Co.*, 44 N.C. App. 615, 624-625, 262 S.E. 2d 651, 658 *review denied* 300 N.C. 195, 269 S.E. 2d 622 (1980).

[4] As to the first element, "[u]nless excluded or modified (§25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." G.S. 25-2-314(1). In its answer, defendant admitted that it was a corporation engaged in the business of wholesale and retail selling of air compressors, thereby admitting that it was both a "seller" and a "merchant" of air compressors. *See* G.S. §§ 25-2-103(1)(d); 25-2-104(1); 25-1-201(28) and (30). Defendant argues no implied warranty arose as between it and plaintiff because the air compressor in question was shipped to plaintiff's plant directly from the manufacturer's factory and did not physically pass from defendant to plaintiff. G.S. 25-2-314(1) does not require a physical passing of goods from seller to buyer, however. The implied warranty arises upon a "contract

for . . . sale." G.S. 25-2-314(1).[2] Defendant admitted that the manufacturer "sold" the air compressor in question to defendant and thus that defendant acquired title to it. *See* G.S. 25-2-106. Defendant also admitted that plaintiff purchased the compressor from it and that it billed plaintiff for the unit. Plaintiff's witness, Burton Edward Walkup, an employee of defendant, testified that he and a representative of plaintiff engaged in extensive discussions in 1973 and 1974 concerning the sale by defendant to plaintiff of an air compressor, and that in the spring of 1974 he and plaintiff's representative reached an agreement regarding the sale of the "Pac Air 60" compressor in question for a purchase price of $7,135.00. The fact that the compressor did not pass through defendant's warehouse, but was shipped directly from the manufacturer's factory to plaintiff, does not render the transaction something other than a contract for sale. Defendant had title to the compressor, and the evidence indicated that it contracted to pass title to plaintiff. Plaintiff's evidence indicated that defendant made no express warranties to plaintiff concerning the air compressor, and therefore that the parties did not exclude or modify the 25-2-314 implied warranty. *See* G.S. 25-2-316. Viewed in the light most favorable to plaintiff, the evidence and admissions indicate that an implied warranty of merchantability covered the air compressor which plaintiff purchased.

[5] As to the second element, breach of the implied warranty, plaintiff must offer evidence that the goods in question were not merchantable at the time of sale. *Rose*, 288 N.C. at 61, 215 S.E. 2d at 578; *Cockerham*, 44 N.C. App. at 625, 262 S.E. 2d at 658. Plaintiff can establish lack of merchantability by showing, *inter alia*, that the goods were not fit for the ordinary purpose for which such goods are purchased because they contained a defect at the time of sale. G.S. 25-2-314(2)(c). Plaintiff's witness, Dr. Zorowski, testified that in his opinion there was a defect in the connection of the service wire to the motor wire inside the terminal or juncture box of the compressor, which could have been aggravated by the vibration of the machine over the two year period of almost continuous operation of the compressor. He also testified that the vibration itself could have caused fatigue at any point where two

2. " 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price (§25-2-401)." G.S. 25-2-106.

wires connected. Plaintiff offered evidence from several witnesses that the terminal box was a closed system, and that no one had tampered with or altered any of the electrical wiring of the compressor between the time of sale and the fire. Viewed in the light most favorable to plaintiff, this evidence indicates breach of the implied warranty of merchantability, in that from it the jury could find existence of a defect at the time of sale and thus lack of fitness for the ordinary purpose for which air compressors are used.

[6] As to the third element, that of proximate cause, Dr. Zorowski testified that in his opinion the fire started as a consequence of electrical arcing across a separated or broken connection between two wires in the terminal box, and that such broken connection resulted from a defect in the wiring or the vibration of the compressor or both. His testimony, viewed in the light most favorable to plaintiff, established as the proximate cause of the fire the alleged defect in or unfitness of the air compressor. Plaintiff's vice president and general manager at the time of the fire testified that the fire completely destroyed plaintiff's shop. He testified that after the fire he supervised an inventory of the shop and the compilation of a list of materials and machinery lost with their values before and after the fire. Plaintiff introduced the list into evidence. Plaintiff's evidence thus indicates both proximate cause and the resultant loss.

A jury could find from the evidence produced each essential element of breach of implied warranty by defendant. The evidence was in no way "too speculative" to allow the jury to decide the question of defendant's liability and the resultant damages. Defendant produced no evidence which negated an element of breach of implied warranty as a matter of law. Therefore, the court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict.

The ruling on defendant's motion in the alternative for a new trial rested within the discretion of the trial court. The appellate court will not reverse the action of the trial court as to a matter in its discretion absent an abuse of discretion. *Coppley v. Carter*, 10 N.C. App. 512, 515, 179 S.E. 2d 118, 120 (1971). We find no abuse of discretion in the court's denial of defendant's motion for new trial.

[7] Defendant's final contentions related to the court's instructions to the jury. Defendant argues the court erred in not instructing the jury, as requested, that it could consider evidence offered by defendant that plaintiff had "abused the goods and . . . not properly maintain[ed] the goods as a reasonably prudent person would do" in determining whether defendant breached its implied warranty of merchantability. A court may refuse a requested instruction if the evidence does not support it. *Jordan v. Storage Co.*, 266 N.C. 156, 161, 146 S.E. 2d 43, 47 (1966). Defendant did not offer evidence that plaintiff had "abused" the air compressor or that plaintiff failed properly to maintain the motor components of the compressor. Plaintiff's evidence indicated that the maintenance manual, which accompanied the machine, did not recommend any maintenance procedures for the internal electrical system of the machine and that the electrical system had not been tampered with. Defendant produced no evidence to the contrary. We thus find no error in the court's refusal to give the requested instruction.

[8] After the jury retired it returned to the courtroom with questions. The following interchange occurred.

> THE FOREMAN: . . . I believe there will be another question as to whether there are time limits or any time frame at all attached to an implied warranty.
>
> THE COURT: In this case there is no applicable time limit and you need not concern yourself with that.

Defendant contends the court's response misled the jury to defendant's prejudice by implying that the jury could not consider the age of the product in determining whether the defect complained of existed at the time of sale. We disagree. The jury's question and the court's answer, examined in context, indicate that the jury questioned whether implied warranties, like many express warranties, terminated after a given time. The answer in no way implied that the jury should not consider the age and condition of the machine in determining whether defendant breached its implied warranty of merchantability.

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

VIRGINIA B. LALANNE v. JAMES F. LALANNE

No. 8015DC1113

(Filed 16 June 1981)

1. **Husband and Wife § 11.2— separation agreement—admissibility of parol evidence**

The trial court did not err in admitting as evidence, over objection, correspondence and testimony regarding negotiations between the parties leading to a contract of separation, since the agreement was ambiguous with respect to the payment of ad valorem taxes, and the challenged evidence was admissible for the purpose of determining the true intent of the parties with respect to who was responsible for the payment of the county taxes.

2. **Husband and Wife § 11.2— payment of ad valorem taxes—construction of separation agreement**

The trial court did not err in finding that defendant was obligated under a separation agreement executed by the parties to pay all the ad valorem taxes on the home of the parties where the agreement itself stated that defendant was to pay all ad valorem taxes on the house; on two occasions defendant told plaintiff that he understood he was to pay all the taxes on the property; and defendant paid all the ad valorem taxes on the property for the years 1971 through 1977.

3. **Husband and Wife § 11.2— separation agreement—alimony arrearage**

The trial court's finding that defendant was obligated to pay an alimony arrearage of $18,200 plus interest as required by the parties' separation agreement was supported by the evidence, and though defendant sent plaintiff a bank check for the $18,200, by defendant's failure to include interest payable on the arrearage, his tender of the check did not constitute payment of the arrearage. G.S. 24-5.

4. **Husband and Wife § 11.2— separation agreement—procurement of life insurance—specific performance proper**

The trial court did not err in ordering specific performance of a provision of the parties' separation agreement requiring defendant to procure and keep in effect a policy of life insurance for the benefit of plaintiff, and there was no merit to defendant's contention that plaintiff should wait until the death of defendant and then make claim upon his estate.

APPEAL by defendant from *Paschal, Judge.* Judgment filed 26 June 1980 in District Court, ORANGE County. Heard in the Court of Appeals 7 May 1981.

In this action plaintiff alleged that defendant breached a separation agreement executed by the parties in 1971. Plaintiff sought to recover arrearages in alimony payments and expenses

incurred for repairs to the house owned by the parties. She additionally asked for specific performance of a provision of the contract requiring defendant to provide plaintiff with a life insurance policy on his life. Defendant's answer denied the material allegations of plaintiff's complaint and asserted a counterclaim for taxes paid by defendant upon the homeplace.

At the hearing, plaintiff produced evidence in support of her claims. Defendant did not offer evidence. The trial judge entered judgment finding facts and making conclusions of law. He ordered defendant to pay the alimony arrearages plus interest, to reimburse plaintiff for the repair expenses, and to pay plaintiff the amounts due as taxes. He further required defendant to specifically perform the provision of the contract relating to the life insurance policy. Defendant appeals.

Nichols, Caffrey, Hill, Evans & Murrelle, by William D. Caffrey and Everett B. Saslow, Jr., for plaintiff appellee.

Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., for defendant appellant.

MARTIN (Harry C.) Judge.

[1] Defendant argues four questions on appeal. He first contends the court erred in admitting as evidence, over objection, correspondence and testimony regarding negotiations between the parties leading to the contract of separation. The parol evidence rule provides generally that any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally, are superseded and made legally ineffective by the writing, and evidence of the earlier transactions is inadmissible. 2 Stansbury's N.C. Evidence § 251 (Brandis rev. 1973). However, if the court finds the contract, or provisions thereof, to be ambiguous, evidence of prior negotiations is admissible to show the intent of the parties. *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968); *Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E. 2d 707 (1976).

Defendant argues that the contract clearly does not obligate him to pay the Orange County taxes on the home of the parties in Chapel Hill. It is apparent that the provision in question, paragraph 9 of the contract, is ambiguous with respect to the payment of ad valorem taxes.

> 9. The parties hereto agree to file joint income tax returns for so long as they are permitted by law to do so. Upon the rendering of any judgment of absolute divorce between the parties, said party of the second part [Virginia] will pay all income and property taxes on her own income, including the alimony payments provided for herein, and will pay the ad valorem taxes on the real estate above-described with the exception of the Chapel Hill ad valorem taxes mentioned above.

The ambiguity is compounded when paragraph 9 is read with paragraph 6(b), the only paragraph relating to ad valorem taxes on the Chapel Hill property.

> 6. At the time of the entering into of this agreement the parties hereto are at the present time owners as tenants by the entirety of a certain piece of property located in Orange County, North Carolina, and known and referred to as 907 Arrowhead Road, Chapel Hill, North Carolina. At the present time the party of the second part is residing in said homeplace.
>
> . . . .
>
> (b) During the term of this agreement and for so long as the above-described property continues to be held as tenants by the entirety with the party of the second part having full possession, use and control of said home, the party of the second part [Virginia] shall be responsible for the payment of all utilities and general upkeep of the home and all repairs for less than One Hundred Dollars ($100.00). The party of the first part [Jim] shall pay all ad valorem taxes due on the house as well as insurance.

As the writing leaves the meaning of the agreement uncertain, we hold the court did not err in admitting the challenged evidence for the purpose of determining the true intent of the parties with respect to who was responsible for the payment of the county taxes.

[2] Next, we consider whether the court was correct in ruling that the contract required defendant to pay the Orange County taxes on the homeplace. Defendant introduced no evidence with respect to this issue, which involves his counterclaim. The record

contains ample evidence to support the findings of fact sustaining this conclusion of law by the court. *In re Foreclosure of Deed of Trust*, 41 N.C. App. 563, 255 S.E. 2d 260, *disc. rev. denied*, 298 N.C. 297 (1979). The agreement itself states that defendant is to pay *all* ad valorem taxes on the house. Plaintiff testified that defendant told her shortly after their separation that he understood he was to pay all the taxes on the property. Again, in 1980, defendant said he knew he was to pay all the taxes, but he just wanted to get a settlement. Defendant does not deny that he paid all the taxes on the property for the years 1971 through 1977. Such evidence of statements and conduct by the parties after executing a contract is admissible to show intent and meaning of the parties. *Cordaro v. Singleton, supra.* "The conduct of the parties in dealing with the contract indicating the manner in which they themselves construe it is important, sometimes said to be controlling in its construction by the court." *Bank v. Supply Co.*, 226 N.C. 416, 432, 38 S.E. 2d 503, 514 (1946). The opinion of the great Chief Justice Stacy in *Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931), expounds on this rule and, in summation, reads:

> Finally, we may safely say that in the construction of contracts, which presents some of the most difficult problems known to the law, no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements.

Id. at 488, 157 S.E. at 859. For more than seven years defendant made no demand upon plaintiff concerning the taxes in question. Only after litigation began did he raise the issue. We hold the court did not err in finding defendant was obligated under his contract to pay all the ad valorem taxes on the home in Chapel Hill.

[3] Next, we hold that the court's finding that defendant was obligated to pay the alimony arrearage of $18,200 plus interest is supported by the evidence, and defendant's exception thereto is overruled. Findings of fact are conclusive upon appeal when supported by competent evidence even though there is evidence in the record which would sustain findings to the contrary. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976);

General Specialties Co. v. Teer Co., 41 N.C. App. 273, 254 S.E. 2d 658 (1979). Although defendant sent plaintiff a bank check for the $18,200 in December 1979, plaintiff never cashed the check and refused to accept it because it did not include interest payable on the arrearages.

Defendant does not deny that he failed to make the alimony payments during the time in question, but relies on his attempted tender of the check. Defendant contends that interest is not payable on the arrearages, but cites no authority in support of his argument. His contention is contrary to the North Carolina law, as N.C.G.S. 24-5 provides that all sums of money due by contract shall bear interest. Interest is allowable from the date of the breach. *Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977). The tender by defendant of the check which did not include interest was not effective to stop the running of interest. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968). By defendant's failure to include interest due, his tender of the check did not constitute payment of the arrearages. *Id.*

[4] Last, we reject defendant's argument that the court erred in ordering specific performance of the contract provision requiring defendant to procure and keep in effect a policy of life insurance for the benefit of plaintiff. The Supreme Court has held that separation agreements are generally subject to the same rules of law with respect to enforcement as other contracts. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). In *Moore*, the Court expressly held that specific performance could be available as a remedy in suits for the enforcement of separation agreements even when the agreement was not incorporated into a judgment.[1] Although *Moore* was concerned with the specific performance of alimony payments, we perceive no reason why the rule should not apply to a provision requiring one spouse to secure a policy of life insurance for the benefit of the other spouse.

An adequate remedy is a full and complete remedy. That there may be *some* remedy at law does not make unavailable the equitable remedy of specific performance. *Id.* Any remedy at law for breach of a requirement to provide an insurance policy is

1. As the divorce decree is not included in this record on appeal, we are unable to determine whether that judgment incorporated the separation agreement, although plaintiff alleged that it did.

more illusory and inadequate than one for failure to make alimony payments. Defendant contends plaintiff should wait until the death of defendant and make claim upon his estate. Such result would force plaintiff to take her chances with the unsettled economic conditions of the future, the very problem the provision for insurance was intended to prevent. The court's ruling allowing specific performance is supported by *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 265 S.E. 2d 654 (1980), *modified on other grounds and aff'd*, 301 N.C. 689, 273 S.E. 2d 281 (1981). *Munchak* approved an order for specific performance, requiring the present funding of a pension plan by the procurement of an insurance policy.

To require defendant to provide the insurance policy, as he agreed, is not unjust. There is no evidence that it would work any hardship or injustice upon defendant, nor has it been shown that the issuance of the policy was not contemplated by the parties. The words of the contract affirmatively demonstrate that this is precisely what the parties did contemplate. Plaintiff made demand upon defendant to procure the policy, and he has refused. Specific performance is an entirely appropriate remedy under the circumstances.

The findings of fact in the judgment are supported by competent evidence and the judgment is supported by those findings and the conclusions of law. The judgment is

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. JOSEPH BERRY FLEMING

No. 8125SC87

(Filed 16 June 1981)

1. Narcotics § 2 — attempt to obtain narcotics by forged prescription — sufficiency of indictment

A bill of indictment was sufficient to charge the offense of attempting to obtain a controlled substance by use of a forged prescription in violation of G.S. 90-98 and G.S. 90-108(a)(10) where it followed the statutory language and

also alleged with particularity the illegal means by which defendant attempted to procure the controlled substance, it being unnecessary to incorporate the forged prescription in the bill of indictment.

2. Criminal Law §§ 34.6, 85— forged prescription for controlled substance—evidence of presentation of other prescriptions

In this prosecution for attempting to obtain the controlled substance Dilaudid by use of a forged prescription, evidence that defendant presented prescriptions for Dilaudid to the same pharmacist on two previous occasions did not constitute an attack upon defendant's character when it had not been placed in issue but was competent to show the pharmacist's ability to recognize and identify defendant as the person who presented the prescription at the time in question and to show guilty knowledge or intent or a plan or design.

3. Criminal Law § 42.6— forged prescription—chain of custody

The State showed a sufficient chain of custody of a forged prescription for controlled substances allegedly presented by defendant to a pharmacist where the pharmacist properly identified the prescription and testified that he saw defendant give it to his cashier, who wrote the address on the prescription and gave it to the pharmacist, and an SBI agent testified that he saw defendant give a paper to the cashier, who gave it to the pharmacist, that after defendant was arrested he received the prescription from the pharmacist, and that he retained the prescription in his possession until the court trial.

4. Narcotics § 3— attempt to obtain narcotics with forged prescription—presumption of forgery or knowledge

When a defendant in possession of a forged prescription for narcotics endeavors to obtain narcotics with it, a presumption arises that he either forged the prescription or had knowledge that it was a forgery.

5. Narcotics § 4— attempt to obtain narcotics with forged prescription—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for attempting to obtain the controlled substance Dilaudid by use of a forged prescription where it tended to show that defendant presented a prescription for Dilaudid to a pharmacist, the prescription was purportedly signed by a physician who testified that he did not sign it and did not authorize anyone to sign his name on the prescription blank, the prescription was written on a form of the N. C. Memorial Hospital, the physician never used such forms and did not ever prescribe for the patient named on the prescription, since the evidence was sufficient to show that the prescription was forged, and since a permissive presumption arose from the evidence that defendant either forged the prescription or had knowledge that it was a forgery.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 28 August 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 26 May 1981.

Defendant was convicted of intentionally attempting to obtain a controlled substance by use of a forged prescription, a violation of N.C.G.S. 90-98 and 90-108(a)(10). The evidence showed that defendant, a resident of Durham, North Carolina, presented a prescription for Dilaudid to employees of Revco Discount Drug Store in Morganton, North Carolina. The prescription was given to the pharmacist, William Andrew Merrill, but was not filled by him because defendant was arrested at that time by two SBI officers. The officers had received information that defendant would present the prescription for filling at that store.

The prescription was written on a prescription form of the North Carolina Memorial Hospital, Chapel Hill, North Carolina, designating Dave Conley as the patient. The form was purportedly signed by Dr. Mark Dellasega. Dr. Dellasega testified that he did not sign the prescription and did not authorize anyone to sign his name on the prescription blank. He had never had a Dave Conley as a patient. Defendant had been in the store on two previous occasions when he presented prescriptions for Dilaudid, which were filled.

From the judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Triggs & Mull, by John R. Mull, for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant moved to quash the bill of indictment and assigns as error the court's failure to allow the motion. The pertinent parts of the bill are:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 21st day of June, 1980, in Burke County Joseph Berry Fleming unlawfully and wilfully did feloniously and intentionally attempt to acquire and obtain possession of Dilaudid (Hydromorphone), a controlled Substance included in Schedule II of the North Carolina Controlled Substances Act, from William Andrew Merrill, Pharmacist, by forgery in that defendant presented to William Andrew Merrill, a registered Pharmacist at Revco Discount Drug Store, Inc., a Corporation, 464 E. Fleming Drive,

> Morganton, North Carolina, a forged prescription dated 6/19/80 made out to Dave Conley, for sixty (60) Dilaudid 4 mg tablets; said prescription being written on a prescription form from the North Carolina Memorial Hospital, University of North Carolina, Chapel Hill, North Carolina with the forged signature of Mark Dellasega, M.D., appearing thereon, in violation of GS 90-98; 90-108(a)(10).

The standard to be applied in testing a bill of indictment is stated in *State v. Greer*, 238 N.C. 325, 327, 77 S.E. 2d 917, 919 (1953):

> The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

We hold the present indictment meets the standard established by *Greer*. The language of the statute is followed, and it is supplemented by particular allegations of specific facts that set out all the elements of the offense and describe how defendant is alleged to have committed the crime. N.C.G.S. 90-108(a)(10) may be violated by attempting to acquire a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. The illegal means by which defendant attempted to procure the controlled substance is alleged with particularity: "defendant presented to William Andrew Merrill, a registered Pharmacist at Revco Discount Drug Store, Inc., a Corporation, 464 E. Fleming Drive, Morganton, North Carolina, a forged prescription dated 6/19/80 made out to Dave Conley, for sixty (60) Dilaudid 5 mg tablets . . . with the forged signature of Mark Dellasega, M.D., appearing thereon . . .." This assignment of error is controlled by *State v. Booze*, 29 N.C. App. 397, 224 S.E. 2d 298 (1976), where the Court held that it was not necessary to incorporate the forged prescription in the bill. The assignment of error is overruled.

[2] Defendant contends the court erred in admitting evidence of previous occasions when defendant presented prescriptions for Dilaudid to pharmacist Merrill. Defendant argues this was an attack upon his character when it had not been placed in issue in the case. We disagree. The evidence was competent on at least two grounds: (1) to show Merrill's ability to recognize and identify defendant as being the person who presented the prescription at the time in question, *State v. Tate*, 210 N.C. 613, 188 S.E. 91 (1936); 1 Stansbury's N.C. Evidence § 92 (Brandis rev. 1973), and (2) to show guilty knowledge or intent or a plan or design. *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975) (plan, identity); *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6 (1965) (intent); *State v. Boynton*, 155 N.C. 456, 71 S.E. 2d 341 (1911) (plan or design); *State v. Wilkerson*, 98 N.C. 696, 3 S.E. 683 (1887) (intent); *State v. Twitty*, 9 N.C. 248 (1822) (guilty knowledge). The assignments of error with respect to this evidence are overruled.

[3] Defendant contends that the prescription in question in this case, and two prescriptions that defendant had previously presented at the store, were improperly admitted as evidence. He argues the state failed to show a proper chain of custody of the exhibits. The purpose of showing a chain of custody of a document is to prove that it is in the same condition with respect to its material parts as at the time of the event. *See State v. Coble*, 20 N.C. App. 575, 202 S.E. 2d 303, *appeal dismissed*, 285 N.C. 236 (1974); *State v. Brooks*, 15 N.C. App. 367, 190 S.E. 2d 338 (1972). The witness Merrill properly identified the prescription in question in this case. He testified that he saw defendant give it to Debbra Ramsuer, his cashier, and that she wrote the address on the prescription and gave it to Merrill. SBI agent Readling testified that he saw defendant give a paper to the cashier, who gave it to the pharmacist, and that after defendant was arrested Readling received the prescription from the pharmacist. Readling retained the exhibit in his possession until the court trial. The evidence complained of was properly identified and received in accord with the rule in *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). Although some of the evidence showing the chain of custody of the exhibit was produced after the exhibit was admitted into evidence, no prejudicial error results. *See id.* The assignment of error is overruled.

[4, 5] We hold that the trial court did not err in denying defendant's motions for directed verdict and to set the verdict aside. There is ample evidence to submit to the jury the question of whether the prescription was forged. The evidence shows that Dr. Dellasega's name was on the prescription and that he did not write it or give anyone permission to do so. Further, the prescription was on a Memorial Hospital form and Dr. Dellasega never used such forms, nor did he ever prescribe for a "Dave Conley." The pharmacist testified that under ordinary circumstances he would have filled the prescription. When a defendant is found with a forged paper and is endeavoring to obtain property with it, a presumption arises that he either forged the paper or had knowledge that it was a forgery. *State v. Welch*, 266 N.C. 291, 145 S.E. 2d 902 (1966); *State v. Jestes*, 185 N.C. 735, 117 S.E. 385 (1923); *State v. Jordan*, 13 N.C. App. 254, 185 S.E. 2d 332 (1971), *cert. denied*, 280 N.C. 303 (1972). The reasons for the presumption are stated by Chief Justice Ruffin in *State v. Morgan*, 19 N.C. 348 (1837). The presumption is permissive only, not conclusive, and does not violate any of defendant's due process rights. It leaves the jury free to accept or reject the inference and does not shift the burden of proof.

The application of the presumption in this case is in accord with *Ulster County Court v. Allen*, 442 U.S. 140, 60 L.Ed. 2d 777 (1979), and *Leary v. United States*, 395 U.S. 6, 23 L.Ed. 2d 57 (1969). Under the facts of this case, the jury could rationally make the connection permitted by the inference. The presumption is not the sole and sufficient basis for the finding of guilt. The presumed fact, the forgery or knowledge of the forgery, is more likely than not to flow from proof of the basic facts, that defendant had the forged prescription and was attempting to procure the drug by its use. *See State v. Roberts*, 51 N.C. App. 221, 275 S.E. 2d 536 (1981). There is a rational connection between the basic and the elemental facts; that is, upon proof of the basic facts, the elemental facts are, more likely than not, true. Also, other evidence in the case, when considered along with the inference of presumption, is sufficient for the jury to find beyond a reasonable doubt the elemental facts, that defendant forged the prescription or knew that it was a forgery. The burden was not shifted to defendant to disprove an elemental fact of the charge. *Ulster County Court, supra.*

Defendant states that the court erred in its charge; however, no argument is made directing our attention to any challenged portion of the charge. The charge with respect to forgery is in accord with *State v. Phillips*, 256 N.C. 445, 124 S.E. 2d 146 (1962).

In defendant's trial we find

No error.

Judges HEDRICK and WELLS concur.

IN THE MATTER OF ROBERT FRANCIS FORD

No. 8010SC1040

(Filed 16 June 1981)

1. Administrative Law § 8— appeal from ruling of state agency—record on appeal

In petitioner's action to have the Teachers' and State Employees' Retirement System of N. C. to waive the deadline clause found in G.S. 135-4(m) and allow him to purchase credit subsequent to 30 June 1979 for his withdrawn account and out-of-state service at a price which was effective until 30 June 1979, there was no merit to petitioner's contention that the record before the superior court should have contained a narration or summary of his oral presentation before the Board of Trustees of the Retirement System, since petitioner's arguments before the Board did not constitute evidence but were more closely analagous to arguments made by a party or his counsel at trial, and therefore could not properly be included in the record before the superior court.

2. Retirement Systems § 3— reinstatement of withdrawn account—no extension of deadline

There was no merit to petitioner's contention that the Board of Trustees of the Teachers' and State Employees' Retirement System of N. C. was wrong in its conclusion that the Retirement System did not have discretionary power to extend or waive statutory deadlines for the reinstatement of a withdrawn account or for purchase of out-of-state service, since a waiver by the Board of Trustees would not be a rule or regulation to prevent injustice and inequality across the board, but simply a waiver in a specific instance, and such action would not be permitted by G.S. 135-6(f).

APPEAL by petitioner from LEE, Judge. Judgment entered 26 September 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 29 April 1981.

The facts in this case are undisputed. Petitioner was employed by the Hendersonville Water Commission and became a member of the North Carolina Local Governmental Employees' Retirement System. He remained a member for 7.42 years—until he resigned his position at the end of 1953. On 23 February 1954, petitioner withdrew his accumulated contribution from the Retirement System, thereby closing his account. Petitioner was employed by the Greenville County Schools in South Carolina from January 1959 through June 1965. Subsequently, he began working for the Henderson County Board of Education and became a member of the Teachers' and State Employees' Retirement System of North Carolina [hereinafter Retirement System] on 1 September 1966. Petitioner is still employed with the Board of Education and has had no break in service.

In 1976, petitioner wrote the office of the Retirement System, making inquiry as to the possibility of purchasing retirement credit for his state service in South Carolina as well as restoring his withdrawn account in the North Carolina Local Governmental Employees' Retirement System. The Retirement System's office responded on 20 May 1976. The office informed petitioner he could restore his withdrawn account by making a lump sum payment of $2,916.58, but that the payment would have to be made by 1 December in order to avoid the accrual of additional interest. The office responded additionally by sending petitioner the forms necessary to verify his South Carolina service. The forms were completed and returned to the Retirement System office in June.

In late June, petitioner was informed by the Retirement System that with his present state service (ten years), he was eligible to purchase five years of *out-of-state* service by making a lump sum payment of $3,599.75 before 1 December 1976. *See* G.S. 135-4(k). Both the June letter and the letter of 20 May admonished petitioner that the lump sum payment had to be made in any event within three years after he became eligible to make the payment. *See* G.S. 135-4(m).

Petitioner did not make the lump sum payment in 1976. On 28 August 1978, he again wrote the Retirement System office requesting updated figures on the cost of restoring his *withdrawn account* and purchasing his *out-of-state service*. The office

responded in September, notifying petitioner that the cost of restoring his withdrawn account had risen to $3,517.87. The office further responded that the deadline to purchase the past service would be 30 June 1979. Upon his request on 2 June 1979, the Retirement System sent a copy of the September 1978 letter to petitioner. Nothing else was heard from petitioner until Tuesday, 3 July 1979.

In a letter dated 3 July petitioner informed the Retirement System that he had called their office on the previous day and had been informed that the period during which he could purchase the service in question had been extended by law and that an actuary would have to recalculate the cost. The undisputed facts show that petitioner did not rely on the system's representation in failing to make the payment by the deadline. On 11 October 1979, a benefits counselor from the Retirement System wrote petitioner to inform him that the cost of restoring his withdrawal account would now be $12,703.12. The cost of purchasing six years of out-of-state service would be $10,281.42. If both periods of service were purchased, the cost would be $28,207.20. (The amount is higher than the sum of the costs quoted because of the change in the actuarial value as a result of petitioner's being able to retire at an earlier date if *both* periods were purchased.)

On 14 February 1980, petitioner requested a Declaratory Ruling from the director of the Retirement and Health Benefits Division of the State Treasurer's office. Petitioner asked that the Retirement System waive the deadline clause found in G.S. 135-4(m) and allow him to purchase credit for his withdrawn account and out-of-state service at the price which was effective until 30 June 1979. The director found that G.S. 135-4(m) makes no provision for a waiver of the deadline and denied petitioner's request.

The director's decision was upheld by the Chairman of the Board of Trustees of the Retirement System. Petitioner appealed to the superior court. From a judgment affirming the decision of the chairman, petitioner appeals to this Court.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Frank B. Jackson for petitioner appellant.

HILL, Judge.

[1] Petitioner argues in his first assignment of error that the superior court erred by overruling his objection to the respondent-State's proposed record on appeal before that court. Petitioner contends the record should have contained a narration or summary of his oral presentation before the Board of Trustees of the Retirement System. We disagree.

The procedures in this case are governed by the Administrative Procedure Act, Chapter 150A of the General Statutes. Petitioner requested the first analysis of his situation by asking that the director of the Retirement and Health Benefits Division give him a declaratory ruling. G.S. 150A-17 provides that:

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability *to a given state of facts* of a statute administered by the agency or of a rule or order of the agency, ... (Emphasis added.)

G.S. 150A-17 clearly does not contemplate an evidentiary proceeding. If evidence were required to establish the facts, then the proper procedure would have been to hold a contested case hearing. *See* G.S. 150A-2(2) and Article 3 of Chapter 150A.

Petitioner, pursuant to section .0303 of the North Carolina Administrative Code, appealed the declaratory ruling to the Board of Trustees of the Retirement System. No evidence was presented at this stage. The Board based its decision affirming the declaratory ruling upon petitioner's oral presentation, the declaratory ruling itself, and the relevant statutory provisions. So, by the very nature of the administrative procedure followed by petitioner, his arguments before the Board could not properly be included in the record before the superior court. Petitioner's statements did not constitute evidence. Instead, petitioner's oral presentation is more closely analogous to arguments made by a party or his counsel at trial. Petitioner's first assignment of error is without merit and overruled.

[2] In his second assignment of error, petitioner argues that the superior court erred in affirming the decision of the Board of Trustees of the Retirement System. In making his argument, peti-

tioner asserts that the Board was wrong in its conclusion that the Retirement System does not have discretionary power to extend or waive statutory deadlines.

G.S. 135-6(f) empowers the Board of Trustees of the Retirement System to "adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter." Rules and regulations are general policies which, when adopted, are applicable across the board. Petitioner is contending that the Board should waive the deadline in his case, despite the fact that no misrepresentation by the State, however innocent, caused him to miss the deadline. Such action would not be a rule or regulation to prevent injustice and inequality across the board, but simply a waiver in a specific instance. This the statute does not contemplate.

If petitioner wants a rule or regulation promulgated which would have the effect of waiving the statutory deadline in his case, he must follow the procedure set forth in G.S. 150A-16. Petitioner's second assignment of error is without merit and overruled.

For the reasons set forth above, the decision of the trial court is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

JERRY H. JEROME, TRUSTEE, AND BREVARD FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS-APPELLEES, v. GREAT AMERICAN INSURANCE COMPANY, DEFENDANT-APPELLANT

No. 8029SC1146

(Filed 16 June 1981)

1. Insurance § 119— fire insurance—standard mortgage clause—notice to insurer of change of ownership

A fire insurance policy did not become null and void because of the failure of a mortgagee to notify the insurer of a change in ownership of the insured property as required by the standard mortgage clause. Furthermore, the

evidence established that a trustee was the owner of the property at all times in question and that no change in ownership had occurred.

2. Insurance § 119— fire insurance—standard mortgage clause—ownership of person not named insured—no increase in hazard

A mortgagee's knowledge that insured property was owned by a person other than the named insured did not constitute knowledge of an increase in hazard of which the mortgagee was required by a standard mortgage clause of a fire insurance policy to notify the insurer.

3. Insurance § 115— fire insurance—insurable interest in property

The named insured in a fire insurance policy had an insurable interest in the insured property, although insured and his wife had conveyed the property to the wife as trustee for their children, where the insured was using the property as a personal residence for himself and his family and would obviously suffer pecuniary loss if a fire occurred, and where insured remained personally liable on promissory notes which were secured by the insured property.

4. Trusts § 6.3— intent to sign deed of trust as trustee

A trustee's failure to sign a deed of trust in her capacity as trustee did not affect the validity of the execution of that deed of trust where the person signing the deed of trust only held the property as trustee and thus clearly intended to sign the deed of trust in her capacity as trustee.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 3 July 1980 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 26 May 1981.

This is a civil action wherein plaintiffs, Brevard Federal Savings and Loan Association (hereinafter "Brevard Federal") and Jerry H. Jerome, Trustee (hereinafter "Jerome"), seek to recover the proceeds of a homeowner's insurance policy issued by defendant wherein W. D. Vickery was the named insured and plaintiffs were endorsed as mortgagees.

The matter was heard on plaintiffs' motion for summary judgment. The pleadings, affidavits, deposition of plaintiff Jerome, and exhibits reveal the following uncontroverted facts: (1) A deed dated 6 August 1975 from W. D. Vickery and his wife B. Diane Vickery to B. Diane Vickery as trustee for the benefit of their children conveying a tract of land whereon was located the premises in question; (2) a homeowner's insurance policy issued by defendant on 16 August 1977 wherein W. D. Vickery was the named insured, insuring the premises in question in the amount of $66,000; (3) a deed of trust executed by W. D. Vickery and his wife, B. Diane Vickery, individually, and B. Diane Vickery as

trustee for their children to plaintiff Jerome as trustee for plaintiff Brevard Federal on 30 September 1977 securing a promissory note in the principal amount of $32,500; (4) an endorsement of the insurance policy also dated 30 September 1977 providing that the policy be endorsed "to show Jerry H. Jerome, Trustee for Brevard Federal Savings and Loan Assoc., 132 S. Caldwell Street, Brevard, N.C. 23712 as Mortgagee;" (5) a second deed of trust, dated 10 February 1978, executed by W. D. Vickery and his wife B. Diane Vickery to plaintiff Jerome as trustee for plaintiff of Brevard Federal, securing a promissory note in the principal amount of $10,000, with the said deed of trust signed by W. D. Vickery and his wife B. Diane Vickery and recorded, and, sometime after 25 February 1978, signed by B. Diane Vickery in her capacity as trustee and re-recorded; (6) the premises in question were totally destroyed by fire on 25 February 1978; and (7) plaintiffs filed a sworn statement in proof of loss on 25 July 1978, but defendant refused to pay the policy proceeds to plaintiffs. From summary judgment for plaintiffs in the amount of $46,871.32, defendant appealed.

Van Winkle, Buck, Wall, Starnes & Davis, by Albert L. Sneed, Jr., for the plaintiff appellees.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., for the defendant appellant.

HEDRICK, Judge.

The sole question presented on this appeal is whether the court erred in granting plaintiffs' motion for summary judgment. G.S. § 1A-1, Rule 56(c) in pertinent part provides:

> The judgment sought shall be rendered forthwith 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.

Defendant contends that genuine issues of material fact exist, "having to do with the obligation of the plaintiff to notify the defendant of the change in ownership and the increase in hazard" and with "whether W. D. Vickery was acting as agent for the owner when he insured the property in his name only and

whether B. Diane Vickery executed the second mortgage in her fiduciary capacity . . . ," and that "the law does not entitle the plaintiff to judgment in its favor."

In support of its contentions, defendant makes several arguments based upon the following provision of the insurance policy in question:

> Loss, if any, under this policy, shall be payable to the mortgagee (or trustee), named on the first page of this policy, as interest may appear, under all present or future mortgages upon the property herein described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.
>
> Provided also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof, otherwise this policy shall be null and void.

Such a provision is known as a "standard mortgage clause," *see Green v. Fiedlity-Phenix Fire Insurance Company*, 233 N.C. 321, 64 S.E. 2d 162 (1951), and it establishes a separate and independent contract between the insurer and the mortgagee as loss payee. *Federal Land Bank v. Atlas Assurance Co.*, 188 N.C. 747, 125 S.E. 631 (1924). *See also* 7 Strong's N.C. Index 3d Insurance § 119.

[1] Defendant first argues that plaintiffs failed to notify defendant of a change in ownership of the insured property as required

by the policy provision quoted above, and that the policy is null and void as a result. We disagree. The provision quoted above does *not* say that the policy would become invalid for simply failing to notify the insurer of a change in ownership. Even if under some interpretation the provision could be construed in such a fashion, the record clearly establishes that B. Diane Vickery, Trustee, was the owner of the property from 6 August 1975 to the date of the loss, 25 February 1978, such that no change in ownership occurred.

[2] Defendant next argues that ownership of property by one other than the named insured constitutes an increase in hazard, and when plaintiff Brevard Federal had the title to the insured property searched at the time the first deed of trust was executed, it should have discovered that title to the insured property was not in the named insured, and then it should have disclosed such an "increase in hazard" to defendant insurer as required under the above-quoted provision. We disagree. The North Carolina cases cited by defendant, *Shores v. Rabon*, 251 N.C. 790, 112 S.E. 2d 556 (1960), and *Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968), simply do not stand for the proposition advanced by defendant, and two out-of-state cases cited by defendant, *Jackson v. American Eagle Fire Insurance Company*, 92 S.W. 2d 874, --- Tenn. --- (1936), and *Pulaski Savings and Loan Association v. U.S. Fidelity and Guaranty Co.*, 539 S.W. 2d 602 (Mo. 1976) are clearly distinguishable. *Jackson*, unlike the present case, involved a policy with a provision requiring that the named insured be the "sole and unconditional owner" of the insured property. *Pulaski* involved an absolute change in ownership after the issuance of the policy which was not disclosed to the insurer, while no such change in ownership took place in the present case. Moreover, by having us hold that ownership of insured property by one other than the named insured was an "increase in hazard," defendant would have us render plaintiffs accountable for failing to discover something which defendant certainly should have discovered when it issued the policy.

[3] Third, defendant argues that plaintiff Brevard Federal, through its agent, plaintiff Jerome, had no insurable interest in the property held under the second deed of trust dated 10 February 1978 since it took the deed of trust from persons who did not own the property. Citing *Imperial Building & Loan*

Association v. Aetna Insurance Co., 113 W. Va. 62, 166 S.E. 841 (1932), defendant contends that when the mortgagor has no insurable interest in property described in an insurance policy naming him as insured, such that the policy is void *ab initio*, the mortgagee under a standard mortgage clause such as the one quoted above likewise has no insurable interest, even though the mortgagee has a separate and independent contract with the insurer. We have found no North Carolina case directly in support of this proposition, and defendant acknowledges that there is case law in other jurisdictions to the contrary; nevertheless, even if we assume the proposition to be true, the record in the present case clearly demonstrates that the mortgagor and named insured, W. D. Vickery, did have an insurable interest in the insured property and the policy was not "void *ab initio*." We note that the policy in question contains no warranty of ownership nor a "sole and unconditional ownership" provision whereby lack of ownership of the insured property by the named insured would void the policy. An "insurable interest" arises if the peril against which insurance is made would bring upon the named insured, by immediate and direct effect, some pecuniary loss, *Federal Land Bank v. Atlas Assurance Co., supra; Rea v. Hardward Mutual Casualty Co.*, 15 N.C. App. 620, 190 S.E. 2d 708, *cert. denied*, 282 N.C. 153, 191 S.E. 2d 759 (1972), or if the named insured would derive some pecuniary benefit from the preservation of the insured property. *King v. National Union Fire Insurance Co.*, 258 N.C. 432, 128 S.E. 2d 849 (1963). Since the record discloses that W. D. Vickery, the named insured, was using the property as a personal residence for himself and his family, he obviously would suffer pecuniary loss, by immediate and direct effect, if the peril insured against, in this case fire, occurred. Moreover, a grantor retains an insurable interest in property after its conveyance where he remains personally liable for a debt secured by the insured property, at least when the policy is not conditioned for exclusive or unconditional title. 3 Couch on Insurance 2d, § 24:101. In the present case, the record shows that even though W. D. Vickery and his wife conveyed the property to the wife as trustee, W. D. Vickery was personally liable on the promissory notes which were secured by the property.

[4] Defendant also argues that the second deed of trust was invalid since B. Diane Vickery did not sign the instrument in her

capacity as trustee for their children, and thus plaintiffs cannot recover under the standard mortgage clause quoted above on this deed of trust. We disagree. A deed executed by the trustee to convey property held in trust will operate as an exercise of the trustee's power of disposition notwithstanding the failure on its face to indicate that it was executed by the trustee in his capacity as such when the intent to exercise the power can be inferred from the circumstances surrounding the transaction. *Tocci v. Nowfall*, 220 N.C. 550, 18 S.E. 2d 225 (1942). Also, the execution of a deed which would otherwise be ineffective is sufficient evidence to indicate such an intent. *Tocci v. Nowfall, supra.* Under the circumstances of the present case, B. Diane Vickery clearly intended to sign the second deed of trust in her capacity as trustee, since she only held the property as trustee. Thus, her failure to sign the second deed of trust in her capacity as trustee did not affect the validity of the execution of that deed of trust.

We hold the record before us discloses no genuine issue of material fact and that the trial judge properly entered summary judgment in favor of plaintiffs.

Affirmed.

Judges CLARK and WELLS concur.

BARBARA BENNETT v. EASTERN REBUILDERS, INC.

No. 805DC940

(Filed 16 June 1981)

Master and Servant § 10— termination of employment contract—breach of contract—damages

In an action for an injunction ordering defendant to re-employ plaintiff and for back pay from the date of plaintiff's discharge from employment with defendant, the trial court properly determined that defendant breached its agreement with plaintiff that, should she be terminated from her position as supervisor, such termination would not result in plaintiff's discharge from defendant's employ but would result in her demotion to her former job as a lead person on defendant's production line, and plaintiff was entitled to damages proximately resulting from defendant's failure to return her to her position as a lead person; however, because plaintiff failed to produce evidence

of the monetary loss she suffered as a result of defendant's breach, and failed to establish that her reinstatement as a lead person would necessarily result in renewed union membership or entitlement under the union contract to a fixed term of employment or to be discharged only for cause, plaintiff was entitled only to nominal damages. Moreover, the trial court erred in entering an injunction ordering defendant to reinstate plaintiff as a lead person, since plaintiff showed no reason why money damages for breach of contract would not make her whole and since defendant could immediately discharge plaintiff without cause under her contract terminable at will, thus making issuance of the injunction futile.

APPEAL by defendant from *Rice, Judge.* Judgment entered 19 May 1980 in District Court, NEW HANOVER County. Heard in the Court of Appeals 7 April 1981.

This is an action seeking an injunction ordering defendant Eastern Rebuilders, Inc. to re-employ plaintiff, and for back pay from the date of plaintiff's discharge from employment with defendant. From a judgment for plaintiff, rendered by the trial court sitting as finder of fact, defendant appeals.

PLAINTIFF'S EVIDENCE

Plaintiff was employed by defendant as a lead person on defendant's production line. This position was regulated by a union contract giving plaintiff substantial job security, including the right to union representation if her job was terminated. In 1975 defendant's agents, management personnel, offered plaintiff a position as a supervisor. Plaintiff refused to accept this position because as a supervisor she could no longer maintain her union status and would lose the job security such status provided. She offered to take the position if defendant would agree that she would not be fired if she did not work out as a supervisor, but would be demoted to her former position as a lead person. Defendant's agents agreed to plaintiff's proposal. In October of 1978 and again in January 1979, plaintiff was having difficulty discharging her duties as a supervisor and requested that she be demoted to her job as a lead person. She received no response to either request. On 2 February 1979, plaintiff's employment with defendant was terminated for low production. She was given no opportunity to return to her former position as a lead person.

DEFENDANT'S EVIDENCE

Two plant superintendents for defendant testified that they had discussed with plaintiff the possibility of her going back on her old job if she did not work out as a supervisor, but that they had only discussed it as a possibility, and had made no guarantees or promises. They testified that the company had no policy of guaranteeing that an employee would be demoted before he was fired. They informed plaintiff prior to 2 February 1979 that she would be terminated for low production and personnel problems. Plaintiff stated at that time that she would not be interested in going back to her old job and they did not offer her the opportunity to do so. Plaintiff did not have a contract of employment with defendant, and no company policy gives an employee the right to a definite fixed term of employment.

The trial court found as facts that defendant agreed to demote plaintiff to the position of lead person rather than fire her if her work as a supervisor were unsatisfactory, that but for defendant's agreement plaintiff would not have accepted the supervisor's position, that plaintiff requested to be returned to her former position, and that defendant fired plaintiff from its employ two weeks after this request. The court awarded plaintiff back pay from the date of her discharge and mandatorily enjoined defendant to re-employ plaintiff as a lead person or in some comparable position.

James J. Wall for plaintiff appellee.

Burney, Burney, Barefoot & Bain by Roy C. Bain; and Adams, Fox, Marcus, Adelstein & Gerding by Randall L. Mitchell for defendant appellant.

CLARK, Judge.

We believe an agreement between an employee and her employer concerning the manner in which her job could be terminated constitutes an enforceable agreement. Defendant argues that because the parties never agreed to a definite term of employment, plaintiff was terminable at will. We agree to the limited extent that we think defendant was free to discharge plaintiff from her supervisory position at any time.

> "Where a contract of employment contains no provision concerning the duration or term of employment, *or the means by which it may be terminated,* it is terminable at the will of either party, with or without cause. *Still v. Lance,* 279 N.C. 254, 182 S.E. 2d 403 (1971); 5 N.C. Index 2d, Master and Servant, § 10, p. 327."

Tatum v. Brown, 29 N.C. App. 504, 505, 224 S.E. 2d 698, 698-99 (1976) (emphasis added). The issue in the case *sub judice* is not how long plaintiff must remain employed, but simply by what means her employment may be terminated. Under the agreement between plaintiff and defendant, she could be terminated from her position as supervisor at any time; however, such termination was to result not in her discharge from defendant's employ, but in her demotion to her former job on the line.

Ample consideration for defendant's bargained-for agreement to demote plaintiff rather than fire her may be found in her agreement to give up her union position and the job security that went with it. It is immaterial whether this "job security" under the union contract was sufficient to keep plaintiff in her former position despite an intention on defendant's part to fire her from it. It is clear from the record that plaintiff believed she was "almost guaranteed of having a job unless [she] stole something from the plant, or something like that." She stated further that in order to take the promotion she had to give up her union seniority and benefits. It was her belief that her job was secure that led her initially to refuse the promotion to supervisor. In order to allay her fears and induce her to take the position defendant's plant superintendents agreed to put her back in her former job if she proved unsatisfactory as a supervisor. Their failure to do this amounted to breach of their contract.

The law provides plaintiff with a remedy for this breach. She is entitled to damages proximately resulting from defendant's failure to return her to her position as a lead person. Plaintiff has failed, however, to produce evidence of the monetary loss she suffered as a result of defendant's breach, and we believe she is therefore entitled to no more than nominal damages. *Builder's Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968).

As defendant argues, plaintiff's employment as a lead person was for an indefinite period and at best terminable at will. *Smith*

v. Ford Motor Co., 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976). Had she been returned to her former position, she would still have enjoyed employment at the will of her employer. To be entitled to compensatory damages she would have the burden of showing that she would have been retained in her former position for some period of time. For that period she would be entitled to compensation at the rate of a lead person, less any amounts she could have earned by other employment during that period. As an employee at will she was entitled to no specific period of employment; and defendant's decision to discharge her entirely from its employment evidences that had she been reinstated as a lead person, she would have been immediately fired. Her damages were thus coextensive with her entitlement to continued employment as a lead person; that is, none at all.

Plaintiff argues that the position as a lead person would have carried with it considerable job security, by virtue of the fact that when she was a lead person she was a union employee under a union contract. She has failed to establish that her reinstatement as a lead person would necessarily result in renewed union membership or entitlement under the union contract to a fixed term of employment or to be discharged only for cause. Plaintiff testified, and the trial court found, that plaintiff had job security before taking the supervisor's job. The relevant issue here, though, is what job security she would have after being returned to that position. It does not follow that she would have the same security. She testified that in order to take the supervisor's job she had to give up her union membership. Upon reinstating her, defendant would be free to terminate her employment before she had a chance to rejoin the union. The only evidence of plaintiff's job security was linked to her union membership, not her employment contract. After admitting that she gave up that membership, plaintiff had the burden of establishing that if she were returned to her lead position, she could again place herself under the penumbra of union protection *before* defendant could terminate her employment. This she failed to do. We hold plaintiff's evidence of damages is too speculative to support the trial court's award of back pay from the date of discharge until trial. Her entitlement under the evidence is to no more than nominal damages.

In addition to damages, plaintiff obtained a mandatory injunction ordering defendant to reinstate her as a lead person. We hold

that this injunction was improvidently entered. Plaintiff has established her entitlement to a remedy at law: damages for breach of contract. Her difficulties are based not on the inadequacy of the legal remedy, but on the inadequacy of her proof at trial. She has shown no reason why money damages for breach could not make her whole. Far from the "irreparable harm" that she alleged in her complaint, her evidence at trial tended to show no damage. "An injury is irreparable, within the law of injunctions, where it is of a 'peculiar nature, so that compensation in money cannot atone for it.' *Gause v. Perkins*, 56 N.C. 177 (1857)." *Frink v. Board of Transportation*, 27 N.C. App. 207, 209, 218 S.E. 2d 713, 714 (1975). Plaintiff's only loss has been whatever wages she would have earned had she been reinstated as a lead person terminable at the will of her employer. For these wages she could be adequately compensated in money damages had she met her burden of establishing the proper amount of such damages.

We note, too, that the issuance of the injunction would be futile, since defendant could immediately discharge plaintiff without cause under her contract terminable at will. This Court will not require the doing of a vain and futile thing. *Nolan v. Nolan*, 45 N.C. App. 163, 262 S.E. 2d 719 (1980).

The judgment of the trial court that defendant is liable to plaintiff for breach of contract is affirmed. That portion of the judgment awarding back pay and enjoining defendant to rehire plaintiff is vacated and the case remanded for an award of nominal damages.

Affirmed in part; vacated in part.

Judges VAUGHN and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 JUNE 1981

ANDERSON v. GREENE No. 8028SC968	Buncombe (79CVS0392)	No Error
BELL v. BELL No. 8023DC947	Yadkin (80CVD208)	Affirmed
BELL v. SPRINGS No. 8027SC916	Gaston (78CVS106)	Appeal Dismissed
CABARRUS COUNTY v. CANTRELL No. 8019DC1001	Cabarrus (80CVD0681)	Appeal Dismissed
DILLS v. SUMNER No. 8030DC1219	Macon (80CVD54)	Affirmed
DORSEY v. DORSEY No. 8126DC41	Mecklenburg (80CVD7855)	Affirmed
IDEAL REALTY v. ABDALLA No. 8011DC726	Johnston (75CVD0717)	Reversed & Remanded
IN RE COLLINS No. 8128DC127	Buncombe (78J287)	Affirmed
IN RE HUFFSTETLER No. 8027DC857	Gaston (79J300)	Affirmed
KINCH v. KINCH No. 8021DC1174	Forsyth (79CVD4098)	Vacated & Remanded
MEREDITH v. SAUNDERS No. 8019SC1118	Randolph (80CVS159)	No Error
OWEN v. TOWNSEND No. 8029DC1027	Transylvania (78CVD174)	Affirmed in Part & Vacated & Remanded in Part
PERDUE v. CAVAN No. 8018DC842	Guilford (78CVD7140)	Reversed
RINDOS v. RINDOS No. 8115DC1	Alamance (80CVD143)	Affirmed
STATE v. CURRY No. 8012SC1145	Cumberland (80CRS4220)	No Error
STATE v. GAUSE No. 815SC107	New Hanover (80CRS14124)	No Error
STATE v. GOLLETT No. 803SC924	Pitt (79CRS15215)	No Error
STATE v. GORE No. 8013SC1164	Brunswick (79CRS6135)	No Error

STATE v. GOSNELL No. 8129SC34	Polk (79CRS2757)	No Error
STATE v. McNEILL No. 8012SC1163	Cumberland (80CRS2552)	No Error
STATE v. SELF No. 8122SC88	Davidson (80CRS4381)	No Error
STATE v. SIMPSON No. 802SC957	Tyrrell (78CRS659)	No Error
STATE v. WATSON No. 807SC1218	Wilson (80CRS2283)	No Error
STATE v. WHITE No. 8015SC1220	Chatham (80CRS2083)	No Error
STATE v. WILLIAMS No. 812SC125	Martin (80CR4119) (80CR4121)	No Error
TEETER v. ANGEL BUILDERS, INC. No. 8022SC976	Davie (79CVS257)	Affirmed
TROTTER v. TROTTER No. 8019DC1159	Randolph (80CVD20)	Affirmed

MERCEDITH LEATHERWOOD BACON v. ROBERT LEATHERWOOD, III AND MAGGIE M. LEATHERWOOD

No. 8030SC781

(Filed 16 June 1981)

Appeal and Error § 6.2— dismissal of claim against one defendant—premature appeal

Where plaintiff's complaint sought a declaratory judgment as to the marketability of title of property under a deed tendered by the male defendant to plaintiff, plaintiff's action against the male defendant was based upon his alleged violation of the terms of a divorce judgment by failing to deliver to plaintiff a warranty deed free from exception conveying their former home, and plaintiff's action against the feme defendant was based upon her failure to sign the deed tendered by the male defendant and her alleged attempt to harass plaintiff and cause her additional expenses by not joining in the deed, plaintiff could not immediately appeal from the trial court's order dismissing the action as to the male defendant for failure to state a claim for relief since the trial court failed to indicate that there was "no just reason for delay" pursuant to G.S. 1A-1, Rule 54(b), and since the court's order did not affect any substantial right of the plaintiff within the meaning of G.S. 1-277 or G.S. 7A-27(d).

APPEAL by plaintiff from *Cornelius, Judge.* Order entered 18 June 1980 in Superior Court, SWAIN County. Heard in the Court of Appeals 4 March 1981.

This is an action for declaratory judgment in which plaintiff asked the superior court to determine whether a deed from defendant, Robert Leatherwood, III, to plaintiff conveyed good title to plaintiff.

Plaintiff's complaint filed 19 November 1979 delineated the following facts. Plaintiff and defendant, Robert Leatherwood, III, formerly husband and wife, were divorced by judgment entered 18 June 1976 in an action entitled *Robert J. Leatherwood, III v. Mercedith Leatherwood.* Robert Leatherwood was given possession of the marital home, but the judgment of divorce gave Mercedith Leatherwood, plaintiff herein, the right of first refusal to purchase the home should Robert Leatherwood decide to sell it. The judgment provided that plaintiff herein was to have the privilege of purchasing the home at the same price offered to Robert Leatherwood in any written and signed contract to purchase. Plaintiff herein was to exercise the right given her by

"delivering and tendering the full purchase price therefor within two weeks" after Robert Leatherwood received an offer.

On 28 September 1979 plaintiff received notice from defendant, Robert Leatherwood, advising her of an offer of $27,000 he had received for the home. In response, plaintiff exercised her purchase option and tendered a check payable in the amount of $27,000 to defendant, Robert Leatherwood, on 1 October 1979. Subsequently, the potential purchaser of the home, J. Robert Varner, increased by $1,350 the amount of his offer to purchase defendant's property. Thereafter, plaintiff, under protest, tendered a check payable to defendant Robert Leatherwood, to Attorney Fred H. Moody, Jr., in the amount of $1,350. Plaintiff advised Moody that she was making her second payment under protest and demanded that a deed to the property be delivered to her.

Moody obtained a warranty deed for the property from defendant, Robert Leatherwood, in return for the $27,000 check. This deed was properly recorded. This deed was not signed by defendant, Maggie Leatherwood, and it contained an exception as to any interest she might possess.

On 15 October 1979 plaintiff advised Moody that she would not accept a deed without the signature of defendant Maggie Leatherwood then wife of Robert Leatherwood, because the failure of defendant, Maggie Leatherwood, to join in the conveyance releasing any marital interest she might have, created a cloud upon the title.

Plaintiff was advised that she would receive a deed from Maggie Leatherwood if she would tender to Maggie Leatherwood a new check for $1,350, payable to Maggie Leatherwood. Plaintiff's second check for $1,350, payable to Robert Leatherwood, would then be returned to plaintiff.

Plaintiff, in her first cause of action, asked the court to determine whether the deed from Robert Leatherwood to her conveyed good title, since the deed contained an exception as to his wife's interest and was not joined in by his wife, Maggie Leatherwood.

As a second cause of action plaintiff alleged that defendant Robert Leatherwood's failure to convey a warranty deed without

any exception upon payment by plaintiff for the property constituted a violation of the terms of the divorce judgment of 18 June 1976. Plaintiff asked the court to require defendant Robert Leatherwood to tender to her a valid warranty deed free from exceptions, and in addition award her damages in the amount of $5,000 for willful harassment and time lost from her employment.

On 17 January 1980 defendant, Robert Leatherwood, made a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) as to both of plaintiff's causes of action.

Defendant, Maggie Leatherwood, likewise, filed a motion to dismiss plaintiff's complaint as to her, pursuant to G.S. 1A-1, Rule 12(b)(6). Maggie Leatherwood filed her answer to plaintiff's complaint. In addition, she filed a counterclaim alleging that statements made by plaintiff in her complaint were false and libelous causing damage to defendant's reputation. Maggie Leatherwood asked the court to award her actual and punitive damages.

The court issued an order on 18 June 1980 in which it found that as to defendant, Robert Leatherwood, plaintiff's complaint did not contain a statement of a claim upon which relief could be granted. The court granted defendant Robert Leatherwood's motion to dismiss plaintiff's complaint insofar as it pertained to him. Plaintiff gave notice of appeal from the court's order.

Riddle, Shackelford and Hyler, by Robert E. Riddle, for plaintiff appellant.

Herbert L. Hyde for defendant appellee, Robert Leatherwood, III.

McKeever, Edwards, Davis and Hays, by Fred H. Moody, Jr., for defendant appellee, Maggie M. Leatherwood.

MORRIS, Chief Judge.

The right of an appellant to appeal a decree of a trial court is circumscribed by G.S. 1A-1, Rule 54(b) which provides:

> (b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court

> may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

However, G.S. 1A-1, Rule 54(b) does not limit an appellant's right to appeal when the trial court's decree is appealable under other statutory provisions, notably, G.S. 1-277 and G.S. 7A-27(d). *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). In brief, these statutes allow the immediate appeal of an interlocutory judicial determination if the judicial determination which is the subject of the appeal affects a substantial right claimed in the action or proceeding; or in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action; or grants or refuses a new trial.

An interlocutory order was aptly defined by Justice Ervin, as, "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950). In the instant case the order of the trial court from which plaintiff appeals was interlocutory.

Plaintiffs sued two parties, the husband and wife. Under G.S. 1A-1, Rule 54(b) the trial court may enter a final judgment as to one of those parties but not the other, and that judgment will not

be immediately appealable unless the trial court so specifies. In the trial court's order of 18 June 1980 dismissing plaintiff's action insofar as it applied to Robert Leatherwood the court gave no indication that there was "no just reason for delay." Therefore, under G.S. 1A-1, Rule 54(b) this appeal is interlocutory and premature.

Nor does plaintiff's case fall within the exceptions of G.S. 1-277 or G.S. 7A-27(d). We are unaware of, and plaintiff has not indicated, how the trial court's order has affected any "substantial right" of plaintiff's or how the order could have in effect determined this action, prevented a judgment from which an appeal might be taken, discontinued the action, or granted or refused a new trial.

Plaintiff, in her complaint, asked the court for a declaratory judgment with regard to the marketability of the property under the deed which defendant, Robert Leatherwood, had tendered her. Insofar as her action involves this request for a declaratory judgment it does not directly implicate or affect either of defendants.

Plaintiff's action, insofar as it pertains to defendant Robert Leatherwood, is based upon his alleged violation of the terms of the 18 June 1976 judgment by which plaintiff and Robert Leatherwood were divorced. She claims his failure to deliver to her a warranty deed free from exception conveying their former home, she having tendered to him the established purchase price of the home, violated the terms of that judgment. In comparison, plaintiff's action insofar as it pertains to the feme defendant is based upon that defendant's failure to sign the deed to the property despite the fact that she signed the contract to sell the property to plaintiff for $27,000. In addition, plaintiff's complaint alleges that Maggie Leatherwood contrived with her husband in a willful attempt to harass plaintiff and cause her additional expenses by not joining in the deed. Thus, plaintiff's action is not of such a nature that the court's dismissal of the male defendant affects the "substantial rights" of plaintiff or causes the occurrence of the other contingencies specified in the statutes. Plaintiff can continue with her action against defendant, Maggie Leatherwood. In addition, plaintiff's rights are fully and adequately protected by her exception to the trial court's order of dismissal of defendant,

Robert Leatherwood, which she may assign as error should final judgment go against her.

For these reasons we think that plaintiff's appeal was interlocutory. Consequently, her appeal is

Dismissed.

Judges MARTIN (Robert M.) and WHICHARD concur.

STATE OF NORTH CAROLINA v. NELSON NAPOLEAN JOHNSON

No. 8018SC1194

(Filed 16 June 1981)

Contempt of Court § 2.1— direct criminal contempt—proceeding substantially contemporaneous with contempt—summary action

A proceeding against defendant for direct criminal contempt was substantially contemporaneous with the contempt within the meaning of G.S. 5A-14 where the court at the end of a bond modification hearing found defendant in direct contempt for vocally disrupting the hearing the preceding day, and the court properly acted against defendant summarily without giving defendant a written order to appear and show cause.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 7 August 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 April 1981.

The defendant, a member of the Communist Workers Party, was charged with engaging in a riot stemming from a confrontation between members of the Party and the Ku Klux Klan in Greensboro on 3 November 1979, in which five people died. Soon after arrest, defendant was released by Order of Pretrial Release on a $15,000 appearance bond.

Defendant moved for revocation and modification of the Order of Pretrial Release. Hearing was held on 6 August 1980 with defendant's counsel (Rosen) present. Assistant District Attorney Knight opposed the motion, alleging that defendant had attacked a police officer. The record reveals the following:

"MR. JOHNSON: That's not true.

Mr. Knight continued with his argument, stating that Mr. Johnson might say that he is not legally responsible for the death of five people on November 3, 1979, whereupon the following ensued:

A SPECTATOR: That's right, the Klan is;

THE BAILIFF: Watch yourselves.

MR. KNIGHT: But he's morally responsible—

MR. ROSEN: I object, Your Honor, that's not part of the facts—

MR. JOHNSON: I object.

MR. ROSEN: This is beyond the scope of what we stipulated to here, Your Honor.

MR. JOHNSON: The Government's agents—

THE COURT: Gentlemen, this is a matter of argument. I'll hear the argument; proceed.

MR. KNIGHT: Whether or not Mr. Johnson is to be detained in the Guilford County Jail is not up to our Office. It's not up to the Court, it's up to him. It's up to him. Can he regulate his conduct so as to respect the rights of others? We hear a lot from him about his rights, but what about the rights of other people to be free from intimidation, the imminent danger of being killed, the presence of violence any time he is supposedly exercising his First Amendment rights? He's not exercising his First Amendment Rights, he's going way beyond that. What he's doing is engaging in conduct which is dangerous. Bring people to the point of frenzy, precipitating and then quietly backing out of—

MR. JOHNSON: With a knife stabbed in my arm—

MR. KNIGHT: —precipitating situation where violence is imminent and on November 3rd it happened, and people died. And we don't want it to happen again.

SPECTATORS: (Several yelling) And the Government killed them. The State is responsible. The State killed them.

MR. JOHNSON: I tell you this is nothing but a continuation of November 3rd.

THE BAILIFF: Court's in session, remain quiet.

MR. JOHNSON: The Judge should allow me to speak.

THE COURT: Take him out.

(Whereupon, deputies approached the Defendant to escort the Defendant out of the Courtroom, wherein a scuffle ensued between the deputies and the Defendant. Spectators were standing and some yelling, 'Let him speak, let him speak.' 'This is supposed to be an open Court, let him speak.' 'Let him be heard.' 'You should let him tell the truth.')

THE COURT: All right, be seated and be quiet or the Courtroom will be cleared. Be seated and quiet or the Courtroom will be cleared.

MR. ROSEN: Your Honor, I'm going to Object to his being ejected from the Courtroom in the way that he was ejected.

THE COURT: The objection is overruled.

(IN THE ABSENCE OF THE DEFENDANT.)

MR. KNIGHT: If Your Honor please, the State at this time would ask that the Court hold Mr. Johnson in Contempt of Court, and so move at this time.

MR. ROSEN: We object to that.

THE COURT: The Court notes the motion and takes no action on it, defers it until we complete the matter at hand."

Oral argument continued. The trial judge then indicated that he wanted to read the written materials submitted. He apparently did so and then allowed the defendant to return to the courtroom.

The State then moved that defendant be held in direct contempt. The court replied that the motion would be considered but not at this time. After final arguments the court recessed for the evening.

On the following morning, with defendant present, the court denied the State's motion for an increased bond.

The court then conducted a hearing on the charge of criminal contempt, and counsel for the parties and the defendant made arguments. The court then found that defendant wilfully disobeyed the orders of the court by speaking out, was warned that he would be removed from the courtroom, but that defendant thereafter joined others in a vocal disruption of the proceedings, and that defendant was then removed from the courtroom. The court then concluded that defendant was in wilful and direct contempt, and ordered that he be imprisoned for 20 days.

Attorney General Edmisten by Associate Attorney R. Darrell Hancock for the State.

Stanback & Stanback by A. Leon Stanback, Jr. for the defendant appellant.

CLARK, Judge.

The defendant attacks the contempt order on the grounds that the proceeding (1) was not substantially contemporaneous with the contempt as required by G.S. 5A-14, and (2) defendant was not given a written order to appear and show cause as required by G.S. 5A-15.

G.S. 5A-14 provides:

> "(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court *and* when the measures are imposed substantially contemporaneously with the contempt." (Emphasis added.)

This statute, a part of the 1977 N.C. Sess. Laws Ch. 711 (codified as Chapter 5A of the General Statutes which replaced Chapter 5), was based on recommendations of the Criminal Code Commission and became effective 1 July 1978. Chapter 5A draws a sharp distinction between proceedings for criminal contempt (Article 1) and proceedings for civil contempt (Article 2). Article 1 distinguishes between direct and indirect contempt, G.S. 5A-13, which provides that direct contempt may be punished summarily according to G.S. 5A-14, or may defer adjudication and sentencing upon notice by a show cause order as provided by G.S. 5A-15.

Thus, the question before us is whether the trial court had the right to proceed summarily against the defendant (G.S. 5A-14) at the conclusion of the hearing for misconduct committed the preceding day, without entering and serving the defendant with a copy of a show cause order as required by G.S. 5A-15(a). The question may be resolved by determining whether the trial court imposed measures *substantially contemporaneously* with the contempt as provided by G.S. 5A-14(a).

Prior to the enactment of the 1977 N.C. Sess. Laws Ch. 711, the decisions of the Supreme Court of the United States had recognized the problems involved in summary punishment for direct contempt and the need for due process safeguards. In *Sacher v. United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451 (1952), the court noted that "[s]ummary punishment always, and rightly, is regarded with disfavor . . . ." 343 U.S. at 8, 96 L.Ed. at 723, 72 S.Ct. at 454; in *Offutt v. United States*, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954), it was observed that summary punishment is justified by the need for immediate penal vindication of the dignity of the court; and in *Taylor v. Hayes*, 418 U.S. 488, 41 L.Ed. 2d 897, 94 S.Ct. 2697 (1974), it was held that due process requirements for notice and the right to be heard must be extended to persons cited for direct contempt of court where final adjudication and sentencing is delayed until after trial. *See In re Paul*, 28 N.C. App. 610, 222 S.E. 2d 479, *disc. rev. denied*, 289 N.C. 614, 223 S.E. 2d 767 (1976), *see also* the connected case of *Paul v. Pleasants*, 551 F. 2d 575, *cert. denied*, 434 U.S. 908, 54 L.Ed. 2d 196, 98 S.Ct. 310 (1977), decided under old Ch. 5 which has since been replaced by Ch. 5A, General Statutes of North Carolina.

The term "substantially contemporaneously with the contempt" in G.S. 5A-14(a) is construed in light of its legislative purpose of meeting due process safeguards. The word "substantially" qualifies the word "contemporaneously," and clearly does not require that the contempt proceedings immediately follow the misconduct. Factors bearing on the time lapse should include the contemnor's notice or knowledge of the charged misconduct, the nature of the misconduct, and other circumstances that may have some bearing upon the defendant's right to a fair and timely hearing.

The contemptuous conduct in the case before us was committed during a bond hearing, not a trial, and it was obvious that the

hearing would last a relatively short period of time. When the defendant was removed from the courtroom, the court was adjudicating, and defendant was put on notice, that the defendant's conduct was so disruptive and contemptuous that he had lost his right to be present during the hearing. This ruling of the court was tantamount to a finding of direct contempt and summary punishment by depriving the defendant of his right to be present during the hearing. The imposition of imprisonment before the conclusion of the hearing could well have antagonized the already infuriated defendant and resulted in further disruption and delay of the hearing. Under these particular circumstances we find that the punishment on 7 August 1980 was substantially contemporaneous with the direct contempt on the preceding day.

Affirmed.

Judges VAUGHN and WELLS concur.

JON HARPER DORSEY BY HIS GUARDIAN AD LITEM, RONALD S. DORSEY v. MICHAEL DENNIS BUCHANAN AND H. O. FAULKNER & SON, INC.

No. 809SC978

(Filed 16 June 1981)

Automobiles § 63.2— child on bicycle—no negligence of truck driver

In an action to recover for personal injuries sustained in a collision between the minor plaintiff's bicycle and an oil truck driven by one defendant and owned by the other defendant, the trial court properly granted defendants' motions for directed verdict where the evidence tended to show that defendant driver had no opportunity to observe the minor plaintiff in a position of imminent danger of being hit by the truck in that the truck was being driven slowly at the time of the collision so that defendant was able to bring it to a complete stop after traveling only two feet following the collision; at the time the minor plaintiff began his journey down his driveway, he was fifty feet from the edge of the street; defendant was driving on the far side of the street from the driveway, thus putting another ten feet between the truck and the point of origin of the plaintiff's journey; the driver's view of the lower portion of the driveway was partially obstructed by a parked car; and the minor plaintiff collided with the truck, not vice versa, and only after the truck had almost completely passed the minor plaintiff's driveway.

Dorsey v. Buchanan

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 19 June 1980 in Superior Court, VANCE County. Heard in the Court of Appeals 9 April 1981.

In this action for damages, the minor plaintiff, Jon Harper Dorsey, (Jon) seeks to recover for personal injuries sustained in a collision between Jon's bicycle and an oil truck owned by defendant Faulkner & Sons, Inc. and being driven by defendant Buchanan. At the close of the plaintiff's evidence, the trial court granted defendants' motions for a directed verdict, from which judgment plaintiff has appealed.

At the trial, plaintiff offered evidence which tended to show that Jon lives at the home of his parents on Oak Street in Henderson. Oak Street, running east to west, intersects at a right angle with Cypress Drive. The Dorsey home is approximately 208 feet from that intersection on the north side of Oak Street. Birch Circle enters Oak Street from the south almost directly across Oak Street from the Dorsey home. The Johnson family home is on the corner of Oak Street and Birch Circle, almost directly across the street from the Dorsey driveway. On the afternoon of the collision, Jon was riding his bicycle in the area, with friends, going back and forth from the top of his driveway to Birch Circle. The distance from the top of the Dorsey driveway to the edge of Oak Street is fifty feet. At about 3:30 p.m., a car was parked on the north side of Oak Street partially in front of the Dorsey driveway, letting Lori Johnson off. As Jon was riding his bicycle up his driveway, he noticed the oil truck on Cypress Drive, but did not see it turn onto Oak Street. He rode on up the driveway, turned around and coasted slowly down the driveway. When he got to the bottom of the driveway, Jon saw the oil truck and ran into the side of the truck. Jon fell off his bike and the truck stopped with the left rear wheel on Jon's hand. When the driver started out of the truck, he noticed the wheel on Jon's hand and moved the truck so as to free Jon's hand. Defendant Buchanan was driving the truck along Oak Street, from west to east. The investigating police officer found the truck parked on the right or south side of Oak Street between Birch Circle and the Dorsey driveway. Oak Street is twenty-one feet wide at this point. From skid marks on the street, the police officer determined that the truck traveled two feet after impact. The cab of the truck is elevated at least as high as the top of a "standard" car. Defendant

Buchanan was familiar with Oak Street and the neighborhood, making approximately three trips a week along Oak Street. He did not see Jon until after the collision.

Zollicoffer & Zollicoffer, by Robert K. Catherwood, for the plaintiff appellant.

Spears, Barnes, Baker & Hoof, by J. Bruce Hoof, for defendant appellees.

WELLS, Judge.

Defendants' motions for a directed verdict at the close of plaintiff's evidence presented the question to the trial court for judgment and to us for review as to whether plaintiff's evidence was sufficient to justify a verdict in his favor.

On a motion by defendant for a directed verdict in a jury case, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. All the evidence which tends to support plaintiff's claim must be taken as true and viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which may be legitimately drawn therefrom. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974); *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971); Home Products Corp. v. Motor Freight, Inc., 46 N.C. App. 276, 277, 264 S.E. 2d 774, 775, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980). A trial court should deny a defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) when reviewing the evidence in the light most favorable to the plaintiff and giving plaintiff the benefit of all reasonable inferences, the court finds any evidence more than a scintilla to support plaintiff's *prima facie* case in all its constituent elements. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 640, 272 S.E. 2d 357, 360 (1980).

Having reviewed plaintiff's evidence according to these rules, we find no evidence of negligence on the part of defendant Buchanan and hold that the trial court correctly granted defendants' motions.

We first note that speed is not at issue in this case. The parties stipulated that the truck was being driven "slowly" at the

time of the collision. The evidence presented by plaintiff at trial sheds further light on this aspect of the events by showing that buchanan was able to bring the truck to a complete stop after traveling only two feet following the collision. Plaintiff's sole contentions are that Buchanan, being familiar with the neighborhood, should have been on the lookout for children playing or riding near the street; that Buchanan could have and should have seen Jon approaching the street; and that his failure to see Jon and warn him of the truck's presence caused the collision. There are four circumstances which negate any such reasonable inference here. First, at the time Jon began his journey down the drive, he was fifty feet from the edge of the street. Second, Buchanan was driving on the far side of the street from the Dorsey driveway, putting another ten feet between the truck and the point of origin of Jon's journey. Third, Buchanan's view of the lower portion of the Dorsey driveway was partially obstructed by a parked car. The fourth and most compelling circumstance is that Jon collided with the truck, not vice versa, and only after the truck had almost completely passed the Dorsey driveway. Thus, the dispositive question here is whether Buchanan had an opportunity to observe Jon in a position of imminent danger of being hit by the truck. We hold that the answer to that question must be in the negative.

The opinion of our Supreme Court in *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973) aptly and clearly states the rules which control our decision here:

> It has long been the rule in this State that the presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Therefore, "the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury." [Citations omitted.]
>
> . . . .
>
> "A motorist is not, however, an insurer of the safety of children in the street or highway; nor is he bound to anticipate the sudden appearance of children in his pathway

under ordinary circumstances. Accordingly, the mere occurrence of a collision between a motor vehicle and a minor on the street does not of itself establish the driver's negligence; and some evidence justifying men of ordinary reason and fairness in saying that the driver could have avoided the accident in the exercise of reasonable care must be shown. In the absence of such a situation, until an automobile driver has notice of presence or likelihood of children near line of travel, the rule as to the degree of care to be exercised as to children is the same as it is with respect to adults." [Citations omitted.]

284 N.C. at 209-10, 200 S.E. 2d at 57-58.

We hold that the evidence in this case does not allow the reasonable inference that defendant Buchanan could have avoided this collision in the exercise of reasonable care. *See, Colson v. Shaw*, 46 N.C. App. 402, 265 S.E. 2d 407 (1980), *reversed on other grounds*, 301 N.C. 838, 273 S.E. 2d 243 (1981).

Affirmed.

Judges VAUGHN and CLARK concur.

E. CRAVEN BREWER, D/B/A BREWER MOTOR AND EQUIPMENT CO. v. HOWARD HATCHER

No. 804DC724

(Filed 16 June 1981)

Contracts § 33— interference with contractual relationship—sufficiency of allegations

Defendant's counterclaim sufficiently alleged a claim for damages for interference with a contractual relationship where it alleged that defendant was about to consumate an agreement for a loan from the F.H.A.; plaintiff wrote a letter to the F.H.A. concerning a balance allegedly due for equipment sold to defendant; as a result of such letter, the F.H.A. refused to lend defendant the money as originally agreed; defendant was not indebted to plaintiff for the equipment; and plaintiff wrongfully and maliciously prevented the F.H.A. from entering the contract with defendant which it otherwise would have entered but for plaintiff's attempt to compel defendant to pay an unjust debt.

APPEAL by defendant from *Martin (James N.), Judge.* Order entered 10 March 1980 in District Court, DUPLIN County. Heard in the Court of Appeals 11 February 1981.

This action was commenced by plaintiff's filing a complaint wherein he alleged that defendant had purchased equipment from plaintiff; that defendant had defaulted on the promissory note he had executed as consideration for the purchase; that plaintiff had repossessed and sold the equipment; and that a $3,080.00 deficiency remained after the sale which defendant owed plaintiff.

Defendant's answer, denying the allegations in the complaint, contained two counterclaims, the second of which reads as follows:

SECOND DEFENSE AND COUNTERCLAIM

9. The allegations contained in all the previous paragraphs of this answer are hereby incorporated by reference into this second defense and counterclaim.

10. On the 10th day of April, 1979, plaintiff maliciously published and wrote a letter to Mr. James Mills, County Supervisor, Farmers Home Administration, Kenansville, North Carolina, concerning the defendant containing the following matter: "It is our understanding that you are working with Mr. Hatcher in helping him meet his financial commitments. Any help you could give us in taking care of the balance due on this equipment would be sincerely appreciated."

11. That these statements imply that Mr. Hatcher is not financially responsible nor capable of handling his financial affairs. That at the time the plaintiff wrote this letter, the plaintiff knew that the defendant had a commitment from the Farmers Home Administration to lend to the defendant an amount of money in excess of $60,000.

12. That the matter so published and written by the plaintiff to the defendant is untrue, false, and inflammatory.

13. That because of the plaintiff's letter, the Farmers Home Administration, by its agent, J. M. Mills, Jr., wrote to the defendant on April 25, 1979, and told the defendant that the Farmers Home Administration would be unable to lend

the money because, inter alia, the debts to Brewer Motor and Equipment Co. must be satisfactorily settled.

14. That the letter written by the plaintiff, Craven Brewer, to Farmers Home Administration, was done gratuitously and without proper cause and done maliciously and with an intent to damage the crdit [sic] and reputation of the defendant.

15. That prior to the publication of said libelous matter of and concerning the defendant, the defendant was in all respects approved and ready to enter into an agreement with the Farmers Home Administration as above outlined and as will be made to appear more specific and certain at trial. Had not this libelous matter been published the defendant would have consummated his agreement with the Farmers Home Administration. As a result of such publication, the Farmers Home Administration refused to lend the defendant the money as originally agreed to between Farmers Home Administration and the defendant and the defendant has been greatly damaged.

16. That the defendant has been greatly injured because of the above conduct of the plaintiff in his credit and reputation and suffered great pain and mental anguish to defendant's damage in the sum of $10,000. That by reason of the plaintiff's false and malicious letter, which letter caused the Farmers Home Administration to write an equally damaging letter to the defendant, various firms, persons and corporations with whom the defendant had previously been doing business on credit and who had previously sold goods to defendant on credit thereafter have refused to sell goods to defendant on credit and defendant was otherwise greatly injured in his credit and reputation and suffered great pain and mental anguish, to defendant's damage in the sum of $10,000 and defendant is entitled to damages.

Plaintiff moved that the second counterclaim be dismissed for failure to state a claim upon which relief could be granted. Defendant appeals from an order granting plaintiff's motion to dismiss which states in part:

1. That the statements made by the plaintiff by letter to the Farmers Home Administration, dated April 10, 1979, are

not libelous, since the statements are not defamatory, and further since said statements are true statements.

2. The law in this jurisdiction requires that a libelous statement must be false and defamatory in order to be actionable.

E. C. Thompson, III, for the plaintiff-appellee.

Bruce H. Robinson, Jr., for the defendant-appellant.

MARTIN (Robert M.), Judge.

In his appellate brief, defendant contends that the court misinterpreted his position by assuming that the counterclaim was one for libel and slander rather than for interference with a contractual relationship. Prior to making this assertion in his brief, defendant states that "[b]efore drafting the Defendant's Counterclaim, Defendant's attorney consulted a recognized form book and followed the format almost verbatim in drafting the Second Counterclaim. See Bender's Federal Practice Forms, Volume 1B, Form No. 288.1 (Complaint in an action against a credit reporting firm for liable [sic])." From this statement it is obvious why the trial court assumed that the theory of defendant's counterclaim was one of libel and defamation. However, we are persuaded that defendant's counterclaim sufficiently alleges a claim for damages for the interference of defendant's contractual relationship with the Farmers Home Administration.

A counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff and it must set forth the facts constituting such cause with the same precision as if the cause were alleged in a complaint. *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40 (1964); *Perkins v. Perkins*, 249 N.C. 152, 105 S.E. 2d 663 (1958); 10 Strong's N.C. Index 3d *Pleadings* § 11 (1977). The following rules, therefore, regarding the sufficiency of a complaint to withstand a motion to dismiss made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, are equally applicable to a claim for relief stated by a defendant in a counterclaim.

For purposes of a motion to dismiss, the allegations of the complaint must be treated as true. *Smith v. Ford Motor Co.*, 289

N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976). A complaint is sufficient to withstand the motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and the allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A plaintiff's claim for relief should not be dismissed *unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). With regard to its sufficiency, the question is whether the complaint, when liberally construed, states a claim upon which relief can be granted *on any theory. Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975).

In *Johnson v. Gray*, 263 N.C. 507, 509, 139 S.E. 2d 551, 552-3 (1965), the Supreme Court quoted the following language with approval from the opinion of Justice Devin (later Chief Justice), writing in *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E. 2d 647, 656 (1945):

> [w]e think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense. . . . In *Kamm v. Flink*, 113 N.J.L., 582, 99 A.L.R., 1, it was said: "Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results." The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense.

In his answer to plaintiff's complaint, defendant denied that he was indebted to plaintiff. The gist of defendant's second counterclaim, quoted above, is that the plaintiff wrongfully and maliciously prevented a third party, the Farmers Home Administration, from entering into a contract with defendant, which

it otherwise would have entered into but for plaintiff's attempt to gain some advantage at defendant's expense, *i.e.*, to compel defendant to pay an unjust debt. The letter written by plaintiff to the FHA is alleged as the means used by plaintiff to accomplish his unlawful design. "The means used do not change the nature of the cause of action." *Johnson v. Graye*, 251 N.C. 448, 451, 111 S.E. 2d 595, 597 (1959).

The question of whether the allegations of defendant's counterclaim presented a claim for relief for libel and slander is irrelevant to this appeal. The defendant has not argued this question in his brief. Therefore, we deem it abandoned. Rule 28, N.C. Rules App. Proc.

For the reasons previously set forth, we hold that the order of the trial court granting plaintiff's motion to dismiss defendant's second counterclaim must be and is hereby reversed.

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIE JUNIOR JONES

No. 8014SC1094

(Filed 16 June 1981)

1. Constitutional Law § 49— right to counsel—waiver

There was no merit to defendant's contention that he was deprived of his right to counsel where the record affirmatively disclosed a knowing and written waiver of counsel.

2. Assault and Battery § 15.6— assault on law officers—self-defense—instructions improper

In a prosecution of defendant for assault on law enforcement officers where defendant contended that the officers made unprovoked assaults on him and used excessive force in attempting to take him from a magistrate's office to the jail and that he was acting to defend himself from those assaults, the trial court erred in instructing the jury that, if they believed from the evidence that the officers used excessive force in processing the arrest of defendant, then any assault by defendant on any officers was justified and excused and constituted no crime "if the assault was limited to the use of

reasonable force necessary to defend against the use of excessive force," since, if the officers made unprovoked assaults or used excessive force against defendant in carrying out their custodial duties, they then became much like aggressors in any affray, and rules of law relating to defendant's right to defend himself came into play and should have been explained to the jury.

APPEAL by defendant from *McLelland, Judge.* Judgments entered 17 July 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 March 1981.

Defendant was charged in three separate indictments with three counts of assault with a deadly weapon on a law enforcement officer, two counts of misdemeanor assault on a law enforcement officer, malicious injury to personal property and with driving under the influence of intoxicating liquor.

The State's evidence tended to show that defendant came to a police station in Durham shortly after 2:00 a.m. on 18 January 1980. He informed police officers Timothy Leathers and Ralph Burwell, Jr., that he had run his car into a ditch. The officers drove defendant to the scene of the accident and called for a wrecker. On the way to the scene, Officer Leathers detected a strong odor of alcohol about defendant. After the wrecker arrived and towed the car out of the ditch, Officer Leathers arrested defendant for driving under the influence. Officer Burwell testified that he smelled a strong odor of alcohol about defendant, but only after he was placed under arrest. Defendant told the officers he had been drinking beer. When he was given sobriety tests, he missed his nose completely with both fingers, wobbled as he walked and was unable to negotiate a turn very well. In Leathers' opinion, defendant was under the influence of alcohol. He was taken to the magistrate's office where he was again given sobriety tests and "kinda sway[ed]" as he turned, touched his nose with his left hand but had a problem doing it with his right hand, and was slow in picking up coins. Defendant was given the breathalyzer test, and his reading was .14. He was taken before the magistrate who prepared his release order and then was allowed to make telephone calls for about 10 to 20 minutes. At the end of that time, Officer Leathers walked over to the defendant and told him it was time to go, placing his right hand on defendant's arm. Defendant threw the phone down and struck Leathers on the left side of his face, knocking him down and breaking a facial bone. He hit Leathers several times with his fist

and also hit him with a chair. Officer Burwell pulled his nightstick out and hit defendant on the leg several times. Defendant was striking Burwell as he attempted to subdue defendant. Burwell's nightstick broke, and defendant picked up one of the pieces and stabbed Officer Leathers in the stomach. Defendant also picked up a chair and threw it at Burwell. Another deputy, Wayburn Pearce, tried to pin defendant in a corner with a chair. He, however, lost the chair, and defendant picked it up and struck Pearce with it.

Defendant's evidence tends to show that he drove his car into a ditch on 18 January when he was on his way home from a lounge around 1:45 a.m. He went to the police station to get help, and the officers went with him to his car. He told them that he had had a few drinks but had not been drinking excessively. After he was arrested, he was taken to the magistrate's office where he was allowed to use the telephone. As he was trying to call his home for the third time, Officer Leathers told him he had been on the phone long enough, grabbed him and jerked him away from the telephone. Leathers began hitting defendant in the chest. Then Officer Burwell struck him on the leg and tried to hit him on the head with his nightstick. Deputy Pearce threw a chair at defendant. Defendant caught it and threw it back, attempting to defend himself. Burwell's nightstick broke on defendant's forearm, and Burwell threw a jagged portion of it at defendant, stabbing him in the groin. Defendant did not start the fight, but he had to defend himself. He stabbed Officer Leathers with the jagged end of the nightstick which had broken on his wrist. A deputy drew a gun on him and told him to get down on his knees. Defendant told the officers that he was giving up. Then they handcuffed him, threw him around, and tore off all of his clothes except his underwear before taking him upstairs. He had a fractured wrist and elbow and numerous bruises.

Defendant was convicted on all charges and received three concurrent sentences of three years imprisonment.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell and Special Deputy Attorney General Isaac T. Avery III, for the State.

Loflin and Loflin, by Thomas F. Loflin III, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first argues that he has been deprived of his right to counsel in violation of his right under the Constitutions of the United States and the State of North Carolina. We conclude that the assignment of error is without merit because the record affirmatively discloses the contrary, as follows.

Defendant, represented by his privately employed counsel, waived formal arraignment on 20 June 1980, entered a plea of not guilty and stated that he was ready for trial. He also executed the following written waiver of his right to assigned counsel:

WAIVER OF RIGHT TO HAVE ASSIGNED COUNSEL

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

s / xWILLIE J. JONES

Sworn to and subscribed before me this _____ day of 6-20, 1980.

s / MARGARET H. WOLFE
Clerk of Superior Court

CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open Court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the assignment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This the 20 day of June, 1980.

s / F. GORDON BATTLE
Signature of Judge

The case was called for trial on 16 July 1980 wherein the following took place:

COURT: You are ready to go to trial without a lawyer?

DEFENDANT JONES: Yes, sir, I am.

COURT: Your plea is what?

DEFENDANT JONES: My plea is not guilty.

COURT: Has he been arraigned heretofore?

MRS. MCKOWN: He was arraigned when Mr. Parks represented him.

The record affirmatively discloses a knowing waiver of counsel and, therefore, the assignment of error is overruled.

[2] Defendant also brings forward assignments of error directed at the judge's instructions to the jury. Among other things, defendant contends that the judge inadequately instructed the jury on defendant's right to defend himself against the officers.

The jury was instructed that the burden was on the State to prove that the defendant intentionally and without justification or excuse struck the officer. The jury was further instructed as follows:

> The use of excessive force in the performance of a duty of his office by an officer does not take the officer outside the performance of his duty, nor make an arrest unlawful; but where the officer uses excessive force in the performance of a duty of his office, then an assault on the officer is excused if that assault is limited to the use of reasonable force to defend against the use of excessive force.
>
> Thus, if you believe from the evidence that the officers used excessive force in processing the arrest of this defendant in the courthouse, then any assault by this defendant on any officers is justified and excused and constitutes no crime if the assault was limited to the use of reasonable force necessary to defend against the use of excessive force.

Defendant contends that this instruction is inadequate. We agree. The instruction fails to declare and explain the law of self-defense as it applies to the evidence given in the case. The officers had the right to use such force as was reasonably necessary to control the defendant while he was in their custody, including removing him from the magistrate's office to a jail cell. Defendant had no right to defend himself against such force as was reasonably necessary for the officers to carry out these duties. The State's evidence tends to show that no unnecessary force was employed. Defendant's evidence, however, tended to show that the officers made unprovoked assaults on him and used excessive force in attempting to take him from the magistrate's office to the jail and that he was acting to defend himself from those assaults. He testified, in part, "I did the best I could to defend myself without, you know, hurting the officers." It is for the jury and not the court to determine the credibility of the evidence. It is for the judge to declare and explain the law arising on the evidence. G.S. 15A-1232. If, indeed, the officers made the unprovoked assaults or used excessive force against defendant in carrying out their custodial duties, they then became much like aggressors in any affray, and rules of law relating to defendant's right to defend himself came into play and should have been explained to the jury.

It is true that the jury was instructed that defendant could defend with the "reasonable force *necessary*." It is well settled, however, that the necessity does not have to be real, it need be only reasonably apparent to the defendant. *See, e.g., State v. Lee*, 258 N.C. 44, 127 S.E. 2d 774 (1962), where a new trial was ordered because the judge's charge was to the effect that the plea of self-defense rests upon real necessity, and not upon necessity, real or apparent. The reasonableness of such belief is to be judged by the circumstances as they appear to the party charged at the time of the assault. It is, however, for the jury, and not the party charged, to determine the reasonableness of the belief under which the party charged acted. *State v. Francis*, 252 N.C. 57, 112 S.E. 2d 746 (1960).

The State argues that the charge can be sustained under the authority of *State v. Mensch*, 34 N.C. App. 572, 239 S.E. 2d 297 (1977), *review denied*, 294 N.C. 443, 241 S.E. 2d 845 (1978). In that case, however, the trial judge had instructed the jury that if the

officers used excessive force, it was the duty of the jury to find defendant not guilty. The court said

> These instructions, in effect, informed the jury that if the officer used excessive force in effecting the arrest, the defendant had the right to assault the officer. These instructions were favorable to defendant, even more so than a general charge on self-defense which would have restricted defendant to the use of reasonable force under the circumstances.

Id. at 574, 239 S.E. 2d at 299. Under that charge, the jury did not have to concern itself with necessity, real or apparent.

We have considered defendant's assignments of error as they relate to the charge of driving under the influence and find them to be without merit.

For the reasons stated, defendant is awarded a new trial on all of the charges except the charge of driving under the influence. Since that conviction was consolidated with the others for judgment, it must be remanded for resentencing.

Remanded for resentencing on the charge of unlawful operation of a vehicle under the influence.

New trial on all other charges.

Judges WELLS and BECTON concur.

GRAHAM HUMPHRIES, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, INC., CARRIER

No. 8010IC1208

(Filed 16 June 1981)

Master and Servant § 68— workers' compensation—occupational disease—permanent disability

Medical evidence presented by plaintiff was sufficient to establish that his chronic obstructive respiratory disease was caused by the conditions of his employment in the weave room of a textile plant, and medical testimony and plaintiff's own testimony sufficiently established that he is permanently disabled by the disease.

Humphries v. Cone Mills Corp.

APPEAL by defendants from North Carolina Industrial Commission. Opinion and Award filed 26 June 1980. Heard in the Court of Appeals 3 April 1981.

On 13 March 1978, plaintiff, Graham Humphries, filed a complaint with the North Carolina Industrial Commission (Commission) alleging that he had contracted an occupational respiratory disease caused by exposure to cotton dust while working for the defendant, Cone Mills Corporation (Cone Mills). Humphries is presently fifty-seven years old and began working in textile mills at the age of sixteen. He worked in the weave room of various mills from that time until his retirement from Cone Mills on 15 January 1976.

Humphries began working for Cone Mills at its Eno Plant in Hillsborough, North Carolina on 21 August 1969 as a loom fixer in the weave room. In 1971, he was promoted to Head Loom Fixer and worked in that position until 1973 when he was promoted to Supervisor of the weave room. Humphries remained in this supervisory position until his retirement in 1976.

Humphries smoked approximately three-fourths of a pack of cigarettes per day for thirty years before he quit smoking in 1969. In 1972, Humphries came under the care of Dr. Herbert O. Sieker of Duke Medical Center for treatment of respiratory problems that included shortness of breath, a tightness in his chest, and wheezing. Although under a regular course of treatment from Dr. Sieker, Humphries' respiratory problems worsened until he could no longer walk from one side of the weave room to the other without resting. Finally, in January 1976, Humphries stopped working because of his breathing problems, and he has not worked since that time.

The Commission upheld, and adopted as its own, an Opinion and Award by Deputy Commissioner Christine Denson in which she found that Humphries was "permanently and totally disabled as a result of [a] chronic obstructive respiratory disease." Humphries was awarded the maximum amount allowable under the Workers' Compensation Act of $146.00 per week for the remainder of his life. In its opinion, the Commission held that:

> Plaintiff's chronic obstructive respiratory disease was due to causes and conditions which are characteristic of and

peculiar to his particular occupation and is not an ordinary disease of life to which the general public is equally exposed outside of the employment.

Defendants are before us appealing from this adverse decision by the Commission.

Maupin, Taylor & Ellis, by Richard M. Lewis, and David V. Brooks, for defendant appellants.

Hassell & Hudson, by Charles R. Hassell, Jr., for plaintiff appellee.

BECTON, Judge.

The scope of appellate review of an award made by the Commission is limited by the Workers' Compensation Act to "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." G.S. 97-86. The Commission's award is "conclusive and binding [on this court] as to all questions of fact." *Id.* Our review for errors of law requires a "two-fold determination of whether the Commission's findings are supported by *any* competent evidence and whether its subsequent legal conclusions are justified by those findings. *See Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980)." *Buck v. Procter & Gamble*, 278 N.C. App. 268, 52 S.E. 2d 88 (1981).

Defendants argue that Humphries' evidence (1) fails to establish that his disease was caused by the conditions of his employment, and (2) fails to establish that he is permanently disabled by the disease. Humphries' claim was brought under the provision of G.S. 97-53(13) which deems an occupational disease to be:

> Any disease . . . *which is proven to be due to causes and conditions* which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment. (Emphasis added.)

This statute in no way requires that the conditions of employment be the exclusive cause of the disease in order to be compen-

sable. In *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), Chief Justice Sharp interpreted the language of G.S. 97-53(13) to mean that "[a] disease is 'characteristic' of a profession when there is a recognizable link between the nature of the job and *an increased risk of contracting the disease* in question." (Emphasis added.) 297 N.C. at 472, 256 S.E. 2d at 198. Moreover, *Booker* holds that the disease need not be one which "originates exclusively from the particular kind of employment in which the employee is engaged, but rather . . . employment must result in a hazard which distinguishes it in character from the general run of occupations. . . ." *Id.* at 473, 256 S.E. 2d at 199.

Defendants argue that the evidence presented only shows, at best, that plaintiff's condition was *aggravated* by the conditions of his employment, not *caused* by them. Our reading of the record is otherwise. Dr. Sieker, Humphries' treating physician and an expert in the field of respiratory disease, testified: "It is my opinion that the cotton dust exposure *contributed* to his bronchopulmonary disease." On cross examination after discussing the contributory effects of cigarette smoking, Dr. Sieker pointed out that "it's possible to say that both [smoking and cotton dust exposure] were contributing factors" in causing the disease, but once Humphries stopped smoking in 1969, "he was still exposed to cotton dust, he had progression of symptoms so the cotton dust of itself must have been a factor in causing trouble."

Dr. Herbert A. Saltzman, an expert in the field of occupational disease, testified that based on his examination of Humphries, "it is more likely than not that [Humphries'] condition is due to byssinosis [a respiratory disease common to textile mill workers]." The testimony of Drs. Sieker and Saltzman is competent evidence which supports the Commission's finding that the nature and condition of Humphries' employment caused him to contract, or at least increased the risk of his contracting, an obstructive respiratory disease.

Defendants also claim that Humphries fails to establish that he is permanently disabled. Defendants concede that Dr. Sieker is competent to offer an opinion concerning Humphries' degree of disability from certain physical activities. The defendants claim, however, that Dr. Sieker, over objection, was improperly permitted to give his opinion on the ultimate issue in the case—whether

Humphries was unable to work at all—and that an improper foundation was laid for the hypothetical opinion question asked of Dr. Sieker. Regardless of the merits of defendants' objection to this question, no objection was made at trial when Dr. Sieker testified that:

> Subsequent to March, 1976, I had occasion to send further correspondence with regard to his disability. That was on 15 February 1978. The letter dated 15 February 1978 says that I confirm a conversation with the insurance company, Provident Life and Accident Insurance Company, of that date, February 15, 1978, and it indicates that I consider Mr. Humphries permanently disabled because of his severe lung disease. The last physician statement was dated August 8, 1977, again stating that he was permanently disabled.

It is well established that if an objection is not made when a question is asked and the answer given, the right to have that evidence excluded on appeal is waived. *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968). Moreover, Dr. Saltzman testified: "I think that [Humphries] was significantly disabled at the time of my assessment [on 19 September 1977]." And, Humphries testified that just prior to retirement, he could not walk from one end of the weave room to the other without having to rest; that he had to rest when climbing as few as five steps in his trailer; and that he could only sleep an hour and a half at a time because of his congestion. Given the expert testimony in the record and Humphries' own testimony about his physical condition, the Industrial Commission had before it competent evidence to support its finding that Humphries was permanently disabled.

The evidence presented, then, supports the Commission's findings that Humphries' disease was caused by the conditions of his employment and that this occupational disease was sufficiently severe to permanently disable him. These findings, taken as true, are competent to support the Commission in concluding as a matter of law that Humphries' disease is compensable under the Workers' Compensation Act and that he is entitled to compensation for permanent and total disability. Based upon this determination, the Opinion and Award of the Industrial Commission are

Affirmed.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

NORMA CABLE HAYES v. JORDON WILSON CABLE AND JOHN NORTH CABLE

No. 8015SC619

(Filed 16 June 1981)

Cancellation and Rescission of Instruments § 10.2— deeds executed under undue influence—claim improperly dismissed

In plaintiff's action instituted against two of her brothers seeking to set aside deeds made by her father to defendants where plaintiff alleged that the deeds should be set aside due to undue influence, inadequate consideration and a breach of fiduciary relationship, the trial court erred in dismissing plaintiff's claim based on undue influence where there was evidence that the father wanted his property to be divided among all his children and expressed this desire on several occasions, including a time close to the date the deeds were executed; the father was in failing health and weakened mental capacity at the time the deeds were executed; defendants exercised substantial control over the life of their father in the years preceding his death; and the consideration for the deeds was inadequate. However, the trial court did not err in dismissing plaintiff's claim based on a breach of fiduciary relationship, since the relationship of a father and son is a family relationship, not a fiduciary one, nor did the court err in dismissing plaintiff's claim based on lack of consideration since, if the jury should find there was no undue influence, the close blood relationship between the parties would be good consideration if the deeds were not deeds of gift.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 10 December 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 14 January 1981.

The plaintiff instituted this action against two of her brothers on 12 February 1979 seeking to set aside deeds made by her father, James Claude Cable, to the defendants in 1977. James Claude Cable died 19 January 1978 at 90 years of age. The deeds were recorded a short time after his death. The plaintiff alleged the deeds should be set aside due to the lack of mental capacity of James Claude Cable, duress and undue influence, inadequate consideration, and a breach of the fiduciary relationship which existed between the defendants and the deceased.

The plaintiff's evidence tended to show that in 1969 James Claude Cable executed a will in which he devised a parcel of land to plaintiff and the remainder of his estate to his three sons. These devises were of no effect after the deeds were recorded. In 1974, Mr. Cable broke his hip and shortly thereafter began suffering a mental and physical decline. At the time he broke his hip, Mr. Cable was living with his second wife. The plaintiff and James Claude Cable's wife were prevented from taking Mr. Cable home from the hospital, after treatment for his broken hip, by Jordan Wilson Cable who arrived at the hospital before they did and took him to Jordan Wilson Cable's home. Jordan Wilson Cable would not let James Claude Cable's wife visit him, once threatening to use his shotgun "and blow her head off" if she visited him. He referred to her as a "gold digger." Several times James Claude Cable expressed his desire to go home and be reunited with his wife. However, in July 1976, they were divorced. The defendants paid James Claude Cable's wife $5,000.00 at the time of the divorce.

The plaintiff's evidence further showed that the tract of land conveyed to Jordon Wilson Cable had a fair market value of $100,500.00 and the tract conveyed to John North Cable had a fair market value of $107,000.00. The deeds to each tract recited a consideration of "$10.00 and other valuable consideration," and each deed contained excise tax stamps in the amount of $8.00. James Claude Cable's grandson testified that his grandfather had told him in the presence of other family members on several occasions in 1969, 1974, 1976, and 1977 that he wanted his property divided equally among his four living children.

At the close of the plaintiff's evidence, the court dismissed the plaintiff's claims based on undue influence, inadequate consideration, and the fiduciary relationship between James Claude Cable and the defendants. The plaintiff took a voluntary dismissal as to the claim for lack of mental capacity. She appealed from the order of dismissal.

E. S. W. Dameron, Jr. and Ross and Dodge, by Harold T. Dodge, for plaintiff appellant.

Vernon, Vernon, Wooten, Brown and Andrews, by Wiley P. Wooten, for defendant appellees.

WEBB, Judge.

We hold it was error to dismiss the plaintiff's claim based on undue influence. Undue influence is "the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result." *Lee v. Ledbetter*, 229 N.C. 330, 332, 49 S.E. 2d 634, 636 (1948). Whether there was undue influence is to be determined by the jury from all the evidence including circumstantial evidence. *See In re Will of Franks*, 231 N.C. 252, 56 S.E. 2d 668 (1949), *reh. denied*, 231 N.C. 736, 57 S.E. 2d 315 (1950) and *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932). There is evidence in the case sub judice that James Claude Cable wanted his property to be divided between all his children and expressed this desire on several occasions including a time close to the date the deeds were executed; that he was in failing health and weakened mental capacity at the time the deeds were executed; that the defendants exercised substantial control over the life of James Claude Cable in the years preceding his death; and that the consideration for the deeds was inadequate. From this evidence, we believe the jury could conclude that the defendants used undue influence to procure the execution of the deeds.

We hold that it was not error to dismiss the plaintiff's claim based on a breach of a fiduciary relationship. The relationship of a father and son is a family relationship, not a fiduciary one. *Davis v. Davis*, 236 N.C. 208, 72 S.E. 2d 414 (1952).

We also hold the dismissal of the plaintiff's claim based on lack of consideration was proper. Inadequacy of consideration may be considered by the jury on the issue of undue influence. *See Jones v. Saunders*, 254 N.C. 644, 119 S.E. 2d 789 (1961). If the jury should find there was no undue influence, the close blood relationship between the parties would be good consideration if the deeds were not deeds of gift, *Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530 (1959).

We have examined the appellant's other assignments of error concerning the exclusion of certain testimony, and we find no merit in any of them.

Reversed in part and affirmed in part.

Judges MARTIN (Harry C.) and WHICHARD concur.

McROY GORE, JR. v. JAMES E. HILL, TRUSTEE, UNITED CAROLINA BANK (WACCAMAW BANK & TRUST COMPANY); ROLAND LENNON GORE AND WIFE, GWEN GORE; AND J. ROLAND GORE AND WIFE, VELMA J. GORE

No. 8013SC1073

(Filed 16 June 1981)

Mortgages and Deeds of Trust § 41.1— foreclosure sale—improper postponement—no standing by purchaser to assert invalidity of sale

The purchaser of property at a foreclosure sale had no basis to claim that the sale was invalid because the sale had been postponed for a period of time in excess of the twenty days permitted by G.S. 45-21.21, since that statute provided procedural protections only for the mortgagor and did not provide protection for the purchaser.

APPEAL by plaintiff from *Britt, Judge.* Judgment entered 25 August 1980 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 5 May 1981.

Plaintiff instituted suit against the defendants to recover damages he claimed he incurred when he purchased property at a foreclosure sale. The sale was conducted under a power of sale by defendant Hill, as substitute trustee, to foreclose a deed of trust executed by the four defendants Gore to secure indebtedness to United Carolina Bank (successor to Waccamaw Bank & Trust Company and hereinafter referred to as "the Bank"). In his complaint, plaintiff alleged that the property which he purchased at the sale was described throughout the foreclosure proceedings as being 253 acres less 125 acres which had already been conveyed. When plaintiff attempted to sell the property, the prospective purchaser, through is surveyor, discovered that there were only 48.40 acres, and the purchaser refused to close the purchase. Plaintiff further complained that the advertised foreclosure sale had been postponed for a period of time in excess of the twenty days allowed under the provisions of G.S. § 45-21.21. Plaintiff sought damages on the theory that the foreclosure was invalid

because the land had been improperly described, and because procedurally the sale was irregular.

Two of the defendants, Hill and the Bank, answered denying plaintiff's material allegations and asserting, among other things, that plaintiff was not one of the persons protected by North Carolina law relating to foreclosures and that he had the responsibility to discover any defect in the title to the foreclosure property. In their separate answer, the four defendants Gore disclaimed any liability to plaintiff with whom none of them had dealt.

After receiving the response of defendants Hill and the Bank to his request for admissions, plaintiff filed a motion for partial summary judgment on the issue of liability. Thereafter, defendants Hill and the Bank filed a motion for summary judgment. Both motions for summary judgment were heard together; plaintiff's motion was denied, and defendant's motion was allowed. Plaintiff appealed.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for plaintiff appellant.

C. Franklin Stanley, Jr., for defendant appellees.

HEDRICK, Judge.

The sole question presented by this appeal is whether the trial court improperly denied plaintiff's motion for partial summary judgment and allowed defendants' motion for summary judgment. Plaintiff's only argument is that the facts as to liability were undisputed: the foreclosure sale had been postponed in a manner contrary to the provisions of G.S. § 45-21.21 and that the sale was, therefore, void.

Upon a motion for summary judgment, the duty of the trial court is not to resolve issues of fact but to determine whether there is a genuine issue of material fact which should be tried by the jury. *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *disc. review denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977). The moving party must then make it clear that he is entitled to judgment as a matter of law. *Id.* The test for summary judgment is, therefore, twofold: Is there a genuine issue of material fact and

is the moving party entitled to judgment as a matter of law? *See* G.S. § 1A-1, Rule 56(c).

The material facts in the case before us are not in dispute. Having determined this, as he did in his order, the trial judge then had to decide which party was entitled to judgment as a matter of law. We hold that he correctly concluded that summary judgment in favor of defendants was proper.

The power of sale by which defendant Hill, as substitute trustee, foreclosed the deed of trust was contained in the deed of trust itself which was executed by the mortgagors, the defendants Gore. The due process rights of the defendants Gore, to the extent that they may not have been afforded in the deed of trust, are set forth in G.S. § 45-21.16 *et seq. Realty Mortgage Co. v. Bank*, 34 N.C. App. 481, 238 S.E. 2d 622 (1977). The procedural requirements of notice and hearing are designed to assure mortgagors that property which they have used to secure an indebtedness will not be foreclosed without due process of law. One of the procedures which is designed for the protection of the mortgagor is the requirement, contained in G.S. § 45-21.21, that the trustee's postponement of the foreclosure sale not exceed twenty days, exclusive of Sundays, after the original date set for the sale and that notice of the specifics of the postponement be posted. Failure to conform to these requirements renders the foreclosure sale voidable at the option of the mortgagor.

Having concluded that G.S. § 45-21.21 provides procedural protections for a mortgagor, we hold that plaintiff herein, purchaser of the property, was not a party protected by G.S. § 45-21.21 and that he has no basis on which to assert that the sale was invalid because the sale was postponed in a manner not consistent with the statute. As purchaser of the property, plaintiff acted at his own risk and subject to the doctrine of *caveat emptor. Buckman v. Bragaw*, 192 N.C. 152, 134 S.E. 422 (1926). Defendants, therefore, were entitled to judgment as a matter of law.

Summary judgment for defendants is

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

BARBARA WYLIE SAUNDERS v. FRANK LAMAR SAUNDERS

No. 8018DC1183

(Filed 16 June 1981)

Divorce and Alimony § 19.5, 24.2— child support and alimony—automatic increase—method of computation

Where a separation agreement between the parties provided that defendant should be charged with "percentage wise" increases in his monthly payments of alimony and child support based upon increases in his gross annual income, defendant's gross annual income could be interpreted to include longevity pay, bonuses, and money realized from summer employment, rather than being limited to defendant's base salary from the public school system.

APPEAL by plaintiff from *Williams, Judge.* Order entered 2 October 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 27 May 1981.

On 30 July 1973, plaintiff and defendant entered into a separation agreement which provided in part as follows:

> "TWELFTH: That the party of the first part shall pay to the party of the second part the sum of $500.00 per month for her support and the support of the children born of their marriage, . . . that the monthly payments of $500.00 are based upon the party of the first part having a gross annual income of $17,400.00, and upon any increase in that gross annual income there shall be a corresponding increase percentage wise in the said monthly payments by the party of the first part to the party of the second part."

On 26 February 1980, plaintiff instituted this action complaining that defendant's gross annual income had increased since 1973, and that, as a result, the monthly payments of $500.00 should be increased under Article Twelve of their separation agreement.

Prior to the hearing before the district court, the parties stipulated that:

> "3. [I]n the year 1973 . . . defendant's projected salary for that year on account of his employment with the Greensboro Public Schools was $17,400.00.

4. [I]n 1977, defendant's total salary income was $21,734.40, including $999.14 in longevity pay from Greensboro Public Schools . . . .

5. [In] 1978, defendant's total salary income was $29,565.44, including $1,057.54 in longevity pay from Greensboro Public Schools, and $1,200.00 realized from summer employment by the University of North Carolina at Greensboro . . . .

6. [In] 1979, defendant's total salary income was $29,784.58, which included $1,109.16 in longevity pay from Greensboro Public Schools, [and] a $200.00 bonus . . . ."

The district court found that gross annual income earned by the defendant did not include additional income for longevity pay, his $200.00 bonus, or pay for work in the summer school at the University of North Carolina at Greensboro.

Plaintiff appealed.

Mary F. Cannon and Luke Wright for plaintiff appellant.

Graham, Cooke and Miles, by E. Norman Graham, for defendant appellee.

WEBB, Judge.

Plaintiff contends the court erred in its interpretation of "gross annual income." We agree. The agreement is clear and unambiguous, and "[t]he terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E. 2d 539, 541 (1962). "Gross annual income" in its "plain, ordinary and popular sense" means total income without deductions. Under this definition, defendant's "gross annual income" should be interpreted to include longevity pay, bonuses and money realized from summer employment. It is from this sum, and not his base salary, that defendant should be charged with "percentage wise" increases in his monthly payments of alimony and support as prescribed by the agreement.

We note the parties, in their arguments and briefs, informed the Court that: (1) plaintiff's attorney prepared the agreement, (2) dividends and interest were not included in the parties' inter-

pretation of "gross annual income," and (3) defendant's salary in 1973, from his work with Greensboro schools, was slightly less than $17,400.00. The record does not contain any of these facts, and we have not considered them as a basis for this opinion.

We reverse and remand for an order consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

OLLIE RIMER LONG, MARY ELLEN LONG ROSEMAN AND VIRGINIA LONG STANCIL v. CABARRUS COUNTY BOARD OF EDUCATION

No. 8019DC1051

(Filed 16 June 1981)

Rules of Civil Procedure § 4; Schools § 4— service of process of board of education

A county board of education was not properly served with process where process was left with the wife of the chairman of the board at his usual place of abode, since G.S. 1A-1, Rule 4(j)(5)(c) requires *personal* service of certain named officials or agents of a board of education and does not permit leaving the process with other persons.

APPEAL by defendant from *Warren, Judge.* Order entered 25 August 1980 in District Court, CABARRUS County. Heard in the Court of Appeals 30 April 1980.

Plaintiff brought this action against the Cabarrus County Board of Education to declare the rights of the parties in a certain tract of land in Cabarrus County. The Board of Education moved to dismiss the action on grounds that the service of process failed to comply with the provisions of Rule 4(j)(5)(c) of the North Carolina Rules of Civil Procedure. The order of the trial court contains a finding of fact that the summons and complaint were served on the Board of Education by serving the Chairman of the Board, Stuart Black, in the following manner: "the Deputy Sheriff of Cabarrus County, North Carolina, left copies with Mrs. Stuart Black who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of

abode." The trial judge denied defendant's motion and defendant has appealed.

James A. Corriher for plaintiff appellees.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for the defendant appellant.

WELLS, Judge.

Defendant's only assignment of error is to the trial judge's conclusion that the service of process in this action complied with G.S. 1A-1, Rule 4(j)(5)(c) of the Rules of Civil Procedure. The pertinent provisions of Rule 4 provide that in an action commenced in a court having subject matter jurisdiction and grounds for personal jurisdiction, service of process upon a county or city board of education shall be made

> (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney in fact authorized by appointment or by statute to be served or to accept service in its behalf, or (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney in fact as specified in (i) and (ii).

"Where a statute provides for service of summons by designated methods, the specified requirements must be complied with or there is no valid service." *Broughton v. DuMont*, 43 N.C. App. 512, 514, 259 S.E. 2d 361, 363 (1979), *disc. rev. denied*, 299 N.C. 120, 262 S.E. 2d 5 (1980). The service of process in this action was not performed in accordance with the clearly stated, explicit provisions in Rule 4(j)(5)(c) which require *personal* service on certain named officials or agents, and does not allow for leaving the process with other persons, as is allowed when the action is against a natural person. *See*, Rule 4(j)(1)(a). The service was therefore defective and insufficient to obtain personal jurisdiction over the Board of Education. *Id.* at 515, 259 S.E. 2d at 363; *see also, Hassell v. Wilson*, 301 N.C. 307, 314, 272 S.E. 2d 77, 81-82 (1980); *Tinkham v. Hall*, 47 N.C. App. 651, 653, 267 S.E. 2d 588, 590 (1980). Plaintiff's agrument that the Board of Education received

actual notice of the proceedings is immaterial. Actual notice may not supply validity to service unless the service is in the manner prescribed by statute. *Stone v. Hicks*, 45 N.C. App. 66, 67, 262 S.E. 2d 318, 319 (1980); *accord, Hall v. Lassiter*, 44 N.C. App. 23, 25, 260 S.E. 2d 155, 157 (1979), *disc. rev. denied*, 299 N.C. 330, 265 S.E. 2d 395 (1980).

Reversed.

Judges VAUGHN and CLARK concur.

EARNEST TERRY GAYMON v. ALICE MURRAY BARBEE

No. 8018SC1181

(Filed 16 June 1981)

Automobiles § 62.1— pedestrian crossing at intersection—negligence of driver—sufficiency of evidence

In an action to recover for personal injury sustained by plaintiff pedestrian as he crossed the street at an intersection, the trial court erred in entering summary judgment for defendant where there was evidence from which the jury could find that defendant was negligent in driving at a speed of 45 to 50 miles an hour in an effort to get through the stoplight, and this negligence was a proximate cause of plaintiff's injury.

APPEAL by plaintiff from *Walker (Hal H.), Judge.* Judgment entered 6 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 May 1981.

This is an action for personal injuries in which the plaintiff, a pedestrian, alleged he was injured by the negligence of the defendant. The plaintiff was struck by an automobile driven by the defendant as the plaintiff was crossing Market Street in Greensboro. The defendant filed an answer in which she denied any negligence and pled contributory negligence by the plaintiff.

The plaintiff moved for partial summary judgment, and the defendant moved for summary judgment. The parties relied on depositions of the plaintiff and defendant and on affidavits. The court granted the defendant's motion for summary judgment, and the plaintiff appealed.

Badgett, Calaway, Phillips, Davis, Stephens, Peed and Brown, by B. Ervin Brown, II, for plaintiff appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by G. Marlin Evans, for defendant appellee.

WEBB, Judge.

The only question presented by this appeal is whether it was error to allow the defendant's motion for summary judgment. We hold this was error.

There have been many cases dealing with injury to pedestrians while crossing a street in front of an oncoming automobile. Many of these cases are cited and analyzed in *Ragland v. Moore*, 41 N.C. App. 588, 255 S.E. 2d 222 (1979), *modified and affirmed*, 299 N.C. 360, 261 S.E. 2d 666 (1980). We believe that the rule from these cases is that it if was the duty of the plaintiff to yield the right-of-way and all the evidence so clearly establishes the plaintiff-pedestrian's failure to yield the right-of-way as one of the proximate causes of his injuries that no other reasonable conclusion is possible, summary judgment should have been entered in favor of the defendant. In the case sub judice, the affidavit of Ophelia Newkirk stated in pertinent part as follows:

> "I observed . . . Earnest Gaymon crossing Market Street at the intersection of Market and English Streets. He had begun to cross the intersection after the other cars had passed through the green light. He was not running across the street, but was walking. I then saw this car coming towards the light going approximately 45 to 50 miles per hour. The light was yellow at the time, so it looked like she was trying to beat the light."

From this affidavit we believe a jury could find that the defendant was negligent in driving at a speed of 45 to 50 miles an hour in an effort to get through the stoplight, and this negligence was a proximate cause of the plaintiff's injury. The jury could also conclude that the plaintiff was negligent in crossing the intersection against the green light. We do not believe, however, that the only reasonable inference that could be drawn is that the plaintiff's contributory negligence was a proximate cause of the accident. Although he may have been negligent, we do not believe

a reasonable man would have to foresee that the defendant would drive at such a speed as to try to get through the intersection before the light changed.

There was evidence by other affidavits and the defendant's deposition that the plaintiff did not cross at the intersection, that he stepped from behind a truck and it was not possible for the defendant to avoid the accident. Considering the forecast of evidence in the light most favorable to the plaintiff, however, we believe the case would have to be submitted to a jury. Summary judgment for the defendant was error. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. VINCENT THOMPSON

No. 8014SC1154

(Filed 16 June 1981)

Criminal Law § 76.7— admissibility of inculpatory statements—reliance on determination made at prior trial

The evidence on voir dire and the trial court's findings at defendant's first trial supported the court's order denying defendant's motion to suppress inculpatory in-custody statements, and the trial court at defendant's second trial did not err in finding that the testimony presented on voir dire at the second trial contained no additional evidence which required reconsideration of the order entered at the first trial.

APPEAL by defendant from *Brewer, Judge* and *Godwin, Judge.* Judgment entered 25 July 1980 Superior Court, DURHAM County. Heard in the Court of Appeals 6 April 1981.

Defendant was charged in a proper bill of indictment with armed robbery. The first trial of this case resulted in mistrial. At the conclusion of the second trial defendant was found guilty as charged and sentenced to a term of eight years minimum, twenty years maximum.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Gary K. Berman for defendant appellant.

HILL, Judge.

Defendant has raised two questions in his brief. The first question, which brings forward assignments of error numbers 1 through 6, raises the issue of whether the trial court erroneously failed to suppress defendant's inculpatory statements.

Prior to the first trial in this matter, defendant filed a motion to suppress inculpatory statements made by him on the day of his arrest. He alleged therein that the statements were not made following a knowing and intelligent waiver of his *Miranda* rights. At the *voir dire* hearing on this motion, Investigator Charles Britt of the Durham Police Department was the sole witness. The State also presented into evidence two Waiver of Rights forms and a written confession signed by defendant. After considering this evidence, Judge Godwin ordered that the motion to suppress defendant's confession be denied. This order was based upon findings of fact and conclusions of law. After a mistrial was declared, defendant's counsel filed a motion suggesting incapacity to proceed. This motion was granted, and defendant was sent to Dorothea Dix Hospital for observation. At the second trial of this matter, defendant again moved to suppress his confession on the basis of the alleged discovery of additional facts pertinent to the issue of whether he made a voluntary, knowing and intelligent waiver of his rights. Judge Brewer held a *voir dire* hearing to consider this matter. After considering testimony from Investigator Britt and the psychiatrist who examined defendant, Judge Brewer denied the motion to suppress. He noted that no additional information had been presented which demanded a reconsideration of Judge Godwin's prior order.

We have examined the evidence in the case offered on both *voir dire* hearings and conclude that the facts found by Judge Godwin are supported by the evidence and amply support the order denying the motion to suppress. At the second trial, after hearing the evidence of Dr. Royal, the psychiatrist who examined defendant at Dorothea Dix Hospital, Judge Brewer entered an order finding that the testimony contained no additional evidence

which required reconsideration of Judge Godwin's order. Our examination of the testimony offered by defendant leads us to the conclusion that Judge Brewer's order was entirely correct. This assignment of error is overruled.

Defendant's remaining assignment of error is to the imposition of judgment. Defendant correctly concedes that it is obvious that this assignment of error is answered by the answer to the question above. This assignment of error is also overruled.

No Error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

FRANCIS YVONNE POWERS v. CURRITUCK COUNTY BOARD OF EDUCATION

No. 801SC1198

(Filed 16 June 1981)

School § 13.2— dismissal of teacher—findings of fact and conclusions of law

Defendant was required to make findings of fact and conclusions of law in entering an order in which plaintiff, a tenured teacher, was notified that the decision of the superintendent to dismiss her was upheld. G.S. 115-142(1).

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 28 July 1980 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 28 May 1981.

Chambers, Ferguson, Watt, Wallas, Fuller and Adkins, by C. Yvonne Mims, for plaintiff appellant.

White, Hall, Mullen, Brumsey and Small, by William Brumsey III, for defendant appellee.

VAUGHN, Judge.

The judgment from which plaintiff, a tenured teacher, appealed affirmed an order of the Currituck County Board of Education in which plaintiff was notified that the decision of the Superintendent to dismiss her under G.S. 115-142(3)(1)(1) was upheld.

The Board acted after a hearing in which plaintiff was represented by counsel, and a full transcript of the hearing was made. The Board, however, made no findings of fact or conclusions of law.

G.S. 115-142(1), in pertinent part, provides as follows:

(4) At the conclusion of the hearing provided in this section, the board shall render its decision on the evidence submitted at such hearing and not otherwise.

(5) Within five days following the hearing, the board shall send a written copy of its findings and order to the teacher and superintendent. The board shall provide for making a transcript of its hearing. If the teacher contemplates an appeal to a court of law, he may request and shall receive at no charge a transcript of the proceedings.

In *Weber v. Board of Education*, 301 N.C. 83, 282 S.E. 2d 228 (1980), our Supreme Court vacated an opinion of this Court, *Weber v. Board of Education*, 46 N.C. App. 714, 266 S.E. 2d 42 (1980), in which this Court considered the merits of the appeal by applying the "whole record test" to determine whether there was substantial evidence to support the Board's decision. The Supreme Court held:

> Our review of the record reveals that the Buncombe County Board of Education made no findings of fact or conclusions of law upon which to base its decision.
>
> The decision of the Court of Appeals is therefore vacated. That court is directed to remand to the Superior Court, Buncombe County which said court shall remand to the Buncombe County Board of Education to make findings of fact and conclusions of law as required by law.

Following the mandate in *Weber*, we, therefore, remand the case to the Superior Court, Currituck County, which court shall remand the case to the Currituck County Board of Education "to make findings of fact and conclusions of law as required by law."

Vacated and remanded.

Judges ARNOLD and WELLS concur.

ROCKINGHAM SQUARE SHOPPING CENTER, INC., AND LEE D. TUTTLE v. INTEGON LIFE INSURANCE CORPORATION AND THE NORTHWESTERN BANK

No. 8017SC1155

(Filed 7 July 1981)

1. **Rules of Civil Procedure § 56.4— affidavit opposing summary judgment—when filed**

Affidavits in opposition to a motion for summary judgment should be served prior to the day of the hearing on the motion, and while G.S. 1A-1, Rule 6(b) and (d) give the trial court discretion to allow the late filing of affidavits, the court does not abuse its discretion when it refuses to accept late affidavits absent a showing of excusable neglect.

2. **Accord and Satisfaction § 1— summary judgment based on accord and satisfaction**

In an action for breach of contract, negligence, fraud, abuse of process, joint venture and unfair trade practices allegedly growing out of the financial failure of a shopping center for which defendant bank provided the construction loan, summary judgment was properly entered for defendant on the basis of the affirmative defense of accord and satisfaction where the evidence showed that, after the corporate plaintiff filed a petition for reorganization under the Bankruptcy Act, the parties agreed that the corporation would be sold to a third party; as a part of the sale, defendant bank agreed to forgive more than $40,000 in interest and other fees to which it was entitled, to relieve the individual plaintiff and his brothers of their individual liability as guarantors, and to consolidate and refinance the remaining liability of the individual plaintiff and his brothers with certain business property as security; the corporation's trustee told the bankruptcy judge that the parties had agreed on a basis for resolving all of the various relationships between the bank, the corporation, and the individual stockholders as guarantors which would follow from the sale and employ the proceeds of the sale; the bankruptcy proceedings were dismissed by an order finding that the stockholders and the bank had agreed upon a settlement of all obligations and other matters and things in dispute among them; and sale of the corporation to the third party was subsequently completed. Furthermore, summary judgment was properly entered for defendant bank since it appeared that plaintiffs' claims were utterly baseless in fact.

APPEAL by plaintiffs from *DeRamus, Judge.* Judgment entered 27 May 1980 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 26 May 1981.

This action concerns the development of Rockingham Square Shopping Center in Madison, North Carolina. Lee Tuttle conceived the idea of building the shopping center in 1971. He and his two brothers, Carl Tuttle and Robert Garth Tuttle, purchased a tract of land in September 1971, borrowing the purchase price of $40,000 from The Northwestern Bank. They incorporated as Rockingham Square Shopping Center, Inc., in 1972. Although each

brother owned one-third of the corporate stock, only Lee Tuttle was active in development of the shopping center. His two brothers acted as "silent partners." Rockingham Square obtained a construction loan of $852,000 from The Northwestern Bank. The Tuttle brothers and their wives personally guaranteed repayment of the loan. Integon Life Insurance Corporation issued a permanent loan commitment in the same amount. Development of the shopping center was hampered by numerous problems. Northwestern advanced almost $250,000 beyond the amount of the original construction loan before the shopping center was completed. Integon refused to close its permanent loan commitment on grounds that the shopping center was not completed by the specified deadline. It gave a second permanent loan commitment, but it refused to close that for the reason that Rockingham Square and the Tuttles were not solvent. Northwestern instituted foreclosure proceedings and Rockingham Square filed for reorganization in federal district court. Eventually, the shopping center was sold to Cos-Wat Dairy Distributors, Inc. for one million dollars, and the bankruptcy proceedings were dismissed. The sale price did not cover all of the Tuttles' liability to Northwestern. Lee Tuttle's brothers sold their corporate stock to him, and he and Rockingham Square instituted the present action against Northwestern and Integon.

By their complaint, plaintiffs sought to hold Northwestern and Integon responsible for the financial failure of the shopping center venture. Plaintiffs alleged claims for breach of contract, negligence, fraud, abuse of process, joint venture, and unfair trade practices. Integon moved to dismiss the action against it for failure to state a claim, and this motion was allowed. Northwestern filed answer, denying the material allegations of the complaint and asserting various defenses, including an accord and satisfaction between the parties in connection with the dismissal of Rockingham Square's bankruptcy proceedings. Further, Northwestern counterclaimed against plaintiffs for indebtedness which it had agreed to cancel as part of the alleged accord and satisfaction.

Discovery was conducted, and Northwestern moved for summary judgment on the basis of interrogatories and depositions. Plaintiffs offered affidavits in opposition at the summary judgment hearing, but the affidavits were rejected as untimely. The

materials before the trial court on summary judgment tended to show the following:

Lee Tuttle was inexperienced in developing shopping centers, but he tried to educate himself by reading. After he and his brothers purchased the land for the shopping center, he began seeking potential lenders and tenants. He approached the Town of Madison in February 1972 about opening and paving a road, Lonesome Road, to improve access to the shopping center area, and the Board of Aldermen voted to open the road. He began getting cost estimates from various building contractors, including Alvis Hole. He had prospective tenants send their requirements to Hole so that he could prepare his estimates. Hole first estimated construction at $7 to $8 per square foot, but he later gave an estimate closer to $12 per square foot. Hole put Tuttle in touch with T. C. Farthing, an engineer who prepared blueprints for the shopping center. Tuttle and Farthing met in September 1972 and agreed that Tuttle would supply specifications and that Farthing would prepare the plans and get them approved.

Tuttle applied to Northwestern for a construction loan in October or November 1972. He testified by deposition that he could not recall what stage the construction loan was in when it was definitely decided that he would hire Alvis Hole as general contractor. At one point he asserted that if he had known Northwestern "was going to require me to have a contractor even under unfavorable conditions, I would have never entered the project." However, at another point, he testified that it was "pretty conclusive" that Hole would be building the shopping center from the time that Farthing became involved. Tuttle also testified that although Northwestern had told him that he would have to have a general contractor, he wanted to supervise construction himself, and he continued to try to talk Northwestern out of the general contractor requirement. Hole testified, "Lee told me that I was his contractor and that he wanted me to build the stores, and that was considerably before we got the blueprints." Hole got blueprints and submitted estimates for A & P and Sears stores on 3 March 1973. He stated that he anticipated building the shopping center at that time. Robert Cardwell, Jr., the manager of Northwestern's branch in Madison, testified that he told Tuttle around the first of 1973 that he would be required to have a general contractor. It was standard bank policy to require a general contrac-

tor on a project of this sort to ensure that the buildings were properly constructed, and Northwestern discouraged Tuttle's desire to build the shopping center himself.

Tuttle obtained a permanent loan commitment from Integon on 19 January 1973 for a 20-year loan of $852,000 at 9 percent interest. This commitment required completion of the shopping center by 19 June 1974. The commitment further provided: "We are to be furnished with complete plans and specifications signed both by contractor and owners"; and "We are to be furnished with a copy of the final construction contract." A construction loan of $852,000 was approved by Northwestern's loan committee and board of directors. Before approval, Northwestern made certain advances to Tuttle: $40,000 for purchase of the land and about $60,000 to $70,000 for grading work. The construction loan was closed on 30 April 1973. The construction loan agreement called for compliance with every provision and condition of the permanent loan commitment of Integon. The parties also entered into a buy-sell agreement on 30 April 1973 providing for Integon to purchase Northwestern's note and mortgage upon compliance with the conditions of the permanent loan commitment.

Rockingham Square entered into a contract with Alvis Hole on 19 June 1973 for the construction of Sears, Scotties Drug, Family Dollar, and A & P stores. Hole was to be paid 12 percent of the costs, plus a $15,000 fee, plus 50 percent of the savings under $11 per square foot. Hole began construction in late July or early August of 1973.

Construction of the shopping center was hampered by numerous problems. There were cost overruns, material shortages, and construction delays. The Town of Madison never opened Lonesome Road. Friction developed among Tuttle, Hole, and Northwestern. It soon became apparent that the shopping center would not be completed by the deadline of 19 June 1974. On 13 December 1973, Integon agreed to extend its commitment for sixty days. On that same date, Tuttle fired Hole when A & P threatened to cancel its lease if work on its building was not done more quickly. Tuttle stated that he got a Northwestern official to approve the firing in advance, but that "some people from Northwestern" subsequently told him to rehire Hole or face foreclosure. Northwestern officials stated that they were concerned about the

considerable delay and difficulty involved in finding a general contractor to take over a half-completed project. Hole asserted that his dismissal would have resulted in the departure of the subcontractors and a three-month delay in construction.

Rockingham Square entered into another contract with Hole on 8 Jaunary 1974. This contract called for Hole to be paid 10 percent of the costs, with the exception of labor costs, for which he was to receive 18 percent up to $2,500 and 13 percent thereafter. Tuttle claimed that this contract was more favorable to Hole because Hole was then angry with him and could inflate the costs. Hole asserted that the new contract was more favorable to Rockingham Square. The new contract did not include the building for a new tenant, TG&Y, and Tuttle undertook construction of this building himself.

On 17 April 1974, the Town of Madison temporarily stopped construction on this building when Farthing complained that Tuttle was using incomplete and unapproved blueprints, threatening the safety of the building.

In June and July of 1974, two other setbacks occurred. On 17 June, Integon reduced its commitment to $786,000 based upon revisions in the projected rent roll for the shopping center. On 10 July, Rockingham Square and the Tuttles had to borrow an additional $175,000 from Northwestern on a demand note at 12 percent interest in order to complete construction.

Throughout construction, Tuttle accused Northwestern of interfering and undermining his authority in disputes with Hole. In one dispute, Tuttle accused Hole of billing him on an electrical subcontract for work that had not been done. Bank officials agreed with Hole that the bill should be paid. In another dispute, a ceiling collapsed and the ceiling subcontractor and electrical subcontractor blamed each other. Tuttle asserted that Northwestern and Hole wanted to pay both and that he was able to persuade them to resolve liability first "only after a lot of pressure." A third dispute involved the unavailability of insulation for the roof of A & P. Tuttle found another type of insulation and got A & P's approval; however, Hole and Northwestern questioned the substitution. They made Tuttle call A & P to confirm the approval, which Tuttle considered to be "very degrading" to him.

Tuttle claimed that the shopping center was completed by the new deadline of 19 August 1974 except for the spreading of gravel on the roof of TG&Y building. Integon took the position that its deadline had not been met, and it refused to go through with its permanent loan. Tuttle wanted to sue Integon; Northwestern encouraged Tuttle to find other permanent financing. Integon offered a new permanent loan commitment on 5 September 1974, in the amount of $773,424, for a term of nineteen years at 10 percent interest. This commitment required closing by 4 September 1975 and further provided for Rockingham Square and its guarantors to be fully solvent at the time of closing. Plaintiffs alleged in their complaint that Northwestern induced them to accept this second permanent loan commitment by promising to help them meet the solvency requirement. Still more money was needed to complete the shopping center. On 13 September 1974, Rockingham Square and the Tuttles executed a $250,000 demand note at 9 percent interest in favor of Northwestern. This note paid off the previous demand note. Northwestern eventually advanced about $242,000 pursuant to this new note. The shopping center was completed and all tenants moved in by the first of 1975.

In June 1975, Integon requested an audit by a certified public accountant to show the solvency of Rockingham Square and its guarantors. Tuttle and his accountant, Herbert Harrington, met with James Hartley, vice-president of Northwestern's credit department, in an effort to get Northwestern to agree in writing as to how it would handle the debt in excess of Integon's permanent commitment. It then appeared that Rockingham Square would have a net cash flow of only $2,074 per year after Integon's debt payments and the shopping center's operating expenses. Northwestern would not agree to any long-term financing. Northwestern suggested that Tuttle sell the undeveloped portion of the shopping center tract in order to meet the solvency requirement, but Tuttle did not want to do so. No solution was reached. Northwestern did write a letter to Integon on 8 August 1975 including the following: "We are most willing to work with Mr. Tuttle in order to resolve any cash flow problems which our other loan transactions may cause. However, we will be unable to take any affirmative action until the Rockingham Square loan has been closed with Integon." Integon took the position that the solvency requirement had not been met, and it refused to close. Both In-

tegon and Tuttle claimed the $17,000 standby fee which had been deposited to Integon's account as part of its loan commitment. Integon agreed to give up one-half of the fee in return for a full release, and such a release was executed in September 1975. Tuttle claimed that Northwestern pressured him into accepting this arrangement.

Northwestern demanded payment on 5 September 1975, but it agreed to give Tuttle time to seek other financing or a buyer for the shopping center. Neither was forthcoming, and on 1 December 1975, Northwestern again demanded payment of the debt, which was then greater than $1,009,000. It instituted foreclosure proceedings, and sale of the shopping center was ordered by the Rockingham Clerk of Superior Court on 5 January 1976. Rockingham Square appealed. Shortly thereafter, an offer to purchase the shopping center arose, and Tuttle and bank officials met on 30 January 1976. The meeting resulted in agreement to delay foreclosure for ninety-one days in return for assignment of rents to Northwestern, dismissal of Rockingham Square's appeal of the foreclosure order, and disbursement of Rockingham Square's appeal bond to Northwestern. This purchase offer did not go through. Foreclosure sale was set for 17 May 1976, but Rockingham Square filed a petition for reorganization under the Bankruptcy Act on 13 May 1976.

The first creditors' meeting was held before Bankruptcy Judge Rufus W. Reynolds on 22 July 1976. The meeting was continued until 23 September 1976 in order for the parties to try to work out a solution. Meanwhile, A & P announced it was withdrawing from the shopping center. Tuttle estimated that the shopping center was worth only $300,000 or $400,000 without a major grocery store tenant. Several offers to purchase the shopping center were unsuccessfully pursued. Eventually, Byrd's Food Centers expressed an interest in taking over the A & P Store, and Cos-Wat Dairy Distributors, Inc., owner of the Byrd's chain, made an offer to purchase the entire shopping center tract for one million dollars. During this time, dissension arose between the Tuttle brothers, and Carl and Robert Tuttle employed their own attorney. Tuttle blames Northwestern's attorney for creating the dissension. The three brothers met as stockholders of Rockingham Square on 13 and 16 September 1976. Carl and Robert Tuttle voted to accept the offer of Cos-Wat. Lee Tuttle was pur-

suing a better deal with another party and was opposed to this sale, but he was outvoted. A contract of sale with Cos-Wat was signed on 16 September 1976. As part of the sale, Northwestern agreed to waive certain amounts due it, to restructure the Tuttles' remaining liability, with certain business property as collateral, and to release the Tuttles from personal liability.

The parties met before Bankruptcy Judge Reynolds on 23 September 1976 and requested approval of their agreement. The trustee's attorney asserted that the parties had agreed "on a basis for resolving all of the various relationships between the bank, the corporation, and the individual stockholders as guarantors which would follow from the sale and employ the proceeds of the sale." Judge Reynolds approved the sale. On 24 September 1976, he dismissed the bankruptcy proceedings, finding in part that "the stockholders and the Bank have agreed upon a settlement of all obligations and other matters and things in dispute among them." The sale to Cos-Wat was closed on 8 October 1976.

Based upon the above materials, the trial court entered summary judgment for Northwestern. Plaintiffs appeal.

Edwards, Greeson, Weeks & Turner, by Joseph E. Turner, for plaintiff appellants.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by William F. Maready and Jackson N. Steele, for defendant appellee, The Northwestern Bank.

MARTIN, (Harry C.), Judge.

[1] At the final pretrial conference on 9 January 1980, defendant's motion for summary judgment was scheduled for hearing at the 5 May 1980 term of Rockingham Superior Court. The parties subsequently agreed for the hearing to be held on 8 May 1980 at 9:30 a.m. Defendant relied upon the pleadings and discovery of record. At commencement of the hearing, plaintiffs delivered to defense counsel and offered to the court the affidavit of Lee Tuttle. Later that day, plaintiffs produced additional affidavits in opposition to summary judgment. Defendant objected to all of these affidavits, and the trial court sustained the objection. On the second day of the summary judgment hearing, plaintiffs moved pursuant to N.C.G.S. 1A-1, Rule 60(b)(6), for relief

from the sustention of defendant's objection. This motion was denied, and plaintiffs now assign error to these two rulings. We find no error in them.

Plaintiffs argue that N.C.G.S. 1A-1, Rule 56, does not require that affidavits in opposition to summary judgment be filed in advance of the hearing and, alternatively, that Rule 6(d) gives the trial court discretion to allow late filing of opposing affidavits. Rule 56(c), in pertinent part, provides: "The adverse party prior to the day of hearing may serve opposing affidavits." *Insurance Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974), dealt with the question of when affidavits in support of a motion for summary judgment must be filed and served. In the course of deciding that issue, this Court quoted the above provision of Rule 56(c) and wrote: "It is clear that opposing affidavits are to be served prior to the day of the hearing." *Id.* at 130, 203 S.E. 2d at 423. This statement is in accord with authorities under the comparable federal rule. *See Jones v. Menard*, 559 F.2d 1282 (5th Cir. 1977); *Beaufort Concrete Co. v. Atlantic States Construction Co.*, 352 F.2d 460 (5th Cir. 1965); *cert. denied*, 384 U.S. 1004, 16 L.Ed. 2d 1018 (1966); 10 Wright and Miller, Federal Practice and Procedure § 2719 (1973). We now reaffirm that affidavits in opposition to a motion for summary judgment should be served prior to the day of the hearing. It is true that Rule 6(b) and (d) gives the trial court discretion to allow the late filing of affidavits. However, both *Chantos* and federal cases hold to the effect that absent a showing of excusable neglect, the trial court does not abuse its discretion when it refuses to accept late affidavits. *Chantos, supra; Farina v. Mission Inv. Trust*, 615 F.2d 1068 (5th Cir. 1980); *Beaufort Concrete Co., supra.*

In the present case the plaintiffs had notice of the summary judgment hearing nearly four months in advance. The discovery relied upon by defendant was of record. Plaintiffs offered no explanation for their delay in presenting opposing affidavits, and we find no error in the trial court's exclusion of them. Plaintiffs' Rule 60(b)(6) motion for relief from sustention of the objection to their affidavits was, of course, inappropriate, as that rule expressly applies only to final judgments. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). Regardless of the rule cited, we find no abuse of discretion in the trial court's refusal to reconsider its ruling. In any event, plaintiffs were not prejudiced. Lee Tuttle's deposition

was already before the court. We have reviewed the affidavits tendered by the plaintiffs, and we find that they add nothing of legal significance to the materials which were considered at the summary judgment hearing.

The principles applicable to summary judgment are well established. The moving party has the burden of clearly establishing the lack of any triable issue of fact. The papers supporting the movant's position are to be closely scrutinized while those of the opposing party are to be regarded indulgently. The motion may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See e.g., Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971). We find summary judgment appropriate in the present case.

[2] Summary judgment was properly entered on the basis of Northwestern's affirmative defense of accord and satisfaction. *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23 (1954), explains accord and satisfaction as follows:

> An accord and satisfaction is compounded of the two elements enumerated in the term. "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a 'satisfaction' is the execution or performance, of such agreement." 1 C.J.S., Accord and Satisfaction, section 1.

Id. at 413, 80 S.E. 2d at 27.

> Defendants' plea of accord and satisfaction "is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting

> for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement." . . .
>
> The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds. . . . Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood.

Prentzas v. Prentzas, 260 N.C. 101, 103-04, 131 S.E. 2d 678, 680-81 (1963) (citations omitted).

In *Construction Co. v. Coan*, 30 N.C. App. 731, 228 S.E. 2d 497, *disc. rev. denied*, 291 N.C. 323 (1976), the plaintiff constructed a motel for the defendants. There was a delay in completion of the project, and construction cost more than the guaranteed maximum set forth in the contract. After completion, the plaintiff and the defendants met in September 1973 to discuss their problems. The defendants agreed to pay the plaintiff a certain amount by certified check and to execute two notes to the plaintiff in return for the plaintiff's execution of an affidavit acknowledging payment in full and waiving any lien rights in the project. This agreement was carried out, but defendants failed to pay the notes and the plaintiff filed suit. The defendants answered and counterclaimed for breach of the construction contract. The plaintiff raised the affirmative defense of accord and satisfaction in its reply. The plaintiff moved for summary judgment on the basis of its president's affidavit regarding the September 1973 meeting. The defendants produced an affidavit stating that no resolution of the contract dispute or complete resolution had occurred. The plaintiff was allowed summary judgment. On appeal this Court wrote:

> Normally, the existence of an accord and satisfaction is a question of fact for the jury. But where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record. 1 Am. Jur. 2d, Accord and Satisfaction, § 53, p. 352.

Id. at 737, 228 S.E. 2d at 501. The Court noted that the amount due the plaintiff was in dispute, that the defendants agreed to ex-

ecute the notes, that the plaintiff's affidavit clearly established that the notes were given in full satisfaction of the disputed debt, and that at no time between execution of the notes and their counterclaim some year and a half later did the defendants deny their obligation on the notes by reason of plaintiff's breach of contract. The Court held that the only possible inference to be drawn from the affidavits was that an accord and satisfaction had been reached at the September 1973 meeting and that defendants' affidavit amounted to a mere general denial, which was insufficient to put the existence of an accord and satisfaction in issue. Summary judgment was affirmed; the cause was remanded for determination of the interest due on the notes.

In the present case the evidence tends to show that the shopping center was facing financial collapse in September 1976 when Cos-Wat offered to buy it for one million dollars. Northwestern offered certain concessions as part of such a sale. Northwestern agreed to forgive more than $40,000 in interest and other fees to which it was entitled, to relieve the Tuttles of their individual liability as guarantors, and to consolidate and refinance the Tuttles' remaining liability, with certain business property as security. The three Tuttle brothers met as stockholders and voted two to one to accept the offer. Lee Tuttle opposed the sale. His deposition reveals that his objection was based upon his desire to pursue a better deal, not on a desire to sue Northwestern. The stockholders did not assert any claim against Northwestern, although the acts now complained of had already occurred. Carl Tuttle explained his vote as follows: "I wanted to avoid foreclosure if I could. I wanted to avoid as much interest owed as possible. I wanted to get out, just to put it bluntly."

The agreement for the sale of the shopping center was signed on 16 September 1976. On 23 September 1976 the parties appeared before the bankruptcy judge to request approval of the sale. Rockingham Square's trustee stated that the parties had "agreed on a basis for resolving all of the various relationships between the bank, the corporation, and the individual stockholders as guarantors which would follow from the sale and employ the proceeds of the sale." The only concern voiced by the attorney for Rockingham Square and Lee Tuttle involved exposure to foreclosure should the bankruptcy proceedings be dismissed and the sale not go through. The next day, 24 September 1976,

the bankruptcy proceedings were dismissed by an order finding that "the stockholders and the Bank have agreed upon a settlement of all obligations and other matters and things in dispute among them." When the sale was subsequently completed, the parties' accord was satisfied. Based upon the above, we conclude that the only reasonable inference to be drawn from the evidence is that the parties' agreement represented a settlement of all matters in dispute among them, exactly as found by the bankruptcy judge. The trial court properly determined that an accord and satisfaction appeared as a matter of law.

Moreover, it appears that summary judgment was properly entered, as the plaintiffs' claims are "utterly baseless in fact." *Kessing v. Mortgage Corp., supra.* For example, plaintiffs' claim for breach of contract is based upon the allegation that Northwestern forced plaintiffs to hire a general contractor even though their contract did not require one. However, the evidence reveals that a general contractor was required by contract. The best that can be said of Tuttle's deposition testimony is that he attempted to talk Northwestern out of the general contractor requirement and that he "didn't know" what stage the construction loan was in when he decided to engage Alvis Hole as general contractor.

Plaintiffs' claim of fraud is based upon the allegation that Northwestern induced them into entering the second permanent loan commitment with Integon by promising to "do whatever was necessary" to help plaintiffs meet Integon's requirement that the borrower and guarantors be solvent. In Tuttle's deposition we find the following:

> Q. Now, you allege in the complaint that somebody at Northwestern made the statement to you that "We'll meet the solvency problem when we get to it or cross that bridge when we get to it" or words to that effect?
>
> A. Words to that effect; yes, sir.

The deposition is insufficient to show a definite and specific representation by Northwestern to the effect alleged in the complaint. Moreover, the deposition does not show clearly that the above statement was made before acceptance of Integon's second permanent loan commitment. Finally, we note that plaintiffs have failed to show how they were damaged by entering the second

permanent loan commitment. The evidence does not support a claim for actionable fraud. *See generally Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

Plaintiffs' claims based upon the theories of joint venture and abuse of process also fail. Among other elements, an agreement for the sharing of profits is essential to creation of a joint venture, *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968); 46 Am. Jur. 2d Joint Ventures § 13 (1969), and the element is lacking herein. Plaintiffs' claim for abuse of process is based upon Northwestern's agreement to delay its foreclosure, in return for certain concessions, while plaintiffs attempted to sell the shopping center. This agreement represented a legitimate effort by the parties to avoid foreclosure, not a "malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ." *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E. 2d 223, 227 (1955).

Finally, plaintiffs group several allegations under claims of negligence and negligent misrepresentation, *see Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied*, 298 N.C. 295 (1979), and unfair trade practices, *see* N.C. Gen. Stat. 75-1.1; *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Suffice it to say that we have reviewed plaintiffs' various allegations and find summary judgment proper as to each of them.

Affirmed.

Judges HEDRICK and WELLS concur.

HENRY B. ROWE v. MARY W. ROWE

No. 8017DC904

(Filed 7 July 1981)

1. Divorce and Alimony § 19.3— modification of alimony order—changed circumstances

The change of circumstances required by G.S. 50-16.9 for modification of an alimony order refers to those circumstances listed in G.S. 50-16.5 which deals with the initial determination of alimony.

2. Divorce and Alimony § 19.3— alimony award— changed circumstances

Where plaintiff sought to modify an alimony award based on changed circumstances, the trial court's failure to consider, or to make findings of fact on, the ratio of defendant's earnings to her needs constituted error, and the court should have found as a fact that defendant's earnings exceeded her needs and concluded therefrom that there had been a change in circumstances.

3. Divorce and Alimony § 19.4— modification of alimony order—changed circumstances—sufficiency of evidence

Where defendant testified that her independent income, $50,000, was well over what she spent for living expenses, $32,647, the evidence established a change of circumstnaces requiring a modification of an alimony order to reflect a finding that defendant was not a dependent spouse and to vacate the award of alimony.

4. Divorce and Alimony § 19.5— consent order for alimony—no estoppel to seek modification

Plaintiff was not estopped to seek modification of an alimony order by his contractual agreement that the parties' consent order would not be modifiable, since the agreement of the parties could not be elevated above the public policy of the State, as expressed by the legislature in G.S. 50-16.9, that an order to pay alimony should be modifiable, and the courts may not be estopped by an agreement of the parties from the exercise of the jurisdiction to modify an alimony order, which the court generally retains upon adoption of the parties' agreement as its own order.

5. Divorce and Alimony § 19.5— alimony order as part of the property settlement—insufficiency of evidence

There was no merit to defendant's argument that the trial court lacked power to modify the parties' consent order providing for payment of alimony by plaintiff to defendant because the order was an integral part of the parties' property settlement, since the proximity in time between entry of the order granting alimony, which made no reference to a property settlement, and judgment granting an absolute divorce, which made no reference to a property settlement, had no tendency to prove that the order was a part of a property settlement; a letter from plaintiff's attorney to defendant's attorney embodying settlement negotiations was inadmissible, and even if admitted, would not have indicated that the alimony provision was reciprocal consideration for the property division; and defendant did not produce any other evidence that the provision contained in the parties' consent order was intended by them to be only a part of their overall property settlement.

6. Divorce and Alimony § 19.5— agreement to pay alimony— modification

An agreement to pay alimony may be adopted by the court as its own order, modifiable and enforceable by contempt, or it may simply be approved or sanctioned by the court, not modifiable except in certain circumstances and not enforceable by contempt.

7. Divorce and Alimony § 18.16— modification of alimony award—failure to award attorney's fees proper

In a hearing on plaintiff's motion for modification of an alimony order, the trial court did not err in failing to award defendant attorney's fees, since the court's finding that defendant's non-alimony income in the previous year was approximately $54,000 established that it was possible for defendant to employ adequate counsel, and an award of counsel fees was not necessary to enable her to meet the husband on substantially even terms.

Judge VAUGHN dissenting.

APPEAL by both parties from *McHugh, Judge.* Order entered 30 April 1980 in District Court, SURRY County. Heard in the Court of Appeals 2 April 1981.

The parties were divorced in 1976. Concurrent with the divorce, the following order was entered in District Court on 6 December 1976:

"THIS CAUSE COMING ON TO BE HEARD and being heard before his Honor, Foy Clark, District Court Judge holding the District Courts of the Seventeenth Judicial District and it appearing to the Court by the stipulations of the parties and the Court finding as a fact the following:

1. THAT the parties stipulate and agree that the Plaintiff is a supporting spouse; that the Defendant is a dependent spouse; that the Defendant is entitled to alimony under the provisions of North Carolina General Statutes 50-16.2; that the sum of $2,500.00 per month is an appropriate amount of alimony; that the Plaintiff has the assets and earning capacity to generate sufficient income to enable the Plaintiff to pay to the Defendant the sum of $2,500.00 per month as permanent alimony and that the parties desire that an Order be entered in accordance with their stipulations providing for the payment by Plaintiff to Defendant of permanent alimony in the sum of $2500.00 per month and subject to the further condition that the Order for alimony shall not be subject to modification upon a showing of change of circumstances by either party or anyone interested as is provided by North Carolina General Statutes 50-16.9(a); and

2. THAT the Court does find as fact that the Defendant is a dependent spouse actually substantially dependent upon

the Plaintiff for her maintenance and support and that the Plaintiff is a supporting spouse; that the defendant is entitled to permanent alimony from the Plaintiff; that the sum of $2,500.00 per month is a reasonable and proper amount of permanent alimony for the Plaintiff to pay to the Defendant; that the Plaintiff has assets and earning capacity to generate sufficient income to enable the Plaintiff to pay to the Defendant the said sum of $2,500.00 per month as permanent alimony; and that the parties desire that the within order for alimony shall not be subject to modification upon a showing of change of circumstances by either party or anyone interested as is provided in North Carolina General Statutes 50-16.9(a).

NOW THEREFORE, by consent of the parties it is hereby ordered that the Plaintiff pay to the Defendant for permanent alimony the sum of $2,500.00 per month, said payments to be due on or before the 5th day of each and every calendar month and to terminate only upon the death of either of the parties or the remarriage of the Defendant, which ever event shall first occur, and it is further ordered that the within order shall not be subject to the provisions of North Carolina General Statutes 50-16.9(a).

s/ FOY CLARK
District Court Judge
Seventeenth Judicial District

CONSENTED TO:

s/ HENRY B. ROWE
Plaintiff

s/ FRED FOLGER, JR.
of Folger & Folger, Attorney
for Plaintiff

s/ MARY W. ROWE
Defendant

s/ D. M. SHARPE,
of Faw, Folger, Swanson & Sharpe
Attorney for Defendant"

On 19 October 1979 Plaintiff in the original action, Henry Rowe, filed a motion to modify the above order to terminate or reduce his alimony obligation for changed circumstances. Specifically, plaintiff alleged that defendant, Mary Rowe, had acquired substantial property since entry of the original order and that her needs had materially decreased, while his own financial burdens had increased and his ability to make the monthly payments were steadily decreasing.

On 13 November 1979 defendant moved for judgment on the pleadings or, in the alternative, for summary judgment. One week later, and before a ruling on defendant's motions, defendant filed her response to plaintiff's motion for modification.

Defendant's response alleged that plaintiff had waived his right to seek modification; that plaintiff was estopped from seeking a modification; that the order of 6 December 1976, as a consent order, represented a contract between the parties which the court could enforce, but not modify; and that the court was prohibited by its own order from modification thereof. The response further denied that the circumstances of the parties had changed. Both parties submitted briefs and proposed orders. The court entered the following order:

> "THIS CAUSE coming on to be heard on November 20, 1979, and being heard upon defendant's motion to dismiss plaintiff's motion for modification of the consent order entered December 6, 1976, and the Court having heard argument from counsel for both parties and having considered briefs filed by both parties, has concluded that the December 6, 1976, order is modifiable as provided by G.S. Sec. 50-16.9(a), it is therefore
>
> ORDERED that defendant's motion to dismiss, or in the alternative, for summary judgment, is denied.
>
> Signed and ORDERED entered this 11 day of December, 1979.
>
> s/ FOY CLARK
> Judge Presiding"

Defendant objected and excepted to the entry of the order.

In March and April defendant supplemented her response to allege that the order of 6 December 1976 was not modifiable because it was an inseparable part of the property settlement of the parties entered into at the same time and amended her estoppel defense to allege the existence of a letter from plaintiff's attorney to her attorney which would establish plaintiff's estoppel by contract. At the hearing, testimony was limited to that of the two parties, Mrs. Rowe's accountant, and a real estate appraiser.

The only evidence necessary to the decision of this appeal was not in conflict. Accordingly, we rely on the following findings of fact, deleting that portion of Finding III with which plaintiff takes issue:

> "III. At the time of the entry of the December 6, 1976 Consent Order, the Defendant had a net worth of approximately 1.1 million dollars. While she had no substantial income at that time, she owned 66.91% of the outstanding capital stock of a closely held corporation, Northwestern Equipment Company ('Northwestern'), which stock had an approximate fair market value of $847,000.00. Unappropriated retained earnings in Northwestern were, at or about the time of the entry of the aforesaid Consent Order, approximately $698,000.00, and the assets of said corporation included cash in the approximate amount of $179,000.00. At or about the time said Consent Order was entered, the Plaintiff offered to purchase Defendant's stock in Northwestern for at least the sum of $600,000.00, an offer which the Defendant declined to accept. Both parties were aware of Northwestern's financial condition at that time. . . .
>
> . . . .
>
> IV. Defendant's present reasonable living expenses are greater than her reasonable living expenses at the time of the entry of the aforesaid Consent Order on December 6, 1976.
>
> V. On December 6, 1976, the Plaintiff had a net worth of approximately 1.2 million dollars. At that time, he had a gross annual income of approximately $105,000.00. His living expenses at that time were approximately $6,100.00 per month.

VI. On or about September 1, 1978, the Defendant sold her stock in Northwestern to H. B. Rowe & Co., Inc., a closely held corporation substantially owned by the Plaintiff and controlled by him, for the sum of $700,000.00 cash. From the sales proceeds, the Defendant paid approximately $250,000.00 in taxes, fees and other expenses associated with the sale. She immediately converted the net proceeds of approximately $450,000.00 into bonds and securities. This entire transaction did not constitute the acquisition of an asset by the Defendant; rather, it amounted to the liquidation or conversion of an asset.

VII. The Defendant's present net worth is approximately $850,000.00. The decrease in Defendant's net worth from December of 1976 is substantially attributable to: (1) the decline in the fair market value of her Northwestern stock between December of 1976 and September 1, 1978, the date it was sold; and (2) the tax consequences and other expenses incidental to the sale of her Northwestern stock.

VIII. Aside from her alimony income from the Plaintiff, the Defendant's present income is derived almost entirely from the bonds and securities which she purchased with the liquidation proceeds obtained from the aforesaid stock sale. Defendant's nonalimony income in 1979 was approximately $54,000.00.

IX. The Plaintiff presently has a net worth in excess of two million dollars. In addition, his taxable income has increased since 1976, and for the calendar year ending December 31, 1979, was approximately $160,000.00. While his monthly living expenses have increased from $6,100.00 per month in December, 1975, to $8,100.00 per month at the present time, approximately $1,800.00 per month of that increase is directly attributable to support of his new wife and her adult children."

In her affidavit of financial standing, admitted into evidence as defendant's exhibit 16, defendant avers that her financial needs as of 10 April 1980 amounted to $2,720.59 per month, which would amount to $32,647.08 per year. She claimed $7,000.00 income per month ($84,000.00/year) including $2,500.00 per month ($30,000.00/year) in alimony from plaintiff. In plaintiff's exhibits 1

and 2, plaintiff projects expenses of $33,000.00 for defendant in 1980 and lists expenses for the previous four years, the highest being 1978 when defendant's expenses amount to $37,101.24.

In her testimony at the hearing defendant stated:

> "Yes, it would be fair to say that even without any alimony that my husband pays me current today, my separate income is well over what I spend for living expenses. No, that was not true on December 6, 1976. No, I had no appreciable, separate income prior to December 6, 1976."

On the foregoing evidence the court found no change of circumstances sufficient to warrant modification of the order of 6 December 1976. Defendant was denied attorney's fees for defending plaintiff's motion in the cause. Both parties appealed.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and Jeri C. Whitfield for plaintiff appellant.

Tuggle, Duggins, Meschan, Thornton & Elrod by David F. Meschan for defendant appellant.

CLARK, Judge.

Plaintiff's assignments of error may be lumped together and treated as one. He excepts to the conclusion of the trial court that there had not been "a change in the circumstances of the parties which would warrant or justify a modification in the Plaintiff's favor of the December 6, 1976 Consent Order, and argues that the evidence required findings of fact which would have mandated the conclusion that defendant was no longer in need of his maintenance and support. We will address first this crucial issue.

The evidence at the hearing on plaintiff's motion in the cause supported the following material findings of fact: (1) In 1976 defendant's expenses exceeded $11,000.00 and her income from sources other than alimony was less than $9,000.00. (2) In 1979 defendant's expenses were $21,000.00 and her income from sources other than alimony exceeded $54,000.00. (3) In 1980 defendant's anticipated expenses were $33,000.00 and her anticipated income from sources other than alimony exceeded $51,000.00. Defendant herself admitted in her testimony that "my separate income is well over what I spend for living expenses. No,

that was not true on December 6, 1976." The General Statutes provide:

> "50-16.9. *Modification of order.*—(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

We fail to see how a change of circumstances could be more clearly established. The few cases which comment on such an eventuality agree that an increase in the dependent spouse's income would entitle the supporting spouse to petition for modification of the alimony order under G.S. 50-16.9. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966).

[1] Defendant in her argument seeks to draw a distinction between cases decided under G.S. 50-16.5 and G.S. 50-16.9. We realize that these statutes are concerned with separate matters—the first with the initial determination of alimony, the second with the modification of a prior alimony order; nonetheless, we fail to see how a change of circumstances under G.S. 50-16.9 can be determined without resort to the test outlined in G.S. 50-16.5. G.S. 50-16.9 allows modification for change of circumstance, but lists no circumstances. G.S. 50-16.5 provides a list of circumstances to be regarded in the initial determination of alimony. We believe the only logical construction of G.S. 50-16.9 is that it requires application of the G.S. 50-16.5 standards again at the time of the modification hearing. If the relevant circumstances in G.S. 50-16.5 list differ materially at that time from the circumstances which obtained at the time the initial order was entered, G.S. 50-16.9 authorizes the judge to modify the order to more fairly accommodate the present circumstances of the parties. This construction adheres to the sound rationale of *Williams v. Williams, supra*, that statutes such as G.S. 50-16.1 through -16.10, since they deal with the same subject matter (alimony), must be construed *in pari materia*. We hold that the "change of circumstances" in G.S. 50-16.9 refers to those circumstances listed in G.S. 50-16.5. "For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do." *Williams v. Williams, Id.* at 181, 261 S.E. 2d at 855.

[2] The findings of fact in the order denying plaintiff's motion in the cause concentrate primarily on defendant's net worth, yet our case law makes clear "that the trial court consideration of the 'estates' of the parties is intended *primarily* for the purpose of providing it with another guide in evaluating the *earnings* and earning capacity of the parties . . . ." *Williams v. Williams*, 299 N.C. at 184, 261 S.E. 2d at 856. (Emphasis added). Of course, it would similarly be error for the court to order a modification based solely on a change in the earnings of the parties. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980). A modification should be founded upon a change in the overall circumstances of the parties. A change in income alone says nothing about the total circumstances of a party. The significant inquiry is how that change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support. The trial court should have considered the *ratio* of defendant's earnings to the funds necessary to maintain her accustomed standard of living. *See Williams v. Williams, supra.* If, as all the evidence at the hearing tends to show, defendant's needs exceeded her earnings at the time of the initial order, but defendant's earnings exceeded her needs at the time of the hearing, it becomes an irresistible conclusion that the material circumstances of the defendant have changed. The court's failure to consider, or to make findings of fact on, the ratio of defendant's earnings to her needs constitutes error. The court should have found as a fact that defendant's earnings now exceed her needs, and concluded therefrom that there has been a change in circumstances.

[3] While we are aware of authority to the effect that "minor fluctuations in income" alone do not require modification of alimony for changed circumstances, *Britt v. Britt, supra*, we believe the change of circumstances under the facts of this case is so extreme that we fail to see how defendant is dependent and thus entitled to any amount of alimony. Under the guidelines set out in *Williams v. Williams*, 299 N.C. at 182-84, 261 S.E. 2d at 855-56, we see no way that defendant could reasonably be called a dependent spouse at the time of the hearing on modification. A woman who requires by her own testimony $32,647.08 annually ($2,720.59 per month) to maintain her standard of living and who receives independent annual income in excess of $50,000.00 cannot be considered "actually substantially dependent," nor can she be

"substantially in need of maintenance and support." See G.S. 50-16.1(3). Defendant's argument that the court's initial determination of dependency is not subject to reconsideration on a subsequent motion under G.S. 50-16.9 is untenable. As we have explained herein, G.S. 50-16.9 calls for a completely new examination of the factors which necessitated the initial award of alimony in order to determine whether any of these circumstances have changed. When the list of circumstances enumerated in G.S. 50-16.5 is properly employed, the conclusion is inescapable that defendant, although formerly dependent, is no longer so. Certainly one of the ultimate circumstances which might change under G.S. 50-16.9, would be the defendant's condition of dependency. We hold that as a matter of law based on the undisputed fact that, as defendant herself has stated, her "separate income is well over what [she] spend[s] for living expenses," the evidence established a change of circumstances requiring modification of the consent order to reflect a finding that defendant is not a dependent spouse and to vacate the award of alimony. We leave intact that portion of the consent order wherein the court found, pursuant to the parties' agreement, that there were grounds for alimony under G.S. 50-16.2. Defendant may, therefore, still seek modification of the order under G.S. 50-16.9 should her circumstances change such that she once again is substantially in need of plaintiff's support and maintenance. She may rely on the finding of entitlement in the consent order as *res judicata* and need only establish her dependency.

Defendant argues that the 6 December 1976 order was not modifiable under G.S. 50-16.9 for two reasons: (1) plaintiff was estopped by his contractual agreement that the Consent Order would not be modifiable, and (2) the agreement to pay alimony was an integral part of the property settlement of the parties which could not be modified by the court.

[4] The estoppel argument is without merit. By sustaining the argument we would elevate the agreement of the parties above the public policy of the State, as expressed by the legislature in G.S. 50-16.9, that an Order to pay alimony should be modifiable. Defendant seeks, we realize, to estop plaintiff from moving for modification rather than to enforce the alimony order as originally written; nevertheless, the result she seeks is the same—a result diametrically opposed to the obvious intent of G.S. 50-16.9.

We will not allow public policy to be thus circumvented. We endorse the following soundly reasoned statement of the Supreme Court of Rhode Island:

> "The respondent's agreement in advance not to appeal under any circumstances to the court for the exercise of the jurisdiction conferred by said section 5 is an attempt, before any cause arises, to oust the court of the jurisdiction, which the Legislature declared shall always exist, and is void as being against the policy of the law. It is one thing for a person to agree, after the circumstances have arisen, to settle the dispute without resort to the courts. It is a different matter for him to attempt to bind himself in advance not to appeal to the courts regardless of what circumstances may arise. The right to appeal to the Superior Court for the modification of a decree for alimony was given not only for the protection of persons obligated by decrees to pay alimony but also for the well-being of society. The legislature on a change of policy may withdraw the privilege granted, but while the right exists the individual cannot barter it away—even with the approval of the court.
>
> . . . .
>
> The power of legislation resides in the legislature and not in the courts. When a decree for alimony purports to take from an individual the right given by statute to apply for modification of the decree, the court has, without authority, attempted to abrogate the will of the legislature and supersede the statutory law by decree of the court. It is elementary that courts can not thus encroach on the legislative domain. There are numerous decisions which hold that a court can not, by consent decrees or otherwise, divest itself of the power conferred by statute to modify decrees for alimony, and we have been referred to no authority to the contrary. *Blake v. Blake,* 75 Wis. 339; *Southworth v. Treadwell,* 168 Mass. 511; *LeBeau v. LeBeau,* (N.H.) 114 Atl. 28; *Wallace v. Wallace,* 74 N.H. 256. See also, *Soule v. Soule,* 4 Cal. App. 97."

Ward v. Ward, 48 R.I. 60, 65-66, 135 A. 241, 243 (1926). Although the issue in *Ward* was waiver rather than estoppel, we see no reason for a different result to obtain, particularly where, as here,

the true issue is not whether a party may do a certain thing, but whether the judiciary may exercise the jurisdiction with which the legislature has invested it. Surely the courts may not be estopped by the agreement of the parties from the exercise of the jurisdiction to modify an alimony order, which it retains generally upon adoption of the parties' agreement as its own order, *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), and which the legislature has specifically approved by its adoption of G.S. 50-16.9. Defendant's assignments of error are overruled to the extent they are based on estoppel by contract.

[5] In support of her property settlement argument defendant correctly points out that the court would lack power to modify the consent order if it were an integral part of the parties' property settlement. *Bunn v. Bunn, supra*, *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979); *see also* Note, *Presumed Separability of Support and Property Provisions in Ambiguous Separation Agreements*, 16 Wake Forest L. Rev. 152 (1980) [hereinafter *Presumed Separability*]. Alimony provisions are presumed separable from provisions for property settlement, and therefore modifiable, even when both appear in the same document. *White v. White, supra; see* Note, *Presumed Separability, supra*, at 164-68. In the face of this presumption, a party opposing modification must establish by a preponderance of the evidence that the provision for alimony contained in the order of 6 December 1976 was intended by the parties to be only a part of their overall property settlement. *White v. White*, 296 N.C. at 672, 252 S.E. 2d at 704. This defendant has failed to do.

Defendant argues that two factors establish that the alimony provision was an inseparable portion of the property agreement. One is the fact that the parties' divorce decree was entered the day following the entry of the consent order. We fail to see how the proximity in time between entry of an order which grants alimony, making no reference to a property settlement, and a judgment which grants an absolute divorce, making no reference to a property settlement, has any tendency to prove that the order was a part of a property settlement. This so-called "factor" tends to prove nothing about the alleged property settlement. The second factor which defendant alleges supports her case for inseparability and, therefore, non-modifiability, is a letter dated 18 November 1976 from plaintiff's then attorney to defendant's

then attorney. The opening paragraph of this letter recites: "I have talked with Henry Rowe again in an effort to settle all matters existing between Henry and Mary. At this time, by way of offer of compromise and settlement on Henry's behalf, I wish to advise the following:" Thereafter appears a list of 11 separately numbered items including: "3. Henry will pay to Mary alimony at the rate of $2,500.00 per month until her death or remarriage. In any event, this payment would terminate at Henry's death." This letter was quite properly excluded from evidence as an offer of compromise and settlement. *Mahaffey v. Sodero,* 38 N.C. App. 349, 247 S.E. 2d 772 (1978); *Hood v. Hood,* 24 N.C. App. 119, 209 S.E. 2d 881 (1974). *See* 2 Stansbury's N.C. Evidence § 180 (Brandis rev. 1973). We uphold the trial court's exclusion from evidence of the letter of 18 November 1976 as embodying inadmissible settlement negotiations. We note further that even had the letter been admitted, its alimony provision is entirely separate from the other provisions for property division. Nothing in the letter recites, or even hints, that the alimony provision is reciprocal consideration for the support provision. The fact that the support provision appears in the same letter with the property provisions would no more rebut the presumption of separability than did the fact in *White* that the support provision appeared in the same consent judgment with the property provision. Therefore, even if the letter had been admitted as the full and final property settlement and support agreement, which it clearly was not, defendant would still be faced with the burden of producing a preponderance of evidence that the provisions therein were inseparable. Defendant fails to produce one scintilla of such evidence.

Defendant also excepts to the sustention of plaintiff's objection to the following question about the agreement in the Consent Order that the order not be subject to modification: "Mr. Meschan: How do you recall that provision got into that order in the negotiating process?" Again defendant's question was addressed to the negotiating process, rather than to the agreement itself. "Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing." 2 Stansbury's N.C. Evidence § 251 (Brandis rev. 1973). " 'Accordingly, all prior and contemporaneous negotiations in respect to those

elements [dealt with in the writing] are deemed merged in the written agreement.' " *Tomlinson v. Brewer*, 18 N.C. App. 696, 700, 197 S.E. 2d 901, 904, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 663 (1973). Additionally, we note that this inquiry had no relevance. Defendant's burden was to show the intent of the parties concerning the alimony provision. The inquiry before us went to the intent of the parties concerning the non-modification provision and had no tendency to prove the parties' intentions in any other matter.

Defendant was free to inquire into the intention of the parties that the support provision in the Consent Order be reciprocal consideration for the property division of the parties. This defendant failed to do. She chose rather to inquire into incidental, collateral, irrelevant, and inadmissible matters. We uphold the trial court's exclusion of these matters.

[6] Agreements to pay alimony such as the one in the Consent Order before us may be adopted by the court as its own orders or they may simply be approved or sanctioned by the court. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). There exists a very clear distinction between the incidents of the two different kinds of consent orders:

> "This distinction was addressed in 1964 in the landmark case of *Bunn v. Bunn*. There the court held that a contract-consent judgment not adopted as an order, but merely approved or sanctioned by the court, cannot be modified or set aside except upon: (1) the consent of both parties; (2) a finding that the agreement was unfair to the dependent spouse; or (3) a finding that the dependent spouse's consent was obtained by fraud or through mutual mistake. In contrast, the alimony provision of a court-adopted consent judgment is modifiable or enforceable by the court's contempt power should the supporting spouse willfully fail to pay because the court's decree supersedes the parties' agreement."

Note, *Presumed Separability, supra*, at 158-59.

The parties had it in their power to enter into a Consent Order which could not be modified by the courts. Such an order, however, would not have been enforceable by contempt. The order of 6 December 1976 appears to have been an attempt to

create a consent order enforceable by contempt but not modifiable. "If the judgment can be enforced by contempt, it may be modified and vice versa. This is only just." *Bunn v. Bunn*, 262 N.C. at 70, 136 S.E. 2d at 243. We refuse to enforce an effort to circumvent the justice of this rule.

[7] Defendant's final argument, that the court erred in failing to award her attorney's fees, is meritless. The court's finding that defendant's non-alimony income in 1979 was approximately $54,000.00 established that it was possible for her to employ adequate counsel. We hold that in this case, as in the *Williams* case, "It is clear from the record before us that an award of counsel fees was not necessary to enable [the wife], as litigant, to meet [the husband], as litigant, on substantially even terms by making it possible for her to employ counsel." *Williams v. Williams*, 299 N.C. at 190, 261 S.E. 2d at 860; *see also Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980).

We have examined the remainder of the assignments of error and arguments of both parties and find them either meritless or disposed of by the issues decided herein.

In summation, we find that the conclusion of the trial court that there was no change of circumstances is not supported by the evidence, and that as a matter of law there was a change of circumstances under G.S. 50-16.5. We further find that the trial court erred in not making more specific findings of fact relative to defendant's costs in maintaining her accustomed standard of living, *i.e.*, $32,647.08 per year according to her affidavit. Such findings of fact would provide a basis for determining in the future if there were a change of circumstances after entry of such modified order should the defendant thereafter seek alimony on the grounds that changed circumstances had again made her a dependent spouse. These corrections can adequately be made by the court without further hearing, it appearing from the record on appeal that the uncontradicted evidence before the trial court is sufficient to support modification of the order. This cause is remanded for findings and entry of an order consistent with this opinion.

Affirmed in part; vacated in part and remanded.

Judge WELLS concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

On defendant's appeal, I would sustain her assignments of error except the one relating to counsel fees which I too would reject. I would, however, hold plaintiff to his bargain and not allow him to succeed in seeking modification of the order. I do not agree that, on the facts of this case, there is any circumvention of public policy in this position. Indeed, sound public policy would seem to support defendant's position. Even if the judgment should be held to be modifiable, I would affirm that part of Judge McHugh's order wherein he declined to do so. The facts of this case do not disclose the kind of change of circumstances that require a reduction in alimony.

HOUSING, INC.; MERHA, LTD.; AND CARL W. JOHNSON, PLAINTIFFS v. H. MICHAEL WEAVER; W. H. WEAVER CONSTRUCTION COMPANY; AND ALVIN R. BUTLER, TRUSTEE, DEFENDANTS AND LANDIN, LTD., ADDITIONAL DEFENDANT

No. 8018SC1096

(Filed 7 July 1981)

1. Contracts § 19— novation

It was apparent from the parties' 27 April 1972 agreement and the acts of the parties that such agreement rescinded the parties' 21 April 1971 agreement and constituted a settlement between the parties for claims involving construction of federally subsidized rental units.

2. Trial § 48— damages—jury verdict properly set aside

The trial judge did not err in setting aside the verdict of the jury on the issue of damages and substituting his findings in lieu thereof upon which he entered judgment, since the stipulations of the parties, the undisputed evidence, and plaintiff's admissions established the amount of defendant's damages as a matter of law, and it is within the power of courts to decide issues of damages where these issues are undisputed.

APPEAL by plaintiffs from *Jolly, Judge.* Judgment entered 19 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 May 1981.

This is an action involving two experienced real estate developers engaged in the construction of federally subsidized rental units across eastern North Carolina. The action has been heard previously on appeal in this Court at which time this Court reversed summary judgment for defendant. *Housing, Inc. v. Weaver*, 37 N.C. App. 284, 246 S.E. 2d 219 (1978). The Supreme Court, on appeal, affirmed and adopted the decision of the Court of Appeals. *Housing, Inc. v. Weaver*, 296 N.C. 581, 251 S.E. 2d 457 (1979). Thereafter, the trial court granted plaintiff's motion to sever trial of a cross action against Landin, Ltd., the third party defendant, and incorporated its ruling in a pre-trial order entered 27 November 1979.

Judge Morris (now Chief Judge), in the original appeal of the case to this Court, has provided an excellent summary of the facts. We set forth portions of that opinion below, along with amendments, which reflect facts brought forth at trial.

> The plaintiffs filed suit 31 December 1973, alleging, *inter alia*, that an agreement dated 27 April 1972 (hereinafter referred to as the 27 April 1972 agreement)—one of two contracts underlying this suit—was procured by economic duress. They seek restitution plus consequential damages. They pray that a note for $122,500 given as part of the consideration for the 27 April 1972 agreement be declared null, void, and of no legal effect and that the deed of trust securing it be cancelled and that they recover of H. Michael Weaver and Weaver Construction Company the sum of $63,333 (the amount already paid to defendant's in excess of defendants' actual expenses of $58,421). Plaintiffs further seek $500,000 in consequential damages due to a loss in cash flow. Plaintiffs either alternatively or in addition to the "inducement by economic duress" claim allege a breach of the initial 21 April 1971 agreement.
>
> Defendants answered denying any wrongful acts in inducing the 27 April 1972 agreement and denying any breach of the 21 April 1971 agreement. Defendants counterclaimed seeking recovery of $122,500 on the note which was given as part of the consideration for the 27 April 1972 agreement and $76,667 (principal and interest) on the balance of the 27 April 1972 agreement. Defendants' further counterclaim for

$150,000 damages for alleged abuse of process was dismissed, but that dismissal is not before this Court. Defendants also impleaded Landin, Inc., whom they allege to be the alter ego of plaintiffs.

Plaintiffs are a developer, and two corporations owned by him. Since there is an identity of interests, they will be hereafter referred to as plaintiff. Defendants are a developer, the corporation owned by him and his family, and the trustee of the deed of trust. Since the interests of these persons are identical, they will be referred to collectively as the defendant. The third-party defendant is a corporation owned by plaintiff Carl W. Johnson, and it is the present owner of the properties involved.

Prior to 21 April 1971 plaintiff had received a commitment from HUD to subsidize and guarantee the rental of low income housing projects in eastern North Carolina. The project, known as 'Mid-East', involved construction in five counties on 11 different tracts of land. Plaintiff needed to associate with another developer to provide 'bonding capacity' (the ability to acquire a payment and performance bond) and capital for prefinancing expenses. After negotiations, plaintiff and defendant executed 'a memoranda of understanding' 21 April 1971. The memorandum was in the form of a letter from defendant to plaintiff. It provided *inter alia* that:

(1) The parties intended to form a joint venture of some type.

(2) Defendant would provide capital until construction financing was obtained.

(3) Defendant would advance to plaintiff $50,000.

(4) Defendant would build the project and receive cost plus 4% prior to division of profits.

(5) 'Profits' were defined to mean the difference in all development costs and the amount that could be borrowed on the completed project.

(6) 'Profits' were to go 70% to plaintiff 30% to defendant.

(7) Losses were to be borne 50-50.

(8) Completed projects were to be owned 50-50 and, possibly, the properties could be divided with each party owning 100% of ½ of the total properties.

(9) Withdrawal prior to 15 May 1971 would leave each party to bear his own expenses except that plaintiff would reimburse defendant for land purchases.

(10) If there were a loss, plaintiff would repay the $50,000 advance to defendant.

In setting up the project, plaintiff had previously acquired options on certain lands (more than 20 tracts). The time approached for the expiration of these options. In June 1971, it became necessary to exercise certain of these options. Rather than have the property conveyed to plaintiff or to a Johnson-Weaver joint venture and then give a deed of trust for the purchase price to defendant (who was to furnish the money), the parties agreed that H. Michael Weaver (a named defendant) would take title in his individual name. Both parties agree that the reason was to simplify the transaction. Defendant also suggests the desire to avoid certain negative tax consequences.

During September and October of 1971 the relationship became less amicable. A dispute arose over construction costs. Plaintiff's evidence suggests the following:

(1) Defendant refused to co-operate on obtaining one financing package to provide a $4,250,000 loan (eventually a $3,920,000 loan was secured).

(2) Defendant would not pay the loan commitment fee on the loan eventually received.

(3) Defendant would not give a maximum on construction costs under the 21 April 1971 agreement except for a $3,920,000 maximum which would cut plaintiff out of all the 'profits'.

(4) Other companies offered to build the project for $3,300,000 or less.

(5) Defendant was attempting to drain all the profits off for itself by way of the construction process.

(6) Defendant became unreasonable and threatened to destroy the project through its record ownership of crucial lands.

(7) Defendant breached certain other duties.

(8) Defendant used its ownership of the lands to force plaintiff to enter another agreement.

Defendant vehemently disagrees and offers evidence tending to show the following:

(1) Plaintiff wanted all the profit once it became apparent that it would be profitable.

(2) Defendant did not breach any duties.

(3) Plaintiff has colored certain instances in which defendant acted reasonably to look like a breach.

(4) Defendant was not obligated to give a maximum price.

(5) $3,920,000 was a reasonable maximum since it really involved only $3,480,000 for construction.

(6) Plaintiff, as well as defendant, rejected the $4,250,000 loan offer for other reasons.

(7) Defendant was always entitled to ½ of the lands and did not hold the lands for anyone else's benefit.

(8) Defendant owned ½ of the whole project and sold it under the compulsion of plaintiff.

The parties continued negotiations. It became apparent to both parties that they could not work together. Plaintiff wanted to get the land back. Defendant demanded $225,000 plus expenses. Plaintiff offered $170,000 plus expenses. Some evidence indicates that defendant offered to buy plaintiff out for $225,000. On 23 December 1971, Johnson and Weaver executed an agreement under which Weaver could receive $200,000 plus expenses to return the land to Johnson if Johnson was able to meet certain conditions. Johnson was unable to do so, and the agreement expired. By agreement of 27 April 1972, plaintiff bought out defendant for $212,500 plus expenses (total $270,921.94). Payment was made as follows:

(1) Reimbursement of expenses was due at the closing of the construction loan.

(2) $20,000 paid by assignment to the defendant of an obligation of the defendant held by plaintiff.

(3) $70,000 paid by a non-negotiable note, secured by a deed of trust on ½ the property, due upon closing of permanent financing.

(4) $122,500 paid by a non-negotiable note, secured by a deed of trust on the other ½ of the property, due upon closing of permanent financing.

(5) Interest began on the later of 1 June 1972 or the commencement of construction.

(6) If the permanent loan did not exceed the development costs, plaintiff was only obligated to pay at the rate of $3,000 per month.

Payments were made as follows:

(1) $20,000.00	July 14, 1972
(2) $18,421.94	September 12, 1972
(3) $70,000.00	October 3, 1972
(4) $13,333.00	October 3, 1972

Total paid $121,954.94

Plaintiff's evidence suggests that the housing authority and HUD at all times from October 1971 until April 1972, were urging him to begin construction. Johnson testified that the housing authority and HUD threatened to withdraw their commitment and award the project to another developer. He further testified that the press of time and the danger of losing the project forced him into compliance. Further evidence suggests that the fear that defendant would foreclose on the two deeds of trust forced him to continue payments.

Plaintiff proceeded on his own after 27 April 1972. In June 1972, he sold ½ interest in the project for $250,000 to Merha, Limited, a limited partnership of which Housing, Inc., was the general partner. The savings and loan which furnished construction financing foreclosed during the fall of 1973. Landin, Ltd., a corporation wholly owned by Carl W. Johnson, purchased the project at the foreclosure sale. The

process was completed in November or December of 1973. Landin still ownes the property. After foreclosure, plaintiff ceased payments on the obligations to defendant and filed suit 31 December 1973 seeking a return of the monies paid and nullification of the notes not yet paid.

Defendant moved for a directed verdict following the close of plaintiff's evidence. The court reserved ruling until the close of all the evidence. Thereafter, at the close of all the evidence, plaintiff moved for a directed verdict as to their claim for restitution and as to defendant's counterclaim, conceding the breach of contract claim should go to the jury. Defendant renewed its motions for a directed verdict on all issues. The trial judge denied all motions, subject to reconsideration upon motions following the verdict. Both parties submitted proposed jury issues and instructions. On the following day, the court announced its decision that the letter dated 21 April 1971 was not a contract and declined to submit breach of contract issues to the jury. The court further ruled that it would submit plaintiff's case to the jury solely for restitution of monies paid.

The court instructed the jury on the issue of restitution that if it believed all of the evidence and found for plaintiff, it should award plaintiff $63,533.00 as restitution ($121,954.94 less $58,421.94, which were Weaver's actual itemized costs and expenses). On the other hand, the court told the jury that if it believed all the evidence on defendant's counterclaim and found for defendant, it should find that defendant was entitled to $149,167 ($122,500 plus $26,667 advanced expenses). The court further instructed the jury "if you do not believe in answering either of these issues that the evidence is as it all tends to show, you should use such other figure as you deem appropriate under the evidence as it has been presented to you in this case."

The court tendered the following issues to the jury, which were answered by them as shown:

1. Prior to execution of the letter agreement dated April 27, 1972, was defendant H. Michael Weaver under a duty to convey to Housing, Inc., title to the lands acquired by him through the exercise of options owned by Housing, Inc.?

ANSWER: No

2. At the time of execution of the agreement dated April 27, 1972, and the promissory notes and assignment thereafter executed, were the plaintiffs Carl Johnson and Housing, Inc., acting under duress, coercion or business compulsion from defendant H. Michael Weaver, as alleged in the complaint?

ANSWER: No

3. If so, did plaintiffs Carl Johnson and Housing, Inc., ratify the April 27, 1972 agreement and the promissory notes and assignment thereafter executed, by their subsequent conduct?

ANSWER: _____

4. If you have found in favor of the plaintiffs as to the foregoing issues, what amount of restitution are plaintiffs entitled to recover from defendant H. Michael Weaver?

ANSWER: $ _____

5. If you have found in favor of the defendants as to the foregoing issues, what amount are the defendants entitled to recover of the plaintiffs?

ANSWER: $ 0

This the 12th day of December, 1979.

Thereafter, the trial judge entered judgment in accordance with the jury's action. Defendant filed a motion for judgment notwithstanding the verdict, for an amendment of the verdict and for a new trial. Plaintiff moved for judgment notwithstanding the verdict, or in the alternative, for a new trial.

A little over six months later the court entered the following amended judgment:

This cause coming on to be heard and being heard before the undersigned Judge upon defendants' motions for judgment notwithstanding the verdict on the fifth issue submitted to the jury, amendment of the judgment, judgment notwithstanding the verdict on all issues, and a partial new trial limited to the issue of defendants' damages (the fifth issue) and on plaintiffs' motion for judgment notwithstanding the verdict on all issues and a new trial on all issues;

And it appearing to the court:

1. Plaintiffs' motion for judgment notwithstanding the verdict on all issues should be denied;

2. Plaintiffs' motion for a new trial on all issues should be denied;

3. Defendants are entitled to an order granting their post-trial motions for judgment notwithstanding the verdict on the fifth issue, amendment of the judgment and judgment notwithstanding the verdict on all issues, any one of which supports an award to defendants on their counterclaim;

4. The jury verdict on the fifth issue and the judgment entered thereon should be set aside and judgment should be entered for defendants in the amount of $215,866.57 pursuant to their post-trial motions;

5. If this judgment awarding damages to the defendants is hereafter vacated or reversed on appeal, the jury's verdict on the fifth issue and the judgment entered thereon should be vacated and set aside and a partial new trial limited to the issue of defendants' damages (the fifth issue) should be granted to defendants;

6. The parties consented to arguing these motions out of session and out of county and to having this judgment signed out of session and out of county;

7. This judgment should constitute a final judgment as to all claims and all parties, except as to defendants' cross-claim against the additional defendant, Landin, Ltd., and that there is no just reason for delay in entering a final judgment as to the complaint and counterclaims.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' motion for judgment notwithstanding the verdict on all issues is denied;

2. Plaintiffs' motion for a new trial on all issues is denied;

3. The verdict of the jury on the issue of defendants' damages (the fifth issue) and the portion of the judgment

(entered in this action on December 13, 1979) relating thereto that orders defendants shall 'recover nothing of plaintiff by reason of the matters and things alleged in their counterclaim' is hereby vacated and set aside.

4. Judgment is granted in favor of defendants against plaintiffs in the amount of $215,866.57, which includes the principal sum of $122,500.00, interest specified in the note at the rate of 8 1/8% from April 1, 1973 through December 12, 1979 in the amount of $66,699.57 and reimbursable expenses of $26,667.00;

5. If this judgment awarding damages to the defendants is hereinafter vacated or reversed on appeal, the court hereby determines in its discretion that defendants' motion for a partial new trial limited to the issue of defendants' damages (the fifth issue) should be granted for the following reasons:

a. Inadequate damages appear to have been given by the jury under the influence of passion and prejudice;

b. The fifth issue should not have been submitted to the jury for the reason that there was no question of fact concerning the amount of defendants' damages;

c. Having submitted the fifth issue to the jury the Court should have instructed the jury to return a judgment for the defendants in the amount herein awarded;

d. The jury's verdict as to the fifth issue was contrary to the greater weight of the evidence; and

e. The jury's verdict on the fifth issue was contrary to law.

6. The costs of this action shall be paid by the plaintiffs; and

7. There is no just reason for delay in entry of this final judgment as to the complaint and counterclaim as provided herein.

Plaintiff excepted and gave notice of appeal.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Frank J. Sizemore III and E. Garrett Walker, for plaintiff appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams Jr., Edward C. Winslow III and John H. Small, for defendant appellees.

HILL, Judge.

We do not find it necessary to address the first issue raised by the appellant: Did the trial court err in failing and refusing to submit to the jury an issue as to defendant's breach of contractual obligation to plaintiff? Serious doubt exists that the letter dated 21 April 1971 was anything more than a letter of intent. There exists sufficient vagueness to make it void and unenforceable. If there was a valid and binding contract under which the parties worked for a period of time, then the contract of sale and purchase of the project as outlined in the 27 April 1972 agreement was effective as a novation of the 21 April 1971 agreement and any working agreement resulting therefrom.

[1] A novation precludes the assertion of any right under the original contract. *Fowler v. Insurance Co.*, 256 N.C. 555, 124 S.E. 2d 520 (1962); *Products Corporation v. Chestnutt*, 252 N.C. 269, 113 S.E. 2d 587 (1960).

Under the 1972 contract, the Johnson interests offered to purchase all of Weaver's right, title and interest in the Mid-East Regional Housing Project. The offer was accepted by the Weaver interests and consummated 14 July 1972 by the delivery of deed, notes and deed of trust, other necessary financing documents, and fulfillment of other obligations set out in the proposal. Johnson testified that the consideration of $212,500 over expenses was the result of negotiations between Weaver and himself. Payments were made beginning with the date of closing up to and including 3 October 1972. A total of $121,954.54 was paid. Suit was filed by plaintiff on 31 December 1973, one day before the due date on the notes. *Over the almost one and one-half years following the date of the offer, payments were made and no complaints expressed by Johnson to Weaver.*

The jury answered issues indicating that Weaver was under no duty to convey to Housing, Inc. title to the lands acquired by

him through the options owned by Housing, Inc. Likewise, the jury answered an issue determining that Carl Johnson and Housing, Inc., were not acting under duress, coercion, or business compulsion at the time of the execution of the agreement dated 27 April 1972. It is apparent from the agreement and the acts of the parties that the second agreement rescinded the prior agreement and constituted a settlement between the parties for claims involving the project. Plaintiff's first assignment of error is overruled.

Appellant next contends the trial judge erred in his instructions to the jury and that it is entitled to a new trial. We disagree. The reasoning set out in connection with the previous assignment of error applies equally here. Johnson argues the court erred in failing to charge on economic duress properly, citing the prior decision of this Court in this case. A careful reading of the charge as a whole reveals the trial judge instructed the jury to find for Johnson unless it determined that Weaver held title to the land in trust for the joint venture. Such an instruction would have included the question of duress. The jury verdict answered the issue. Weaver conveyed not only title to the real estate but all other interests to Johnson. The nature and quality of the title held by Weaver became moot as a result of conveyance. Plaintiff's second assignment of error is overruled.

[2] Appellant next contends the trial judge erred in setting aside the verdict of the jury on the issue of damages and substituting his findings in lieu thereof upon which he entered judgment.

At the conclusion of the trial, the jury returned a verdict finding as a fact that (1) Weaver had no duty to convey to Housing, Inc., title to the lands acquired by him through the exercise of options owned by Housing, Inc.; and (2) that Housing, Inc., and Johnson were not acting under duress, coercion or business compulsion in executing the 27 April 1972 agreement and notes which were the basis of Weaver's counterclaim. The jury also found the Weaver interests were not entitled to recover *any* amounts from the Johnson interests under the 27 April 1972 agreement (which was the basis for the notes) or otherwise. The trial judge adopted the verdict and entered judgment to the effect that neither party was entitled to recover from the other.

Defendant moved to set aside the verdict with respect to the issue of its damages and moved for judgment n.o.v. as to all issues, including damages, or to amend the judgment to include damages. In the alternative, defendant moved for a new trial limited to the issue of defendant's damages or upon all the issues. Plaintiff also moved for judgment n.o.v. or alternatively for a new trial upon all issues. Thereafter, both parties submitted arguments to the trial judge, and some six months later, on 24 June 1980, the trial judge entered the order and judgment set forth in the facts above.

Approximately one month prior to the trial, plaintiff moved to sever for trial the issue of defendant's liability to plaintiff from those of damages and defendant's cross claim against Landin, Ltd. In stating its reason, plaintiff alleged:

> If the Weaver defendants prevail on any of their defenses the damage issue will not be tried at all because *there is no dispute as to what amount is due and owing on the notes*, if they are valid. (Emphasis added.)

Likewise, in support of a motion *in limine* and motion to sever filed by plaintiff two weeks later, plaintiff stated:

> There is no controversy with respect to the amount of damages Weaver would be entitled to recover upon the notes if Housing alone is, or Housing and Landin, are liable upon them. Therefore, the question of the amount of Weaver's damage is not an issue.

The trial court entered a final pretrial order in which it severed defendant's counterclaim against Landin for a subsequent trial. At that time both parties submitted proposed jury issues. Neither party included an issue for determining plaintiff's liability to defendant or for determining the amount of the defendant's damage.

Plaintiff admitted in its complaint that defendant was entitled to be reimbursed for working capital advances in the sum of $58,421.94. During the trial Johnson testified plaintiff still owed $26,667.00 on the working capital advances. At trial the unpaid promissory note for $122,500 was admitted into evidence. Johnson admitted he signed the note on behalf of Housing, Inc. and that he personally guaranteed the note. Both parties stipulated the due date as of 1 January 1974. On its face the interest rate was

established at 8 1/8%. Plaintiff first raises the issue of interest allowed on the unpaid note after the award. No assignment of error was taken to the award of interest, and it is deemed abandoned. App. R. 10(c). The amount of the award of damages made by the trial judge was not in dispute and was certain as to terms.

Under G.S. 1A-1, Rule 59(a), the courts of this State have the authority to set aside a verdict as to one issue and order a new trial as to it while leaving the verdict for the remaining issues intact. *Also see Hussey v. R.R.*, 183 N.C. 7, 110 S.E. 599 (1922).

If a verdict was returned, the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. G.S. 1A-1, Rule 50(b)(1).

The trial court had the power to grant a new trial as to the issue of damages alone, but such a trial would be a waste of judicial resources because the stipulations of the parties, the undisputed evidence, and the plaintiff's admissions establish the amount of defendant's damages as a matter of law. The trial court could have entered a directed verdict under the circumstances, or it could have waited for the jury verdict and thereafter stricken out the adverse answer to the issue and answered the issue itself. This the court elected to do. Our courts have long recognized the power of the courts to decide issues of damages where this area is undisputed. *Whitley v. Redden*, 276 N.C. 263, 171 S.E. 2d 894 (1970). This assignment of error is overruled.

We have examined the two remaining assignments of error brought forward by appellant. For the reasons set out above in reaching our decision, we find such assignments of error to be without merit in this case.

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. LEWIS ROGERS, JR.

No. 8114SC9

(Filed 7 July 1981)

1. **Criminal Law §§ 66.1, 66.11— in-court identification—pretrial show-up—opportunity for observation**

A pretrial identification procedure was not impermissibly suggestive because a robbery victim viewed defendant within an hour of the alleged crime while defendant was sitting handcuffed in a squad car with blood running down his face, and the victim's in-court identification of defendant was not unreliable because the victim never gave the police a detailed description of her assailant and she was only in his presence for several minutes, where the evidence on voir dire showed that the victim conversed with her assailant in a parking lot immediately prior to the attack; the victim had her eyes on her assailant the entire time he ran toward her after breaking into the building where the victim worked; the lighting in the building was very bright; about ten minutes after the crime the police brought a man to the building for the victim to identify, but the victim indicated that he was not the one who had attacked her; and within an hour after this she identified defendant as her assailant without any hestiation or doubt.

2. **Criminal Law § 62— results of voice stress test—absence of stipulation**

The trial court did not err in the exclusion of testimony by defendant that he denied during a voice stress test that he had assaulted the victim or broke into any building and that he had passed the test absent a valid stipulation between the prosecutor and defendant that the test results would be admissible in evidence.

3. **Criminal law § 162— admission of testimony—violation of constitutional right—failure to object**

Defendant's allegation that the admission of evidence violated a constitutional right does not prevent the operation of the rule that the admission of competent evidence is not ground for a new trial where no objection was made at the time the evidence was offered.

4. **Constitutional Law § 68; Criminal Law § 128.2— absence of subpoenaed witness—denial of mistrial**

Defendant was not denied his constitutional right to compel the attendance and testimony of witnesses for his defense by the trial court's refusal to order a mistrial because of the absence of a witness who had administered a voice stress test to defendant and who had been subpoenaed by defendant where defense counsel declined to state what the materiality of the witness's testimony would be. G.S. 15A-1061.

5. **Criminal Law § 111.1— instruction that indictment constitutes no evidence of guilt**

The trial court's instruction that "the fact that [defendant] has been indicted constitutes no evidence of his guilt of anything whatsoever" did not con-

travene the statute prohibiting reading the indictment to the jury, G.S. 15A-1221(b), and was not prejudicial to defendant.

6. Criminal Law § 114.3— no expression of opinion in instructions

In a prosecution for felonious breaking and entering wherein the trial court, in response to a question by the jury as to whether it must find an intent to commit larceny or an intent to commit a felony in order to return a guilty verdict, instructed that the jury must find an intent to commit larceny at the time of breaking and entering and that in such context larceny included armed and common law robbery, the trial court did not express an opinion on the evidence in further instructing the jury that there was no evidence "in this case of any intent to commit armed robbery, or any other type of theft besides larceny and/or common law robbery."

APPEAL by defendant from *Brewer, Judge.* Judgment entered 25 July 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 29 April 1981.

Defendant was indicted and convicted of common law robbery and felonious breaking or entering. At trial, Val Rosado testified that on the evening of 18 February 1980 she was working as a part-time research assistant at the Physical Research Center of Duke University. As she was getting ready to leave around 7:30 p.m., she heard a hissing noise outside. She removed a can of dog repellent from her purse and exited the building to check on her car. Outside she observed a man standing beside one of the cars in the parking lot next to the building. The man was standing approximately ten feet from Ms. Rosado, and a light from the building was shining on him. When Ms. Rosado asked the man what he was doing, he responded that air was coming out of her tires. She asked him several more questions, to which the man continued to reply that air was escaping from her tires. Ms. Rosado then panicked, ran into the building, and locked the door. She then telephoned the building next door. She saw a fist come through a glass pane in the door and rip at the lock. The man walked across the room and slapped Ms. Rosado's face several times. She then sprayed him in the face with the dog repellent. After a few seconds, he ran from the building. Ms. Rosado then noticed that her purse, which had been hanging from her shoulder, was missing. She further testified that the man who attacked her was present in the courtroom. At this point a voir dire hearing was conducted to determine the admissiblity of Ms. Rosado's in-court identification of the defendant.

On voir dire Ms. Rosado testified that when the man put his fist through the window and opened the door, she was standing approximately fifteen to twenty feet away. The lighting in the room was very bright, and she watched his face as he walked toward her. About ten minutes after the attack, policemen brought a man to the building for her to identify. She informed them that he was not her assailant. Within an hour, the police brought a second man, the defendant, to the building and asked Ms. Rosado whether he was the person who attacked her. Defendant was sitting in the backseat of a squad car and blood was trickling down his cheek. Ms. Rosado observed defendant and immediately identified him as her assailant.

At the conclusion of the voir dire hearing, the trial court denied defendant's motion to suppress the in-court identification and evidence of the pretrial identification procedure. Upon resumption of her direct examination, Ms. Rosado identified defendant as her assailant and then repeated her voir dire testimony.

Ross Dunseath testified that on the evening of 18 February 1980 he was in the building next door to where Ms. Rosado was allegedly attacked. He and a friend heard the intercom buzzing. When they answered the telephone, they heard screaming on the other end. Dunseath and his friend then ran toward the building next door and saw a man running from the building carrying a purse. Dunseath then chased the man to a wooded area. Instead of following him into the woods, Dunseath ran to a nearby campus security station and informed the officers there of the man's whereabouts. The officers already had been notified of the incident. As officers surrounded the wooded area, Dunseath and an officer waited nearby in a squad car for about ten minutes. After hearing something on the radio, Dunseath and the officer drove to an area next to the campus security station. There Dunseath observed a man struggling while officers attempted to handcuff him. He then identified this man as the man he had been chasing. A purse located about ten feet from the man was also identified by Dunseath. Dunseath testified that the man he chased and later identified on 18 February 1980 was defendant.

Campus security officer Larry Scarlett testified that at 7:25 p.m. he received a call that an attack had taken place at a

specified location on campus. While checking the area, he was notified that a suspect was in the wooded area behind the campus security station. He proceeded to this area and spotted a man with a purse in his hand. The man was apprehended and handcuffed. Scarlett testified that this man was defendant. He further testified that after he had handcuffed defendant and after Dunseath had identified him as the man he had chased, defendant was taken to the Physical Research Building. There Ms. Rosado identified him as her assailant. Defendant was then taken to jail.

Defendant presented testimony that on the date at issue, he rode his cousin's bicycle to visit his parole officer and his sister. On the way to his sister's house, he stopped at a Quick Stop near Duke University. When he left the store, the bicycle was missing. Someone then told defendant he had seen a "black dude" riding the bicycle up Erwin Road. Defendant started running up this road and spotted a person riding his bicycle. He lost sight of the bicycle and turned around. As he was returning to the store, he was apprehended. Defendant denied any participation in the alleged crimes.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Loflin & Loflin, by Ann F. Loflin, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant has brought forward nine assignments of error on appeal.

Defendant first argues that Judge Brewer committed error when he made certain findings of fact in his order denying defendant's motion to suppress the in-court identification of defendant and evidence of his pretrial identification. After a voir dire hearing on this motion, the trial court found:

> 1. On the 18th day of February, 1980, Valda Rosado was employed by a program sponsored by Duke University on a part time basis working generally between 4:30 and 7:30 in the afternoon.
>
> 2. At approximately closing time on the 18th of February, 1980, Valda Rosado heard a hissing noise outside the place of business.

3. She went outside and observed a male individual identified by her as the defendant Lewis Rogers, Jr., behind a car.

4. She observed this individual identified as the defendant stand up, saw his face. The area was illuminated by a light from the window of the building.

5. She carried on a conversation with this individual concerning whether or not he had let the air out of the tires. Concerned by his responses Valda Rosado returned inside the place of business.

6. At that time she attempted to make a telephone call to a co-worker in an adjacent office building. That she observed the individual she identifies as the defendant place his fist through the door of the building, unlock the door, and come toward her at a rapid rate of speed.

7. The individual identified as the defendant then struck Valda Rosado, removed a purse from her person, and continued to slap her. She then sprayed a quantity of dog repellent in the face of the individual identified as the defendant and he left the building.

8. Valda Rosado was standing approximately 15 to 20 feet from the door in an area well lighted by artificial lighting, and she concentrated her attention on the face of the defendant during the entire time that he approached her.

9. After the incident in question, within approximately ten minutes, law enforcement officials asked Valda Rosado to determine if an individual located in a police car was the individual who attacked her. Valda Rosado stated that the individual in the police car was not the individual who attacked her.

10. Within an hour of the incident in question law enforcement officials brought the defendant Lewis Rogers, Jr., to the place of business of Valda Rosado and asked her to determine if the individual located in the police car was the individual who attached her.

11. At this time without hesitation Valda Rosado stated that the individual in the police car, the defendant, was the individual who attacked her approximately one hour earlier.

12. The only statement made by law enforcement officers at this time was a request that Valda Rosado determine the individual in the police car was the individual who had attacked her previously.

13. The pre-trial identification procedure, considering all circumstances and the proximity of the time of the identification procedure, and the incident in question, was not impermissibly suggested [*sic*].

14. The witness Valda Rosado's identification of the defendant in court was not based upon or tainted by the pretrial identification procedure but was based upon the witness's independent observation of the individual identified as the defendant during the incident in question on the early evening hours of the 18th day of February, 1980.

Defendant specifically contends that findings of fact 3, 4, 6 and 12 are totally unsupported by competent evidence. As to findings of fact 3 and 4, defendant argues that there was no voir dire testimony that Ms. Rosado recognized the man standing in the parking lot as defendant. We find no merit to this argument. Immediately prior to the voir dire hearing, Ms. Rosado testified without objection that she saw a man in the parking lot. On voir dire, she testified that she "did notice his [defendant's] face by the car." There is no indication, as defendant would have us believe, that the man Ms. Rosado saw beside the car in the parking lot and the man who attacked her seconds later were two different men. Defendant further contends that there was no voir dire testimony supporting finding of fact 6. On direct examination prior to the voir dire hearing, Ms. Rosado gave testimony consistent with this finding of fact. This direct testimony was not objected to by defendant. Her testimony on voir dire further supported this finding.

Defendant next contends that finding of fact 12 was unsupported by voir dire testimony, since Ms. Rosado merely testified that she could not recall any "other" statement made by law enforcement officials. He contends that she did not testifiy that their request for her to determine the identity of the individual in the squad car was the "only" statement made. Finally, defendant argues that findings of fact 13 and 14 were erroneously designated as conclusions of law. Findings of fact that are essen-

tially conclusions of law will be treated as such upon review. *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978). They will be upheld when there are other findings upon which they are based. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). No prejudicial error was committed by these erroneous designations, as the trial court later made conclusions of law almost identical to these findings of fact. The conclusions are supported by the findings of fact.

The alleged errors cited by defendant in the six findings of fact can be considered, at most, technical errors and are clearly not prejudicial. This is particularly true in light of the remaining findings of fact to which defendant did not except. These findings of fact alone are sufficient to support Judge Brewer's order.

In his second assignment of error, defendant argues that Judge Brewer's conclusions of law in his order denying the motion to suppress are unsupported by the findings of fact and violate both defendant's constitutional due process rights and substantial rights provided by Chapter 15A of the General Statutes of North Carolina. Judge Brewer concluded that the pretrial identification procedure was not impermissibly suggestive, that Ms. Rosado's identification of defendant in court was based on her observation of defendant at the time of the alleged crimes and independent of any pretrial identification, that no statutory or constitutional rights of defendant were violated by the pretrial identification procedure, and that defendant's motion to suppress and exclude both his in-court identification and evidence of the pretrial procedure should be denied.

In a recent decision, Chief Justice Branch succinctly summarized the procedure which must be followed in determining whether an in-court identification of a defendant is of independent origin or is tainted by an impermissibly suggestive out-of-court identification.

> An improper out-of-court identification procedure requires suppression of an in-court identification unless the trial judge determines that the in-court identification is of independent origin. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). The test to determine the validity of pretrial identification procedures under the due process clause is whether the totality of the circumstances reveals pretrial procedures

so suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency, fairness and justice. *State v. Henderson, supra.* Even if the pretrial procedure is invalid, the in-court identification will be allowed if the trial judge finds it is of independent origin. *State v. Headen,* 295 N.C. 437, 245 S.E. 2d 706 (1978). After hearing the voir dire evidence, the trial judge must make findings of fact to determine whether the in-court identification meets the tests of admissiblity. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). The standards to be used to determine reliability of the identification are those set out in *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972)—(1) opportunity to view, (2) degree of attention, (3) accuracy of description, (4) level of certainty, (5) time between crime and confrontation. *See State v. Headen, supra.* If the findings of the trial judge are supported by competent evidence, they are conclusive on the appellate courts. *State v. Tuggle, supra.*

State v. Clark, 301 N.C. 176, 182-83, 270 S.E. 2d 425, 429 (1980).

[1] In the instant case, defendant first contends that the pretrial identification procedure was impermissibly suggestive, because it consisted of the alleged victim's viewing defendant within an hour of the alleged crime while defendant was sitting in a squad car handcuffed, with blood running down his face. Defendant also contends that the identification evidence was not reliable, because Ms. Rosado never gave the police a detailed description of her assailant and because she was only in his presence for several minutes at the most. We disagree with these contentions. Admittedly, one man show-ups are not advocated by our courts. We further recognize that there is no evidence in the record that Ms. Rosado gave a detailed description of her assailant to the police prior to any identification. She testified on voir dire that her identification of defendant was based upon the "totality " of his face. The voir dire testimony in the record and the findings of Judge Brewer, however, show that Ms. Rosado had her eyes on her assailant the entire time he ran towards her after breaking into the building, that the lighting in the building was very bright, and that Ms. Rosado conversed with her assailant in the parking lot immediately prior to the attack. About ten minutes after the attack the police brought a man to the building for her to identify, whom she indicated was not the one who had attacked her,

and within an hour after this she identified defendant as her assailant, without any hesitation or doubt. Judge Brewer's findings are therefore supported by competent evidence and are binding on this Court. *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Wright*, 275 N.C. 242, 166 S.E. 2d 681, *cert. denied*, 396 U.S. 934 (1969). The findings support the conclusions of law. Our determination here is consistent with other decisions concerning in-court identifications alleged to have been tainted by out-of-court identification procedures. In each of these decisions there had been a pretrial show-up of the defendant. *See State v. Edwards*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980); *State v. McCain*, 39 N.C. App. 213, 249 S.E. 2d 812 (1978); *State v. Quinn*, 36 N.C. App. 611, 244 S.E. 2d 431 (1978); *State v. Westry*, 15 N.C. App. 1, 189 S.E. 2d 618, *cert. denied*, 281 N.C. 763 (1972). Defendant in the instant case has failed to show any violation of his statutory or constitutional rights.

[2] Defendant next argues that the trial court violated his Sixth Amendment right and his due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the North Carolina Constitution, by refusing to allow defendant to testify as to the results of a polygraph examination. Defendant was merely allowed to testify that he had taken such an examination. Out of the presence of the jury, defendant testified that Richard Elsener gave him a voice stress test, that he told Elsener that he neither assaulted Ms. Rosado nor broke into any building, and that he passed the test. Defendant now alleges that the court's refusal to admit this evidence denied him his right to offer all favorable testimony in his own behalf. We hold that the trial court was required by law to disallow evidence of these test results. "In North Carolina it is well settled that, absent a valid stipulation of admissibility between the parties, results of polygraph examinations are inadmissible in state court proceedings." *State v. McNeil*, 46 N.C. App. 533, 537, 265 S.E. 2d 416, 419, *cert. denied*, 300 N.C. 560 (1980) (citations omitted). Evidence of such a stipulation is missing from the record on appeal.

[3] Defendant next assigns error to the following question posed to defendant on cross-examination: "And isn't it in fact true that you refused to make any statement whatsoever to the officers after they apprehended you that night?" Defendant responded, "No, they didn't want to talk to me." Defendant argues that this

question violated his Fifth Amendment right not to have his silence used against him. This assignment of error is overruled, as defendant failed to object to the question at trial. The admission of incompetent evidence is not ground for a new trial where no objection was made at the time the evidence was offered. Defendant's allegation that the admission of this testimony violated a constitutional right does not prevent the operation of this rule. *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972). Furthermore, upon direct examination, defendant testified that he had spoken with the officers when he was arrested, and later told one of them about the bicycle, a material aspect of his defense. The state is entitled to further investigate issues brought out during the direct examination, even when such testimony is not otherwise admissible. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

[4] Defendant argues that the trial court erred in denying his motions for mistrial made during the trial and again at the close of all the evidence. During defendant's presentation of evidence, his counsel requested the court to call Richard Elsener, the alleged polygraph examiner, to the stand. Elsener was not present, and defense counsel indicated that he had been subpoenaed and that he was a material witness. Defendant's counsel moved for a mistrial, arguing that Elsener's "failure to be in court to testify is important, necessary, material to the defendant." The court then asked defense counsel what the materiality of Elsener's testimony would be. Defense counsel then responded that it would not be in the best interest of her client to inform the prosecutor of Elsener's testimony. The court thereafter denied defendant's motion for a mistrial. Defendant now contends that this denial was a violation of his constitutional right to compel the attendance and testimony of witnesses for his defense. Pursuant to N.C.G.S. 15A-1061, "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." It is within the court's discretion to decide whether such prejudice has occurred, and the court's decision will not be disturbed on appeal absent a showing of gross abuse of that discretion. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). Defendant, in the case sub judice, has shown no abuse of discretion. As the record is silent as to what the witness would have

testified had he been called to the stand, it cannot be determined that the ruling was prejudicial, even if it was error. *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978); *State v. Darden*, 48 N.C. App. 128, 268 S.E. 2d 225 (1980). Assuming that Elsener's testimony would have concerned the polygraph test, such testimony would have been incompetent for the reasons previously discussed.

[5] Defendant next assigns error to that portion of the jury charge where the court instructed: "The fact that he [defendant] has been indicted constitutes no evidence of his guilt of anything whatsoever." Defendant contends that this statement was "highly prejudicial . . . and done in contravention of the purpose and intent of G.S. 15A-1221 and the indictment itself." This assignment of error is without merit. N.C.G.S. 15A-1221(b), 1979 Supplement, provides: "At no time during the selection of the jury or during the trial may any person *read* the indictment to the prospective jurors or to the jury." (Emphasis added.) According to the Official Commentary to N.C.G.S. 15A-1221 (prior to its amendment in 1977), the Criminal Code Commission felt that jurors might "get a distorted view of the case" after "hearing the stilted language of indictments and other pleadings." Clearly no such prejudice could have resulted from this cautionary instruction regarding the indictment.

[6] Defendant assigns error to the court's clarification of a question posed by the jury. During their deliberation, the jury returned to the courtroom and questioned the court as to whether they must find an intent to commit larceny or an intent to commit a felony, on the charge of breaking or entering. The court instructed them that they must find that at the time of the breaking or entering defendant intended to commit larceny. After a conference with the parties' attorneys, the court then instructed:

> [T]he term larceny, as it is used here, means any type of robbery, any type of theft. For example, common law robbery is a form of larceny. Armed robbery would be a form of larceny, as the term is used here.

When the jury later returned with an unrelated request, the court further stated:

> Ladies and gentlemen, one thing I want to clear up and make sure there was no confusion. When I was answering

> your question in my instructions to you was that the State must establish an intent to commit larceny. I indicated to you that the term larceny used in that context is a generic use of the term and would also encompass an intent to commit common law robbery. I also indicated as an example that it would cover an intent to commit armed robbery. I did not mean to imply by that that there was any evidence in this case of such an intent, and you should not construe it is that, and that it would be no evidence, of course, in this case of any intent to commit armed robbery, or any other type of theft besides larceny and/or common law robbery.
>
> I simply wanted to make it clear that an intent to commit common law robbery would be included in the term "intent to commit larceny."

Defendant argues that this clarification constituted a violation of N.C.G.S. 15A-1232, because the court instructed on principles of law not presented by the evidence. The trial judge adequately instructed the jury, both in the excepted-to portion and earlier in the charge, that to find defendant guilty of the breaking or entering as charged, they must find that defendant intended to commit a larceny. Defendant additionally argues that, in this portion of the charge where the trial court instructed "that it would be no evidence, of course, in this case of any intent to commit armed robbery, or any other type of theft besides larceny and/or common law robbery," it expressed an opinion as to defendant's guilt and as to the sufficiency of the evidence. We do not agree. In this statement the court simply clarified that no evidence of armed robbery or any other type theft had been presented by the state. In numerous other portions of the charge, the trial judge correctly and thoroughly instructed upon the applicable law and advised the jury that he had no opinion about any aspect of the case and that they should draw no inference from anything he said or did. Reading the charge as a whole, we find no prejudicial error. *State v. McCambridge*, 23 N.C. App. 334, 208 S.E. 2d 880 (1974).

Last, defendant argues that the trial court committed prejudicial error when it permitted the jury to take two photographs of the alleged crime scene into the jury room. These photographs had earlier been admitted into evidence as state's exhibits 2 and 3. N.C.G.S. 15A-1233 provides in relevant part: "(b) Upon request

by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." Defendant emphasizes that there is nothing in the record to indicate that the parties consented to this action. Leaving unanswered the intriguing question of whether the statute violates the constitutional concepts of separation of power, Article I, Section 6, North Carolina Constitution, we find that defendant impliedly consented to this action when he failed to object to the jury's request to take the exhibits into the jury room. Additionally, defendant has failed to show any prejudicial error. N.C.G.S. 15A-1443(a) provides:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant . . ..

Defendant has failed to meet this burden. *See State v. Bell*, 48 N.C. App. 356, 269 S.E. 2d 201 (1980).

We hold that defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge MORRIS and Judge HILL concur.

PATRICIA L. EDWARDS v. TYRONE AKION AND THE CITY OF RALEIGH, NORTH CAROLINA

No. 8010SC961

(Filed 7 July 1981)

1. Municipal Corporations § 12.3— waiver of governmental immunity by purchase of insurance

Under the common law, a municipality is not liable for the torts of its employees committed while performing a governmental function; however, a

municipality's immunity from civil liability in tort is waived under the authority of G.S. 160A-485(a) by the purchase of liability insurance.

2. **Insurance § 149; Municipal Corporations § 12.3— *intentional assault*—coverage by municipal liability policy**

An intentional assault by a municipal employee was an "occurrence" within the meaning of a liability policy purchased by the municipality and was covered by the policy, although neither expected nor intended by the municipality, if committed within the scope of the employee's duties.

3. **Municipal Corporations § 21.5— assault by sanitation worker—scope of employment**

In an action against a city to recover for injuries sustained by plaintiff when she was assaulted by a city sanitation worker, a genuine issue of material fact was presented as to whether the sanitation worker was acting within the scope of his employment at the time of the assault where the materials on motion for summary judgment showed that plaintiff and the sanitation worker engaged in an argument about whether the worker should pick up additional refuse from behind plaintiff's home; plaintiff went into her house and attempted to call the sanitation department; and plaintiff then went to the garbage collection truck which was still parked in front of her house and was trying to tell the truck driver what happened when the sanitation worker struck her several times.

4. **Municipal Corporations § 21.5— assault by city employee—negligent supervision**

In an action against a city to recover for injuries sustained by plaintiff when she was assaulted by a city sanitation worker, a genuine issue of material fact was presented on the issue of whether the sanitation worker was negligently supervised where plaintiff presented affidavits to the effect that the driver of the sanitation truck, who was in a supervisory position over the sanitation worker, refused to intervene on plaintiff's behalf, and where the city introduced affidavits indicating that the driver in fact attempted to restrain and control the sanitation worker.

Judge HILL dissenting.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 15 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 8 April 1981.

Plaintiff brought this action seeking compensatory and punitive damages for personal injuries she sustained during an altercation with defendant Akion, an employee of defendant City of Raleigh.

The City provides refuse collection services to Mrs. Edwards's home in Raleigh, North Carolina. On 4 August 1978, a team of refuse collectors, including Akion, collected garbage from

Mrs. Edwards's residence. An argument ensued between her and Akion concerning the manner in which he had performed the services. Mrs. Edwards was knocked to the ground twice and received injuries.

Upon hearing, the City's motion for summary judgment was granted. Additional facts pertinent to this appeal are set out below.

DeMent, Redwine & Askew, by Johnny S. Gaskins, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by Richard B. Conely, for defendant appellee, City of Raleigh.

MARTIN (Harry C.), Judge.

Plaintiff seeks to recover from the City of Raleigh upon two theories. First, she alleges that Akion committed an assault and battery upon her while he was acting within the scope of his employment, imputing liability to the City. Second, she contends that the City negligently failed to supervise the activities of Akion, and that this negligence proximately caused her injuries. Plaintiff's sole assignment of error deals with the propriety of the trial court's granting summary judgment in favor of the City on these claims.

The standard for determining whether summary judgment is appropriate is set out in Rule 56(c) of the North Carolina Rules of Civil Procedure and is thoroughly explained in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The moving party must clearly establish that there is no triable issue of fact and that it is entitled to judgment as a matter of law. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975). In an action based on negligence, summary judgment for a defendant is proper where the evidence demonstrates no negligence by the defendant or contributory negligence by the plaintiff, or where it is established that the defendant's negligence was not the proximate cause of the plaintiff's injury. *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *disc. rev. denied*, 297 N.C. 452 (1979). Applying these principles, we must conclude that the trial court erred in granting summary judgment for the City.

[1] Plaintiff has conceded that Akion's actions constitute an intentional tort and that the refuse collection service provided by the City is a governmental function. Under the common law, a municipality is not liable for the torts of its employees committed while performing a governmental function. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1970); *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E. 2d 18 (1970), *cert. denied*, 277 N.C. 727 (1971). This immunity is waived only under the authority of statute. *Id.* N.C.G.S. 160A-485(a) authorizes a city to waive its immunity from civil liability in tort by purchasing liability insurance. Immunity is waived only to the extent that the city is indemnified by the insurance contract. *Id. See White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967). All issues of law or fact relating to insurance coverage are heard and determined by the judge sitting without a jury, unless the city waives this right and demands a jury trial on insurance issues. N.C. Gen. Stat. 160A-485(d).

The City of Raleigh purchased a liability insurance policy from the South Carolina Insurance Company. The policy is included as an exhibit in the record, and was in effect at the time plaintiff's injury occurred. The City is the named insured under the terms of the policy. Persons insured include "the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such . . .." An endorsement amends the policy "to include any employee of the named insured while acting within the scope of his duties as such . . .." The policy states: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence . . .." It defines an "occurrence" as "an accident . . . which results in bodily injury . . . neither expected nor intended from the standpoint of the insured." There is no provision expressly excluding intentional acts.

[2] The first issue, then, is whether an intentional assault can be an "occurrence" within the meaning of the insurance policy. The language of the policy clearly provides that the expectations or intent are to be viewed from the standpoint of the insured, as opposed to that of the injured party. The City argues that because Akion was covered as an additional insured under the endorse-

ment, the event should be viewed from his standpoint, and that because plaintiff contends Akion intentionally assaulted her, his actions were outside the coverage of the policy. We do not agree. The City is the named insured. It certainly did not expect or intend that its employees would assault a third party. As to the City, the acts of Akion were an "occurrence" under the terms of the insurance policy.

The use of the term "insured" in this context is ambiguous. Such ambiguities are to be construed against the insurer. *See Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967). "The insurance companies have it within their power, by simplicity and clarity of expression, to remove all doubt." *Bone v. Insurance Co.*, 10 N.C. App. 393, 395, 179 S.E. 2d 171, 172, *cert. denied*, 278 N.C. 300 (1971) (noting that it is a well established rule in this jurisdiction that an intentional assault, unforeseen and unprovoked, *against* an insured is to be considered accidental).

Even when an insurance policy expressly excludes coverage for intentional injuries, there exists a significant split of opinion as to whether an assault will be covered. *See* 44 Am. Jur. 2d Insurance § 1411 (1969) (and cases cited therein); Annot., 2 A.L.R. 3d 1238 (1965). Where there is no specific exclusionary clause, but, instead, the language is similar to that used in the policy here in question, the courts are even more inclined to hold in favor of coverage. *See* 44 Am. Jur. 2d, *supra*, § 1412; Annot., 33 A.L.R. 2d 1027 (1954). We feel the better approach is that described in 44 Am. Jur. 2d, *supra*, § 1411:

> [W]here a third person seeks to recover from an insured on the basis of injuries or damages allegedly caused by an agent of the named insured, in the absence of a showing that the injury complained of was "at the direction of" the named insured, a liability insurer is not relieved of its obligation to the insured by an "intentional injury or damage" clause. Even though injuries or damages have been intentionally caused by a person who would be an "additional" insured under the terms of a particular liability policy, it has been held that an "intentional injury or damage" exclusion clause does not relieve the insurer of its obligations to the "named" insured where the injured person seeks to recover from the "named" insured rather than the "additional" insured, at

least in the absence of a showing that the injurious acts were directed by the named insured.

In *Jackson v. Casualty Co.*, 212 N.C. 546, 193 S.E. 703 (1937), our Supreme Court held that an intentional assault by the driver of an automobile was not covered by an automobile insurance policy covering accidental injury. Later, in *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964), however, the Court noted that in *Jackson*, North Carolina had aligned itself with the minority view, and held that an intentional assault with an automobile would be considered an accident, but only where the insurance coverage was mandatory. This decision was based on the statutory purpose of mandating compulsory motor vehicle insurance to compensate innocent victims, "not, like that of ordinary insurance, to save harmless the tortfeasor himself." *Id.* at 291, 134 S.E. 2d at 659. We believe a similar rationale applies to a liability policy procured by a city. As a city is ordinarily immune from tort liability, when it voluntarily waives that immunity by purchasing liability insurance, it obviously does so to protect innocent victims. By extending its coverage to city employees, the clear intent is to protect victims from acts of the employees as well as its officers, directors, and stockholders. The endorsement amended "persons insured" under the policy to include employees acting within the scope of their duties. We hold that the policy covers intentional torts committed by a City employee, when neither expected nor intended by the City, *if* these actions were committed within the scope of the employee's duties.

[3] The next question is whether Akion's actions were committed within the scope of his employment. Acting within the scope of employment means doing what one was employed or authorized to do: *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804 (1967); *Thrower v. Dairy Products*, 249 N.C. 109, 105 S.E. 2d 428 (1958). An act is within the scope of an employee's implied authority, even if it is contrary to the employer's express instructions, when the act is done in the furtherance of the employer's business and in the discharge of the duties of employment. *West v. Woolworth Co.*, 215 N.C. 211, 1 S.E. 2d 546 (1939). The employer is liable if its employee, in performing his duties, adopts a method which constitutes a tort and inflicts an injury upon a third party. *Id. See also* Annot., 6 A.L.R. 985, 1007 (1920). To relieve the employer of responsibility, it is not sufficient to show that the employee was violating a rule or instruction. *Duckworth*

v. Metcalf, 268 N.C. 340, 150 S.E. 2d 485 (1966); *Hinson v. Chemical Corp.*, 230 N.C. 476, 53 S.E. 2d 448 (1949). However, there is a difference between carrying out the employer's business and attempting to punish one who interferes with that business. *See Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968); *D'Armour v. Hardware Co.*, 217 N.C. 568, 9 S.E. 2d 12 (1940); *Overton v. Henderson*, 28 N.C. App. 699, 222 S.E. 2d 724 *disc. rev. denied*, 290 N.C. 95 (1976).

We find *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665 (1921), to be instructive. In *Munick*, the plaintiff went to the office of the city water-works to pay his water bill. He paid with four dollars and a roll of fifty pennies. A clerk gave him a receipt and was recounting the pennies as the plaintiff was leaving the office. The manager of the water-works came out, became upset about the pennies, pushed them onto the floor, and demanded the plaintiff take them back. The manager became verbally abusive, then physically assaulted the plaintiff. The trial court granted nonsuit in favor of the city at the close of the plaintiff's evidence, on the grounds that the assault by the manager was not within the scope of his authority. The Supreme Court reversed, holding that at the time of the assault, the manager was acting in his capacity as agent for the city, stating: "He was there in the prosecution and furtherance of the duties assigned to him by the defendant municipality. . . . 'Acting within the scope of employment means while on duty.'" *Id.* at 193, 106 S.E. at 667 (citations omitted). Although the plaintiff in *Munick* was an invitee on the city's property, Akion, like the office manager in *Munick*, was at the place his municipal employer had assigned him. Nor is it determinative that the Court in *Munick* found that the city there was acting in a business capacity rather than performing a governmental function, as that distinction pertains only to the issue of governmental immunity from tort liability, previously addressed.

The City relies on the majority opinion in *Robinson v. Sears, Roebuck & Co.*, 216 N.C. 322, 4 S.E. 2d 889 (1939) (Seawell, J., dissenting), as authority for its position that Akion was not acting within the scope of his employment. In that case, the plaintiff, a customer in the defendant corporation's store, remonstrated with an employee for the language he had directed at other employees. The employee directed the plaintiff outside and then assaulted him. The plaintiff testified that the conversation between the two

of them had not been about the corporate defendant's business, but rather about "a personal matter." In affirming the trial court's granting nonsuit in favor of the corporate defendant, our Supreme Court held that "where an assault by an employee is purely personal, having no connection with the employer's business but a merely accidental or incidental one, the doctrine of *respondeat superior* is inapplicable and cannot be successfully invoked to support a recovery against the employer." *Id.* at 323, 4 S.E. 2d at 890. Unlike the situation in *Robinson*, however, plaintiff here has not admitted that the altercation was over a personal matter, but, instead, asserts that it involves the services that Akion was performing at her home.

Nor do we find *Wegner, supra*, controlling. In *Wegner*, the plaintiff's evidence at trial demonstrated that he had been assaulted by a bus boy employed by defendant, "not for the purpose of doing anything related to the duties of a bus boy, but . . . for some undisclosed, personal motive." 270 N.C. at 68, 153 S.E. 2d at 809. The plaintiff had requested the bus boy to remove dirty dishes from his table. While so doing, the employee also took the plaintiff's clean glass, which the plaintiff requested him to replace. The bus boy slammed a glass on the table, walked away, and then began an argument with the plaintiff, which culminated in the employee's physically attacking the plaintiff. The Supreme Court held that the trial court had properly granted nonsuit for the defendant corporation at the close of all the evidence, as the employee's actions could not be deemed an act of his employer. The Court noted, however, that the result would have been different if, instead of the bus boy's walking away, the glass he slammed down on the plaintiff's table had shattered, injuring the plaintiff, because in that case the employee would have been performing an act, which he had been employed to do, in a negligent or improper manner.

In contrast, in the case sub judice, the affidavits and depositions show that Mrs. Edwards and Akion were quarreling about whether the latter should pick up additional refuse from behind plaintiff's home. The collection truck was still in front of her house, and the dispute concerned whether Akion had completed the service he was there to do.

In her affidavit, plaintiff stated:

6. That she made an effort to discuss with Tyrone Akion the manner in which he had attempted to collect her garbage.

7. That Tyrone Akion then began to hit her with his fists and to kick her with his feet.

8. That this assault and battery occurred without her having provoked Tyrone Akion in any way which would have justified such actions.

Her neighbor Aaron Bass, who witnessed part of the affray, testified in his sworn deposition:

> The first thing that drew my attention to her was her calling to the gentlemen asking him to wait. I think this was her words, "wait." I am referring to Tyrone Akion when I refer to the gentlemen. At that time she was several yards behind him as he was going to the garbage truck. She was trying to get his attention. She was coming down towards the street. He was in front of her. Near the truck. He was carrying a can. A garbage can. . . . I don't recall whether "yelling" is what she was doing. I heard her calling, "Wait. Wait." I heard this across the street from my house. After I heard that, then I look up, and I saw her coming along the street behind him. I then went back to work on my steps. Immediately after that I heard some cursing. My memory may be a little faulty. I think both of them were raising their voices at each other.
>
> . . . And by the time I looked over there, she was already on the pavement down here. I had previously seen her coming down. The next time I saw her she was on the ground.

The City submitted affidavits of the sanitation superintendent for the City, one of which described Akion's responsibilities:

> Mr. Tyrone Akion was employed by the City of Raleigh as a sanitation laborer. The duties of this position include collecting garbage from houses and businesses; emptying garbage into the collection truck; operating the packing mechanism . . ..
>
> The only contact allowed with the public is the answering of routine questions concerning service. Any complaints concerning service or his duties in general are to be reported

to his supervisor and not handled personally by the sanitation laborer. Any additional public contact would be outside of Mr. Akion's area of responsibility and not approved by the City.

The investigative notes of a detective for the Raleigh Police Department were submitted with the officer's affidavit, and contained statements given to him during the course of his investigation. The statement of Aaron Bass included: "I was working in my yard when I heard our neighbor, Patricia Edwards, calling the garbage man to 'wait.' She called him several times and he ignored her. When I looked up she was on the ground and I rushed over to the yard . . .."

Another neighbor told the officer she had seen a garbage truck parked in front of plaintiff's house and a man yelling, cursing, and swinging at Mrs. Edwards.

While hospitalized, Mrs. Edwards told the officer:

The garbage man emptied two of the garbage cans into a yellow tub and left the other. He started back to his truck, and I call to him several times and he paid no attetion to me. I finally caught up with him at the truck. He said that he had only two hands and I was trying to hassle him (He said that) He said this about four (4) times. Then he (garbage man) started to walk away to the neighbors. He walk [*sic*] on and I called him a S.O.B. Then he took off his gloves and dropped his tub and walked up to me right in my face. He asked me was I trying to call his mother a bitch. I said no, all I want you do to is pick up my trash. He finally walked off and I went back into the house and tried to call the sanitation dept several times and I could not get an answer. I opened the front door and the truck driver or someone with the truck was standing by the truck. I walked out to the truck driver and proceeded to tell him what had happened and that I had call [*sic*] the (garbage man) a S.O.B. and about the trash. I was trying to tell him what happened when the (garbage man) threw down his gloves and ran over to me. He (garbage man) said he didn't have to take this . . . from this white trash. Then he grabbed my shirt and began hitting me with his fist several times.

Although other crew members told the detective that Mrs. Edwards began the dispute, George Fogg, one of the workers, stated that Akion told him the disagreement did concern the garbage collection.

Another police officer's affidavit included a summary of his knowledge of the events. He stated that Akion told the magistrate that the dispute was over whether he should pick up a certain type of garbage behind plaintiff's house.

In light of the above evidence before the trial court, we cannot say, as a matter of law, that Akion was not acting within the scope of his employment at the time he allegedly assaulted Mrs. Edwards. When there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury. *Pinnix v. Griffin*, 219 N.C. 35, 12 S.E. 2d 667 (1941); *Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573 (1938). The doctrine should be applied liberally, especially where the business involves a duty to the public, and the courts should be slow to assume a deviation from the duties of employment. 8 Strong's N.C. Index 3d Master and Servant § 34 (1977). In this case, the facts surrounding the incident are not unequivocal, and a jury should determine whether the alleged assault arose out of personal animosity or an effort by Akion to accomplish the duties assigned him.

[4] Similarly, the issue of whether Akion was negligently supervised involves a question of material fact. Affidavits submitted by the City indicates that Akion was to report any complaints or problems to his supervisor. The City, in its answers to plaintiff's interrogatories, admitted that James Allen, driver of the collection truck, was the general "lead man" for the crew, and was responsible for conveying instructions to Akion. Allen "was responsible to the supervisor for ensuring that assigned collection crew completed their daily task. He resolved minor complaints. Matters that he could not resolve were telephoned to the Sanitation Office and were dispatched by radio to supervisor."

The City concedes that if Allen were negligent in the performance of his supervisory role as alleged, and if such negligence proximately caused plaintiff's injuries, its insurance policy would provide coverage. Plaintiff, in her affidavit, claimed Allen could

have, but refused, to intervene on her behalf. Aaron Bass, in his deposition, stated:

> Tyrone Akion had been moved over into the yard, also, but near the rear of the truck. The other two gentlemen were not physically holding him. He was over there with them. . . .
>
> I did not notice whether the other gentlemen that were with Mr. Akion had begun to hold him at any time. I am referring to the period prior to Mrs. Edwards' breaking away from me. My impression was that they were afraid of him. They attempted to move themselves physically between them. Between the combating individuals. But they seemed to be afraid to put their hands on him. My impression is that they did not attempt to hold him.

The City introduced affidavits indicating that Allen in fact attempted to restrain and control Akion. Thus the question of negligent supervision must be submitted to the jury.

Nor is the record unequivocal, as the City argues, regarding evidence that plaintiff assumed the risk of injury by voluntarily participating in the altercation, thereby barring her claim if the City were to be found negligent. *See Hale v. Power Co., supra.* The summary judgment granted to the City is

Reversed.

Chief Judge MORRIS concurs.

Judge HILL dissents.

Judge HILL dissenting.

I must dissent. The situation must be divided into two parts: one occurring on the premises of Mrs. Edwards where Akion refued to remove a tire because it was located at the rear of the Edwards' house, and the second at the street when Akion had completed his job of collecting Mrs. Edwards' garbage. Mrs. Edwards had followed Akion to the street, continuing her verbal assault, calling Akion a "S.O.B." It was after Akion had completed his assigned duties that he assaulted Mrs. Edwards, suddenly and without warning, in a public place. The assault arose as a per-

sonal retaliation by Akion against Mrs. Edwards and in no way as furtherance of the employer's business or in the discharge of employment. I find *Munick, supra,* distinguishable. I do not find the assault committed while Akion was acting within the scope of his duties. The decision of the trial judge should be affirmed.

GEORGE E. SHEPARD, JR., INC. v. KIM, INC.

No. 8018SC881

(Filed 7 July 1981)

1. **Contracts § 27.1— contract for sale of property—mutual assent or counter offer**

In an action to recover damages for an anticipatory breach of contract for the sale of certain real property to plaintiff realtor, there was no merit to defendant's argument that there was never a meeting of the minds between the parties as to the inclusion or exclusion of the sentence, "Buyer [plaintiff] is purchasing this property in his investment account for a profit," and that the sentence in issue constituted a counter offer by plaintiff, since the evidence tended to show that an offer and acceptence took place when an authorized agent of defendant made an offer to sell by signing a contract of sale and plaintiff accepted it by his execution; the contract contained binding mutual promises of the parties to perform an act in the future in exchange for money; the sentence in issue was not a material change altering the legal relationship of the parties and in no way affected defendant's obligation to pay a 7% commission to the listing broker; and because the sentence did not materially change the legal relationship of the parties, it did not constitute a counter offer by plaintiff.

2. **Corporations § 11— contract for sale of real property—express and apparent authority of agent**

In an action to recover damages for an anticipatory breach of contract for the sale of real property, defendant could not claim that a sentence inserted in the contract of sale by plaintiff was a counter offer by plaintiff which was not accepted by defendant, since defendant's agent in N.C., by corporate resolution, was authorized to execute the agreement which included the sentence in question with plaintiff; the agent obtained the express approval of defendant's secretary before agreeing to the change; and defendant was estopped from denying the agent's authority because defendant placed her in a position where reasonable persons were justified in assuming that she had authority to act.

3. **Vendor and Purchaser § 1— contract for sale of property—delivery not essential**

In an action to recover damages for an anticipatory breach of contract for the sale of real property, there was no merit to defendant's contention that, to

be valid, a contract to convey land must be delivered, since delivery is not essential for a contract which does not attempt to transfer title.

4. Vendor and Purchaser § 8— breach of contract to sell property—damages

In an action to recover damages for an anticipatory breach of contract for the sale of real property, there was no merit to defendant's contention that there was no competent evidence of the fair market value of the property involved, since plaintiff established that assignment of the contract was within the contemplation of the parties; plaintiff assigned the contract to a third party for $85,000; the third party would have been willing to pay more than $85,000 for the contract; and there were other serious negotiations and alternative plans for use of the property.

APPEAL by defendant from *Battle, Judge.* Judgment entered 8 May 1980 in Superior Court, GUILFORD County.[1] Heard in the Court of Appeals 1 April 1981.

George E. Shepard, Jr., Inc. (Shepard, Inc.) seeks to recover damages from Kim, Inc. alleging an anticipatory breach of contract for the sale of certain real property known as the King's Inn Motel (Motel) in Greensboro, North Carolina. Kim, Inc. in its Answer denied the existence of a valid contract. Following a nonjury trial, the court ordered Kim, Inc. to pay Shepard, Inc. $85,000.00 in damages for breaching the contract. Kim, Inc. appeals.

On 21 March 1978, the Motel was listed "for sale, lease or exchange" by Kim, Inc. with the Richardson Corporation.[2] George E. Shepard, Jr., a realtor in Greensboro and President and sole stockholder of Shepard, Inc. became interested in the Motel. Linda Cox, Kim, Inc.'s Vice President in Greensboro, arranged for Shepard to tour the Motel and told him that Alphonse Della-Donna, an attorney in Florida, would make the decisions concerning the sale of the property for Kim, Inc.

Shepard and Della-Donna met in Florida on 27 and 28 June 1978 to negotiate the sale of the Motel. During their discussions, Shepard advised Della-Donna that he (Shepard) was a real estate broker, but that he was not going to claim any of the commission

1. With the consent of all parties, Judgment was entered out of session in Durham, North Carolina.

2. Under the terms of the listing agreement, Richardson Corporation was entitled to a 7% real estate commission in the event of the sale of the property.

from the sale of the Motel; that he was purchasing the property in his investment account for profit; and that he was going to syndicate the property with a group of investors. During the negotiations, Della-Donna telphoned Linda Cox in Greensboro and instructed her to telephone Richardson Corporation and inquire as to the commission payable to Richardson Corporation if the Motel were sold through another broker. Linda Cox made the call as requested. Bryan Clemmons of Richardson Corporation informed Linda Cox that Richardson Corporation's commission would be one-half, or 3.5%, if the property were sold through another broker.

Following the meeting in Florida, Shepard returned to North Carolina and prepared a document, Plaintiff's Exhibit No. 1 (PX1), based on his negotiations with Della-Donna. Shepard sent PX1 to Della-Donna and then deposited $5,000.00 in escrow with High Point Bank & Trust Co. in accordance with PX1. Della-Donna and Shepard had further negotiations over the telephone and agreed on various changes to PX1. The changes agreed upon were incorporated in an 18 July 1978 contract (PX4)[3] prepared by Della-Donna and sent by Air Express Service to the Greensboro airport for execution by Shepard as President of Shepard, Inc. and by Linda Cox as Vice-President of Kim, Inc. A corporate resolution authorizing Linda Cox to sign the contract as Vice President of Kim, Inc. was attached to the contract.

Shepard and Linda Cox met at the airport and examined PX4. At the airport, Linda Cox stated that she had been instructed by Kim, Inc. to add "this is a net, net, net-lease" to paragraph 9 of PX4. Shepard agreed to this addition and then told Linda Cox that he wanted to add the language "[b]uyer is purchasing this property in his investment account for profit" to paragraph 8 of PX4. Linda Cox told Shepard that this additon would have to be approved by Kim, Inc., and consequently, she telephoned Robert Sturrup, a law partner of Della-Donna and Secretary of Kim, Inc., in Florida. Robert Sturrup agreed to Shepard's additon to paragraph 8 and instructed Linda Cox to make the requested change. After the two above-described addi-

3. PX4 differed from PX1 in, among other respects, that it specifically spelled out that Shepard would not receive any commission, and deleted the sentence "[b]uyer is purchasing this property in his investment account for a profit."

tions were made, PX4 was executed by Shepard, Inc. and by Linda Cox as Vice President of Kim, Inc. The next day, PX4 was taken to High Point Bank & Trust for signatures acknowledging that the earnest money was in escrow, and the bank was instructed to forward PX4 to the office of Della-Donna in Florida so that Robert Sturrup as Secretary of Kim, Inc. could attest the signature of Linda Cox.

During the telephone call on 18 July 1978 between Shepard, Linda Cox and Robert Sturrup, Shepard inquired about the short form (PX5) used for recording purposes, which was supposed to have been included in the package of documents sent by Della-Donna to Greensboro. Robert Sturrup agreed promptly to mail PX5 to Shepard and did so. On 20 July 1978 Shepard received PX5. Shortly thereafter, Robert Sturrup telephoned Shepard and asked him not to record PX5 because there was a problem with Richardson Corporation's commission. Shepard indicated that he would not record PX5 unless advised to do so. After receiving advice from other people to record PX5, Shepard did so on 21 July 1978.

After Bryan Clemmons of Richardson Corporation learned about PX4 and discovered that Shepard was not claiming any commission, Clemmons telephoned Della-Donna and told him that Richardson Corporation was claiming its 7% commission as listing broker. Della-Donna told Clemmons that if Kim, Inc. had to pay a full commission the deal would not be closed. By telephone call from Della-Donna to Shepard on 26 July 1978 and by letter from Sturrup to Shepard dated 28 July 1978, Kim, Inc. expressed its concern about Shepard's addition to PX4. It notified Shepard that Kim, Inc. would not attest Linda Cox's signature nor deliver PX4 until the dispute with Richardson Corporation was resolved.

On 20 September 1978, Shepard and Richard Maxwell of Maxwell Associates[4] entered into an agreement whereby Shepard assigned PX4 to Piedmont Holding, Inc. (Piedmont) for $85,000.00. This assignment was conditioned upon Kim, Inc.'s notification to

4. Explaining Shepard's connection with Maxwell Associates, Richard Maxwell testified: "Mr. Shepard is a licensed broker in the State of North Carolina, . . . [O]n July 1, 1978, . . . he was an independent employee-contractor working through Maxwell Associates on his listings and sales . . .

. . .

Piedmont of Kim, Inc.'s intent to honor its contract with Shepard, Inc. by 2 October 1978. Sturrup and Della-Donna were notified of this assignment. Richard Maxwell testified that at all times between 20 September 1978 and 2 October 1978 Piedmont was not only prepared and able to pay Shepard, Inc. the sum of $85,000.00 according to the terms of the contract between them, but also that Piedmont was prepared to pay, and would have paid, more than $85,000.00 for the assignment. On 3 October 1978, the required notice of intent to close not having been sent by Kim, Inc., Piedmont notified Shepard, Inc. that it was, therefore, cancelling the assignment between Shepard, Inc. and Piedmont.

Frazier, Frazier & Mahler, by Harold C. Mahler and Patrick A. Weiner, for defendant appellant.

Roberson, Haworth & Reese, by J. Brooks Reitzel, Jr., for plaintiff appellee.

BECTON, Judge.

I

[1] We address the pivotal issue in this case at the outset—did Shepard, Inc. prove the existence of a valid and enforceable contract? The evidence when viewed in the light most favorable to Shepard, Inc., establishes a contract, breach of contract, and resulting damages. Consequently, the trial court properly denied Kim, Inc.'s motions for entry of a judgment of dismissal on the merits.

a) Mutual assent or counter offer

To form a valid contract there must be an offer and an acceptance, supported by adequate consideration. Kim, Inc. argues (1) that there was never a "meeting of the minds" between Della-Donna (whom Shepard knew was the ultimate decision-maker) and Shepard as to the inclusion or exclusion of the following sentence: "Buyer is purchasing this property in his investment account for a profit."; and (2) that the sentence in issue constituted a counter-offer by Shepard. The trial court rejected Kim, Inc.'s arguments, and so do we. A manifestation of offer and acceptance

[H]e could operate as George E. Shepard, Jr., Inc., outside and separate and apart from Maxwell Associates. He could operate under George E. Shepard, Inc., for his own account. If he were to transact any business for other than his own account, it would have to go through Maxwell Associates."

took place at least on 18 July 1978[5] when Linda Cox, the authorized agent of Kim, Inc., made an offer by signing PX4, and Shepard accepted it by his execution. PX4 contains binding mutual promises of the parties to perform an act in the future in exchange for money, and "is governed by the general rules of law governing the formation of contracts in general." 77 Am. Jur. 2d *Vendor and Purchaser* § 4 (1975). *See also Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820 (1960); *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E. 2d 666 (1945).

To create a counter-offer, a change in the original offer must be material; it must alter the legal relationship of the parties to the contract. *See, e.g., Carver v. Britt*, 241 N.C. 538, 85 S.E. 2d 888 (1955) ("subject to details to be worked out" held to refer not to the acceptance of the offer but to the performance of the contract). We do not consider the sentence in issue in this case to be a material change altering the legal relationship of the parties. It in no way affects Kim, Inc.'s obligation to pay a 7% comission. First, Della-Donna had already included in paragraph eight of PX4 a statement that Shepard, Inc. was purchasing the improvements and that no real estate commission would be due either Shepard or Shepard, Inc. Second, if the commission did not have to be shared with any other broker who negotiated a sale, lease or exchange, then Richardson Corporation was entitled to the full 7%. Specifically, Bryan Clemmons, the listing agent for Richardson Corporation, testified: "[Della-Donna] did say it was his understanding that Shepard was waiving his commission, since he was a broker, and I would only be entitled to 3.5%. I said that has nothing to do with Richardson Corporation's getting 3.5%; they get 7% because they are the listing broker."

The commission was governed by Kim, Inc.'s listing contract with Richardson Corporation which obligated Kim, Inc. to pay 7%

5. Shepard, Inc. makes a compelling argument that an agreement on the essential terms of the sale and lease was reached between Shepard and Della-Donna at the original meeting on 28 June 1978. Shepard, Inc. argues that even though the subordinate terms of the agreement had not been concluded, the agreement was sufficient at law to find a contract. *See Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496 (1970) wherein the court held that an oral agreement to sell contained the essential elements of an enforceable contract, even though the attorneys for the parties could not agree upon subordinate terms. In *Yaggy*, a telegram was sufficient to take the contract out of the statute of frauds.

to Richardson Corporation regardless of who sold the property. *Insurance & Realty, Inc. v. Harmon*, 20 N.C. App. 39, 200 S.E. 2d 443 (1973). What Richardson Corporation did with its 7% depended on whether Richardson Corporation sold the property or whether the property was sold by an outside broker. Bryan Clemmons further testified:

> If the listing broker sells it, he gets the whole 7%. If an outside broker sells it, depending on the situation, he can get anywhere from 10% to 50%.
>
> There is no rule or resolution adopted by the Board of Realtors, or anything that firmly commits all members to pay a certain commission. It is entirely on an individual basis. *It is usually negotiated after the sale.* It depends on what the selling broker's involvement in the transaction is, as to whether they split 50/50, or whatever.

Della-Donna mistakenly concluded that Shepard's waiver of a commission entitled Kim, Inc. to retain 3.5% of the real estate commission and only obligated Kim, Inc. to pay Richardson Corporation 3.5% as the listing broker. His unilateral mistake was not created by the sentence added by Shepard on 18 July 1978. Because this sentence did not materially change the legal relationship of the parties, it did not constitute a counter-offer by Shepard, Inc.

b) Express and apparent authority

[2] Even if the sentence were considered material, Linda Cox, by corporate resolution, was authorized to execute the agreement with Shepard, Inc.[6] Further, Linda Cox obtained the express approval of Robert Sturrup, who was Secretary of Kim, Inc., law

6. The Corporate Resolution attached to the Contract states: "RESOLVED, that Linda Cox, as Vice President of Kim, Inc., be and she is hereby authorized to execute an Agreement with George E. Shepard, Jr., Inc. concerning the sale of the improvements known as King's Inn Motel, Greensboro, North Carolina, together with the furniture, furnishings, fixtures and equipment therein and providing for a lease of the land upon which the King's Inn Motel is located, which will contain an option to sell."

partner of Della-Donna,[7] and a participant with apparent authority to act for Kim, Inc. Linda Cox was clearly an agent of Kim, Inc., and her acts as an agent in accordance with express authority are binding on Kim, Inc. *Investment Properties v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973).

In addition to Linda Cox's express authority, Kim, Inc. is estopped from denying her authority because it placed her in a position where reasonable persons were justified in assuming she had authority to act. Shepard, Inc. dealt with her in reliance on her authority. 19 Am. Jur. 2d, *Corporations* §1164 (1965) states:

> [A] corporation which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that [s]he has the authority to perform the act in question and deal with [her] upon that assumption, is estopped as against such persons from denying the officer's or agent's authority.

Thus, Linda Cox possessed both express and apparent authority to bind, and did bind, Kim, Inc.

Kim, Inc. also argues that PX4 is unenforceable because Linda Cox's signature was not attested by the secretary of Kim, Inc. in compliance with G.S. 55-36(a) which reads:

> Notwithstanding anything to the contrary in the bylaws or charter, any deed, mortgage, *contract* . . . when signed in the ordinary course of business on behalf of a corporation by its president or vice-president *and attested or counter-signed by its secretary or an assistant secretary* . . . shall with respect to the rights of innocent third parties, be as valid as if executed pursuant to authorization from the board of directors. . . . The foregoing shall not apply to parties who had actual knowledge of lack of authority. . . . (Emphasis added.)

G.S. 55-36 protects innocent parties from later assertions by corporations that their contracts were not, in fact, authorized by the

7. Although Della-Donna was attorney for Kim, Inc., he was neither a shareholder, director or officer of the Corporation and no Resolution authorized him to take any formal action with regard to PX4. Moreover, Shepard had numerous dealings with Sturrup.

corporation's board of directors. Thus, in contracts between corporations and innocent third parties, the statute suspends the ordinary agency rules requiring proof of authority. Subsection (e) clearly shows the statute's remedial nature stating "nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, or apparent authority, ratification, estoppel or otherwise." G.S. 55-36(e).

Kim, Inc., relies on *Realty, Inc. v. McLamb*, 21 N.C. App. 482, 204 S.E. 2d 880 (1974) in which this court held that a corporate deed which is not attested by the corporate secretary is void nothing else appearing. "Nothing else appeared" in *McLamb;* the only evidence introduced was the deed itself. More importantly, the *McLamb* court remanded the cause for a determination as to whether the corporation ratified the deed or was estopped to deny its validity, and whether the deed might be construed as a contract to convey. In the case at bar, the authority of Linda Cox and Robert Sturrup to bind Kim, Inc. is shown by express and apparent authority. On the facts of this case neither G.S. 55-56 nor *McLamb* is controlling.

c) Delivery

[3] Kim, Inc., states its final contention on the validity of the contract thusly: "[T]o be valid, a contract to convey land must be in writing and must be delivered." We again reject Kim, Inc.'s argument. The trial court's finding that PX4 was delivered to Shepard, Inc. for signatures is sufficient. There is no requirement that, once delivered, a document must be retained. (The trial court also found delivery of PX5, the short form.) While delivery may be essential under the laws of conveyance to effect a transfer of title, delivery is not essential for the contract in this case which does not attempt to transfer title. PX4 only contains mutual promises by the parties, and is governed by the ordinary principles of contract law.

In this case a valid and binding contract existed. The legal obligations which the parties' agreement created are clear.

Shepard, Inc. has demonstrated that there was an anticipatory breach[8] of the contract.

II

Based on thirteen separate exceptions, Kim, Inc. contends the trial court erred in admitting certain testimony into evidence. Kim, Inc. excepted to evidentiary rulings of the trial court and challenged the admitted evidence on the following grounds:

1) Relevancy

   a) Shepard's testimony that Robert Sturrup did not indicate that there were "any additional changes to be made, or anything else to be agreed upon";

   b) Maxwell's reading into evidence the assignment of Shepard's alleged contract rights to Piedmont for $85.000.00;

2) Hearsay

   a) Shepard's testimony that he was told that Linda Cox would execute the agreement;

   b) Shepard's testimony that Linda Cox told him that R. C. Boyce "did not want to go through with the transaction";

3) Best Evidence

   a) Shepard's testimony as to who was authorized to act on behalf of Kim, Inc.;

   b) Shepard's testimony as to the purpose of PX5, the short form;

4) Competency

   a) Shepard's testimoney that Della-Donna indicated to him that they had an agreement.

We find no prejudice in any of the evidentiary rulings. There is competent evidence, not objected to, to support each of the court's findings of fact. Further, most of the objections were prop-

8. *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968), defines an anticipatory breach as, "a breach committed before there is a present duty of performance, and is the outcome of words evincing intention to refuse performance in the future." (Citations omitted.) *Id.* at 107, 164 S.E. 2d at 32.

erly overruled. For example, since PX4 and PX5 were admitted into evidence, Kim, Inc.'s "Best Evidence" objection and "Hearsay" objection (about who would execute the agreement) are meritless. Moreover,

> [i]n a trial before the judge, sitting without a jury, "the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found." There is a presumption that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings; but the presumption is rebuttable, and "it would be reviewable error for the judge, exercising at the same time his own and the functions of a jury, to admit and act upon incompetent evidence in finding facts."
>
> It would be difficult to rebut the presumption in favor of proper action except in cases where the only evidence to support the finding was incompetent, or where the judge by words or conduct indicated his intention to consider the incompetent evidence. Stansbury, N.C. Evidence 2d §4a (Brandis revision 1973).

III

Citing numerous exceptions, Kim, Inc. argues that there was insufficient evidence to support the court's Findings of Fact and Conclusions of Law. Shepard, Inc.'s meticulous and detailed eleven-page response, our review of the entire record, and the applicable standard set forth below impel a conclusion that the court did not err in its Findings of Fact and its Conclusions of Law. The applicable standards can be summarized thusly:

1. The trial court's findings of fact in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

2. When there is sufficient competent evidence to support a finding of fact by the court, it will be presumed that the court

disregarded incompetent evidence tending to support the same finding, unless the record affirmatively discloses that the finding was based, in part at least, on incompetent evidence heard over objection.

3. When the findings supported by competent evidence are sufficient to support the judgment, the judgment will not be disturbed because (a) another finding, which does not affect the conclusion, is not supported by evidence; (b) the court made an additional finding which is immaterial to the case; (c) the court admitted evidence relating to an immaterial finding; or (d) the court refused to make additional, immaterial findings. *See Industries, Inc. v. Construction Co.*, 29 N.C. App. 270, 224 S.E. 2d 266, *disc. rev. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976).

We conclude that the court's Findings of Fact and Conclusions of Law are supported by competent, relevant and probative evidence.

IV

[4] Kim, Inc.'s final argument is that there was no competent evidence of the fair market value of the property involved. Damages for the breach of a contract involving real estate are cogently expressed in *Johnson v. Insurance Co.*, 219 N.C. 445, 14 S.E. 2d 405 (1941):

> [T]he damages recoverable for breach of contract by the vendor to convey real estate are only such as may fairly and reasonably be well considered as arising naturally . . . from such breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of the breach. The loss of the vendee's bargain is assessed upon the basic either of the difference between the contract price and the actual value of the land, or the actual value of the land less the amount, if any, remaining unpaid on the contract price.

Id. at 449-50, 14 S.E. 2d at 407.

Shepard, Inc. established that assignment of the contract was within the contemplation of the parties. Consequently, the assignment to Piedmont was clearly foreseeable. Further, the best evidence of the loss of bargain caused by the failure of Kim, Inc. to perform under the contract is the free, armslength bargain to assign the contract to Piedmont. There is no evidence of collusion between Shepard, Inc. and Piedmont. This bargain was made

when neither party was compelled to buy or sell. Shepard's testimony of other serious negotiations ("As of September 20, 1978, there were several possible purchases I was still working with.") and Richard Maxwell's testimony of alternative plans (condominiums or a medical clinic), show that conditions were ripe for establishing fair market value of the property. Richard Maxwell's testimony is compelling.

> I knew from the outset in mid-July, 1978, that there was a slight problem between Mr. Shepard and Kim, Inc. over the property. Although that problem apparently hadn't gone away by September 20, 1978, there was every reason to believe that it would go away. . . . I was prepared, as of September 20, 1978, to pay him more money than I offered.
>
> On September 20, 1978, I was simply intending to purchase that piece of property, to develop it as a medical clinic. [It was already zoned for a medical clinic.]
>
> . . .
>
> I looked at several alternatives. . . . I looked at it with one group owning the land; individual groups owning the condominiums on that piece of property. . . . I looked at the entire project, either keeping the existing buildings and remodeling them, or tearing down every building. I had, at that time, negotiated a contract to tear all the buildings down.
>
> . . .
>
> I knew I was prepared to pay Mr. Shepard more money, and I knew that when he signed that I had already made money. I believe that my investors were aware of the figures in my proposal to Mr. Shepard. . . . [T]he investors rely on me to come up with the package; then they will invest in me.
>
> . . .
>
> I considered handling this investment project myself. I could have financially handled it myself without partnership. I was prepared to close the transaction on my own.

Kim, Inc. also maintains that Shepard, Inc. could have mitigated its damages by paying $15,750, the disputed 3.5% commission to Kim, Inc., and closing under protest. The law does not require that Shepard, Inc. incur undue risk, expense or humiliation in order to mitigate damages, 11 Williston, *Contracts*, § 1353 (1957).

Shepard, Inc. demonstrated by competent evidence that a contract had been formed, that there was an anticipatory breach of the contract, and that the natural and proximate damages were $85,000.00. We find no error in the trial court's evidentiary rulings and conclude that the trial court correctly denied Kim, Inc.'s motion for dismissal. Accordingly, we

Affirm.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. VERNON LEE CHAMBERS

No. 8114SC99

(Filed 7 July 1981)

1. **Criminal Law § 111.1— informing jury of charge against defendant—propriety of instructions**

The trial judge did not violate G.S. 15A-1213 or G.S. 15A-1221(a)(2) by advising the prospective jurors that defendant had been accused in a bill of indictment returned by the grand jury at the July 8, 1980 Session alleging that he broke and entered a certain building and that when he did so he had the intent to commit larceny.

2. **Criminal Law § 116.1— instructions on right of defendant to testify**

Defendant was not prejudiced by the trial court's unduly repetitious instructions on defendant's right to testify or present evidence or to refrain from testifying or presenting evidence.

3. **Criminal Law § 71— shorthand statement of fact**

A witness's testimony concerning his work duties "at the time when the breaking and entering started" did not constitute an opinion on the ultimate issue to be decided by the jury, since the use of the term "breaking and entering" was merely a shorthand statement of fact.

4. **Criminal Law § 122— failure to admonish jury before overnight recess**

Defendant was not prejudiced by the failure of the trial court to admonish the jury pursuant to G.S. 15A-1236 prior to an overnight recess.

5. **Criminal Law § 73.2— statements not within hearsay rule**

A witness's testimony that another witness called to him and said "someone had broken into the shop" and during the pursuit of defendant he "understood that the defendant was heading" in a certain direction did not constitute inadmissible hearsay, since the first statement was part of the

witness's account of the circumstances surrounding the alleged break-in, and the second statement was a description of the witness's mental state.

6. Criminal Law § 113.8— misstatement of fact in charge—harmless error

In a prosecution for breaking and entering a repair shop with intent to commit a felony therein, the trial court's misstatement of fact that when defendant was seen in the shop area "the shop was dark" did not constitute prejudicial error since the issue of whether the shop was dark was not material to the jury's determination as to whether defendant was guilty of feloniously breaking and entering the shop.

7. Burglary and Unlawful Breakings § 6.4; Criminal Law § 113.4— failure to define "breaking" or "entering"

The trial court did not err in failing to define the terms "breaking" or "entering" in the absence of a request for special instructions.

8. Burglary and Unlawful Breakings § 6.4— breaking or entering—instructions—absence of owner's consent

The trial judge sufficiently charged the jury that in order to be found guilty of breaking or entering a repair shop, defendant must have broken or entered the shop without the owner's consent.

9. Criminal Law § 114.2— no expression of opinion in statement of evidence and intentions

In a prosecution for breaking and entering a repair shop with intent to commit larceny therein, the trial court did not express an opinion on the evidence in instructing that there was direct evidence tending to show that defendant had no authority to be in the shop since there was direct evidence that no one had given defendant any authority to be in the shop. Furthermore, the trial court did not express an opinion that it was defendant's intent to steal chain saws from the shop where it was clear that the trial court was stating the State's contention regarding defendant's intent and not his own opinion.

10. Criminal Law § 112.4— charge on circumstantial evidence

The trial judge did not err in failing to add the phrase "consistent with innocence" at the end of his charge on circumstantial evidence.

11. Burglary and Unlawful Breakings § 6.4— breaking or entering—instructions—without consent or wrongfully

The trial court, in instructing on misdemeanor breaking or entering, did not err in instructing the jury that the breaking or entering must have been without consent or wrongfully.

12. Burglary and Unlawful Breakings § 6.4— breaking and entering—mere presence of defendant at crime scene—refusal to give instruction

In a prosecution for felonious breaking or entering, the trial court did not err in refusing to instruct the jury that mere presence of the defendant at or near a location where a crime was allegedly committed, such as the breaking of a door, was insufficient evidence upon which to convict defendant of a crime

where there was substantially more evidence against the defendant than his presence at the scene of the crime.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 4 September 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 May 1981.

Defendant was indicted for feloniously breaking and entering a building occupied by Stone Brothers and Byrd Farm Supplies with the intent to commit larceny after a trial by jury, defendant was found guilty and sentenced to an active prison term. From the judgment, defendant appeals.

Evidence presented by the State tends to show that the farm supplies business is located in a large building. The rear of the building is used as a warehouse and contains a repair shop which is enclosed by partitions. The store and warehouse are open to the public until 5:30 p.m.

At about 5:00 p.m. on 21 April 1980, the repair mechanic locked the door to the repair shop. Later, at about 5:10 p.m., another employee noticed the door to the repair shop was partially open and observed defendant sitting down or squatting inside the shop. The second employee summoned the repair mechanic and the manager of the store.

When asked how he got inside the repair shop, defendant replied that he walked in, that he was looking for a chain saw, and inquired whether any were for sale. (The repair shop is used to repair chain saws, and many were in the shop at the time.) Upon investigation, the repair mechanic found the door to the shop had been kicked in and several chain saws had been moved from the rear of the shop to the front.

Defendant left the store, and an employee pursued him on foot. Another employee and the manager pursued in a pickup truck. Defendant entered a taxi, and store employees asked that the taxi driver not carry defendant anywhere. The police arrived and took defendant into custody. Later it was discovered that the sliding dead bolt and jamb of the shop door had been damaged to the extent the door could not be secured. Nothing was missing from the shop.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant appellant.

HILL, Judge.

[1] Prior to the selection of the jury, the trial judge advised the prospective jurors as follows:

> [T]he defendant is accused in a bill of indictment returned by the Grand Jury at the July 8, 1980 Session, and in that bill of indictment it is alleged that on 21 April 1980 he broke and entered a building at 700 Washington Street used by Stone Brothers and Byrd Farm Supply as a repair shop; that when he did so he had the intent to steal, commit larceny.

Defendant contends in his first assignment of error that the judge's statement advised the jury that defendant had been indicted by the grand jury and repeated portions of the indictment in clear violation of G.S. 15A-1221(a)(2) and G.S. 15A-1213. We do not agree.

The statutes cited above require that the trial judge briefly inform the prospective jurors of the charge against the defendant. The judge may not read the pleadings to the jury. A cursory comparison of the trial judge's statement to the prospective jurors shows that the judge did not violate G.S. 15A-1213, but instead satisfied its mandate. The judge informed the prospective jurors of the charge against defendant without reading any of the pleadings to them. Defendant's assignment of error is not based on an accurate reading of the record and is overruled.

[2] In his second assignment of error, defendant argues the trial court erred in repeatedly emphasizing to the jury defendant's right to take the stand and testify in his own defense.

The trial judge first mentioned defendant's right in his opening remarks to the jury.

> [T]he State will present evidence. The defendant may present evidence or not as he sees fit. He may, having no burden of proof, if he chooses, rely on what he perceives to be the

> weakness of the State's evidence and present no evidence himself. He will have an opportunity to present evidence and may do so if he chooses.

Later during the examination of the jurors by defense counsel, the trial judge stated:

> He is himself a competent witness to testify, but he may not be compelled to testify.

Subsequently, in his charge to the jury, the judge said:

> He is a competent witness to testify in his own behalf, but as he has no burden of proof, may not be compelled to testify . . .. [H]e has a right to present evidence but may not be compelled to present it.

Defendant concedes the trial judge's comments are correct statements of law, but contends they magnified in the jurors' minds defendant's right to present evidence and to himself testify to such an extent that when defendant did in fact exercise his right *not* to present evidence, his failure to do so could not but have been unfairly emphasized in the minds of the jurors. Defendant contends this over-emphasis constituted prejudicial and constitutional error. We do not agree.

Under G.S. 8-54, the trial judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant requests the instruction. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). In fact, it is better *not* to give such an instruction unless defendant requests it. *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied*, 404 U.S. 1023 (1972). It is not, however, always prejudicial error to give an unrequested instruction regarding defendant's failure to testify or present evidence. *State v. Caron*, 288 N.C. 467, 473, 219 S.E. 2d 68 (1975). There is no prejudicial error if the instruction "makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him . . .." *Baxter, supra*, at p. 738-9.

After examining the trial judge's instructions in the instant case, we find them to have conformed with the standard set forth in *Baxter*. Defendant suffered no prejudice or deprivation of his

constitutional rights. We caution, however, that the trial judge was unduly repetitious and emphasize that our finding of no error should not be construed as an endorsement of the instructions. Defendant's second assignment of error is overruled.

[3] In his third assignment of error, defendant contends he was prejudiced by the trial court's allowance into evidence, over objection, of a witness's description of his work duties "at the time when the breaking and entering started." Defendant argues that the witness's statement came at a time when the State had not introduced any evidence of a breaking or entering and constituted an impermissible statement of opinion on the ultimate issue to be decided by the jury. We find no error. The witness's use of the term "breaking and entering" was clearly a convenient shorthand term to describe what he was doing at the time defendant was found in the repair shop and was not meant to constitute an opinion on a question of law. *See State v. Goss*, 293 N.C. 147, 154, 235 S.E. 2d 844 (1977). This assignment of error is overruled.

[4] By his fourth assignment of error, defendant claims the trial judge committed error by failing to properly instruct the jury members concerning their duty not to discuss the case among themselves, or with other people, and to insulate themselves from news stories concerning the case.

Trial of this case began on a Wednesday and ended the following day. When the court recessed on Wednesday, the trial judge instructed the jury as follows:

> [M]embers of the jury, don't talk about the case out of court. Mr. Sheriff, announce a recess until 9:30 in the morning. Good evening to you all.

G.S. 15A-1236 imposes an obligation on the trial judge to admonish the jury at appropriate times during the trial that it is their duty not to talk among themselves about the case except in the jury room after their deliberations have begun; not to talk to anyone else, or allow anyone else to talk with them or in their presence about the case; not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations; to avoid reading, watching, or listening to accounts of the trial; and not to talk during the trial to parties, witnesses, or counsel. Defendant contends the mandate

of G.S. 15A-1236 is clear, and failure by the trial judge to instruct the jury accordingly constitutes reversible error.

The problem has been addressed by this Court in *State v. Turner*, 48 N.C. App. 606, 610, 269 S.E. 2d 270 (1980). Therein Judge Clark, speaking for the Court, said:

> The failure of the trial judge to admonish the jury at an appropriate time in violation of G.S. 15A-1236 does not involve the violation of a constitutional right. Nor do public policy and practical consideration preclude in this case any hearing to determine whether the failure to admonish prejudiced the defendant. It is noted that defendant and his counsel were present in the courtroom when the overnight recess was ordered. If defense counsel was concerned about the failure of the trial judge to admonish the jury, it would have been a simple matter for defense counsel to call to the attention of the judge such failure to admonish. Extending the reversible error *per se* rule to all violations of Chapter 15A of the General Statutes would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of G.S. 15A-1443.
>
> We find no merit to defendant's fourth assignment of error. It is overruled.

[5] In his fifth assignment of error, defendant contends the trial court improperly allowed the State, over objection, to elicit improper hearsay testimony from their witness Davis. Specifically, defendant contends it was error to allow two of Davis's statements into evidence. First, Davis testified that another witness, Riggsbee, called to him and said "someone had broken into the shop." Davis later testified that during the pursuit of defendant, he "understood that the defendant was heading [in the direction of Washington Street]."

We find no error in permitting this testimony to remain before the jury. The first statement was not offered for the purpose of proving the truth of the matter stated. Rather, it was part of Davis's account of the circumstances surrounding the alleged break-in. The second statement did not constitute hearsay either. Instead, it was a description of the witness's mental state, a subject upon which he was eminently qualified to testify. Defendant's assignment of error is overruled.

Defendant contends in his sixth assignment of error that the trial court erred in denying his motion to dismiss at the close of the State's evidence and again at the close of all the evidence on the ground that the evidence was insufficient as a matter of law for the case to be submitted to the jury. Considering the evidence in the appropriate light, we find the trial court properly denied the motion. A reasonable inference of defendant's guilt may be drawn from the evidence. This assignment of error is overruled.

Defendant next attacks the trial judge's charge to the jury in several assignments of error. In the first of these assignments, defendant contends the trial judge committed prejudicial error in its recapitulation of the evidence.

[6] While recapitulating the State's evidence for the jury, the trial judge stated that when defendant was seen in the shop area "the shop was dark." Later the judge stated "that the shop itself was dark when defendant was in it." The defendant, through counsel, called to the attention of the trial judge prior to deliberation by the jury that these were misstatements of fact, not supported by the evidence. Thereafter, the trial judge charged the jury to disregard what the court said in its recapitulation of the evidence if the recollection of the jury differed from that of the court. Defendant contends this was insufficient and the judge was obligated to correct the misstatements after they were called to the attention of the court. *See State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978). We do not agree.

There was evidence the warehouse was not lighted, but in any event the issue of whether the area inside the shop area was dark when the doors were closed was not material to the jury's determination that defendant was guilty of feloniously breaking and entering the repair shop with the intent to commit a felony. Error, if any, could not have been prejudicial. Defendant's seventh assignment of error is overruled.

[7] In the second of his assignments of error relating to the charge, defendant contends the trial judge committed prejudicial error in failing to properly and completely instruct the jury on the elements of felonious breaking or entering.

Defendant first argues that the trial judge failed to fully define what is sufficient to constitute a breaking or an entering.

We do not agree. Defendant contends that instead of merely chargint that in order to find defendant guilty it would first have to find "there was a breaking . . . or an entering . . .," the trial judge should have gone into a discourse regarding just what does constitute a breaking or entering. We find defendant's contention to be untimely. It has long been held that it is not error for the trial judge to fail to define and explain essential elements of the crime charged, in the absence of a request for special instructions, if they are words of common usage and meaning to the general public. *State v. Patton*, 18 N.C. App. 266, 268, 196 S.E. 2d 560 (1973). Unfortunately, the term "break or enter" is becoming all too familiar to the general public. Defendant's argument is without merit.

Defendant next argues that the trial judge failed to fully define the term "larceny." For the reasons stated above, defendant's argument is without merit. Furthermore, after examining the judge's definition, we find it to be entirely adequate.

[8] Finally, defendant argues the trial court failed to instruct the jury that before defendant could be found guilty of the charged offense, either the breaking, or entering, or both, had to be without the actual or implied consent of the owner of the premises. A charge is to be construed contextually as a whole. Isolated errors will not be held prejudicial when the charge as a whole is correct. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972). After examining the charge, we find the trial judge made it clear to the jury that in order to be found guilty, defendant must have broken or entered the shop without the owner's consent. Defendant's eighth assignment of error is overruled.

[9] In the third of his assignments of error relating to the charge, defendant argues the trial judge erred by expressing an opinion that there was direct evidence tending to show defendant was given no authority to be in the shop area, and by further expressing the opinion that it was defendant's intent, at the time he entered the shop, to steal the saws. We do not agree.

In his charge, the trial judge stated, "There is direct evidence tending to show that he entered the shop, or was found in the shop, was given no authority to be in the shop." The record reveals that Joseph Lee Riggsbee, an employee of Stone Brothers

and Byrd, testified, "I had not given Vernon Lee Chambers permission to go back in the shop." Likewise, George Davis, general manager, testified, "Neither I, nor anyone else to my knowledge, gave the defendant permission to go into the repair shop area of the store." This is direct evidence that no one had given the defendant any authority to be in the shop. The judge did not state an impermissible opinion. Neither did the trial judge express an opinion that defendant had the intent to steal the saws. The judge charged: "*The State contends* that you should . . . draw inferences . . . that it was the defendant who broke the door, entered, moved the saws to the door for the purpose of stealing them, *which was his intent*, and that he was caught . . .." (Emphasis added.) As we have already stated, a charge is to be construed contextually. We find it to be abundantly clear that the trial judge was stating the State's contention regarding defendant's intent, not his own opinion. Defendant's ninth assignment is overruled.

[10] Defendant argues in his fourth assignment of error relating to the charge that the trial judge erred in failing to add the phrase "consistent with innocence" at the end of his charge on circumstantial evidence.

In *State v. Stiwinter*, 211 N.C. 278, 189 S.E. 868 (1937), the court, in addressing circumstantial evidence, stated in part:

> However, the rule is, that when the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of the defendant's guilt, and exclude any other reasonable hypothesis. Accord: *State v. Miller*, 220 N.C. 660, 18 S.E. 2d 143 (1942).

The trial judge charged on the intensity of the evidence required to convict the defendant on circumstantial evidence, beyond a reasonable doubt, in accordance with *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965). After stating the State's contentions, the trial judge stressed the defendant's contentions, summing them up in part as follows:

> The defendant contends . . . that the evidence does not point unerringly to his guilt and exclude every reasonable hypothesis of innocence.

The charge was adequate, and defendant's tenth assignment of error is overruled.

[11] Defendant argues in his fifth assignment of error relating to the charge that the trial judge erred by incorrectly charging the jury with regard to the offense of misdemeanor breaking or entering.

After reading the pertinent portions of G.S. 14-54(b), the trial judge explained to the jury that non-felonious breaking or entering differed from felonious breaking and entering in that it need not be done with intent to commit larceny or any other felony, but must be wrongful—without any claim of right. Thereafter, the trial judge instructed the jury they must find beyond a reasonable doubt the defendant broke or entered the shop of Stone Brothers without consent or wrongfully. The trial judge used the words of the statute. The charge was free from prejudicial error. *State v. Wade*, 14 N.C. App. 414, 188 S.E. 2d 714, *cert. denied*, 281 N.C. 627 (1972). Defendant's eleventh assignment of error is without merit.

[12] In his sixth assignment of error relating to the charge, defendant argues the trial judge erred by refusing to give a requested jury instruction.

Prior to the court's charge to the jury, the defendant requested in writing that the trial judge charge the jury as follows:

> I instruct you that mere presence of the defendant at or near a location where a crime was allegedly committed, such as the breaking of a door, without proof beyond a reasonable doubt that defendant participated in criminal conduct, with a felonious intent, is not sufficient evidence upon which to convict the defendant of a criminal offense.

The trial judge declined to do so.

There was substantially more evidence against the defendant than his presence at the scene of the crime. Admittedly, there was no direct evidence the defendant broke the door lock. He was discovered shortly after the breaking in an area which had been sealed off and secured from use by customers of the store, in an area where the lights were off. Twelve of fifteen chain saws had been moved closer to the door from the rear of the shop.

The defendant was squatting on the floor. He refused to wait for the manager of the store to arrive at the scene, and then ran. There was no evidence that any other persons were present in the shop area. The jury was clearly instructed that the State must prove beyond a reasonable doubt the elements of the offense for which he was convicted. Defendant's contentions were given to the jury.

Although a judge is obligated to give a special instruction requested by a party if it is rendered properly and is correct in all respects, there is no obligation to deliver such an instruction if it is not relevant to the case on trial. We find no prejudice in the refusal by the trial judge to give the special instruction in this case. Defendant's final assignment of error is overruled.

In the trial of the case below, we find

No error.

Judges MARTIN (Robert M.) and CLARK concur.

RUBY P. ADCOCK AND HUSBAND, HENRY CARLTON ADCOCK; ELSIE CHRISTINE P. HANAVAN AND HUSBAND, JOHN F. HANAVAN; ANNIE BELLE C. PERRY, WIDOW; NANCY P. JACOBS AND HUSBAND, CLAUDE JACOBS, JR.; AND JOHN THOMAS PERRY, DIVORCED, PETITIONERS v. JAMES T. PERRY AND WIFE, HATTIE MAE H. PERRY; WILLIAM LYON WHITFIELD AND WIFE, BEATRICE B. WHITFIELD; ZACK P. WHITFIELD, UNMARRIED; DONALD WAYNE WHITFIELD AND WIFE, JOHNNIE T. WHITFIELD; AND JEAN H. BARBEE AND HUSBAND, HOWARD J. BARBEE, RESPONDENTS

No. 809SC800

(Filed 7 July 1981)

Wills § 28.5— wife's interest under will—intention of testator

The trial court properly concluded as a matter of law that the intention of the testator, as gathered from a review of the entire will, was to make an absolute devise of all his property, real and personal, to his wife, and language in the will that the wife should sell or mortgage any of the property in order to provide for her own personal expenses but should not sell or dispose of any property for the purpose of benefiting her children or members of her family was precatory and did not limit the absolute devise to the wife in any manner; furthermore, language in the will by which testator attempted to give a re-

mainder interest to his children in the property which he had previously devised and bequeathed absolutely to his wife was void because it was repugnant to the absolute devise.

APPEAL by respondents, James T. Perry and wife, Hattie Mae H. Perry, from *Farmer, Judge.* Judgment entered 19 May 1980 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 11 March 1981.

This appeal arose from a special proceeding for the partition of land. In a petition filed 13 March 1979 with the Clerk of Superior Court of Granville County petitioners averred that they and respondents were the owners as tenants in common of two parcels of land, particularly described therein, situate in Dutchville Township, Granville County.

Petitioners and respondents allegedly acquired their interest in these lands as heirs of the late W. T. Perry who died testate on 24 May 1946. W. T. Perry disposed of his property in his last will and testament, on record in Will Book 30, at page 79, in the office of the Clerk of Superior Court of Granville County, as follows:

> I, W. T. Perry, of the County and State aforesaid, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament in words and figures as follows, to-wit:
>
> Item 1
>
> I direct my executrix, hereinafter named, to pay my funeral expenses, my debts and the costs and charges of administering and settling my estate from and out of the first money coming into her hands belonging to my said estate, and should it be necessary for my executrix to raise any money for said purposes by a sale of any part or all of my personal property I hereby authorize and empower my said executrix to make either public or private sale, as she may deem best, of any part or all of my said personal property.
>
> Item 2
>
> All of the balance and residue of my property, real and personal which I may own at the time of my death, I give, bequeath and devise unto my beloved wife, Annie Perry, and I

do hereby give, grant and extend to the said Annie Perry the right to sell or mortgage any part of the real and personal property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family.

Item 3

After the death of my said wife, I give, bequeath and devise all of my property remaining to my four children, share and share alike, provided that Graham Perry, one of my children, between now and the date of my death conveys to me that tract of land in Dutchville Township, Granville County, containing 16 acres, more or less, conveyed to the said Graham Perry by L. C. Sadler and others by deed of record in the office of the Register of Deeds of Granville County in Book 89, at page 429, and should the said Graham Perry fail, and, or refuse to convey said tract of land to me before my death, then the said Graham Perry is to receive no part or share in my estate, and the share or part, to which he otherwise would be entitled to receive or take hereunder, is given and devised to my other three children, share and share alike.

Item 4

The children hereinabove in item three referred to shall include and apply to the child or children of any of my own children that may be dead at the time of my death, and my grand-children shall have and receive the shares to which the parent or parents of such grand-children would be entitled, if living.

Item 5

I hereby nominate, constitute and appoint my said wife, Annie Perry, executrix of this my last will and testament, and I hereby direct that she be permitted to qualify and to enter upon and to discharge the duties hereby imposed upon her without being required to give bond.

In testimony whereof, I have hereunto subscribed my name and affixed my seal, this the 26 day of May, 1945.

Petitioners and respondents are the remaindermen or the heirs of deceased remaindermen after the life of Annie Perry. Petitioners interpret the testator's will as a devise of a life estate in the two parcels of land to be partitioned to his wife, Annie S. Perry, with a vested remainder in his four children. Annie S. Perry died on 15 February 1979, and, if petitioners are correct, they and respondents own the property as tenants in common. Petitioners requested the court to appoint commissioners to sell the two parcels of land because the land itself could not be equitably partitioned among the petitioners and respondents.

Respondents, William Lyon Whitfield and wife, Beatrice B. Whitfield; Zack P. Whitfield; and Donald Wayne Whitfield and wife, Johnnie T. Whitfield, filed their answer to the petition on 30 March 1979. In their answer they denied most of the allegations of the petition. They averred that W. T. Perry had in fact in his will devised a fee simple absolute in the two tracts of land to his wife Annie S. Perry.

By the terms of her will, Annie S. Perry devised the two tracts of land in fee to her daughter, Sudie P. Whitfield, and her daughter's husband, R. L. Whitfield. Sudie P. Whitfield and R. L. Whitfield both predeceased Annie Perry. The Whitfields were survived by three children, respondents William Lyon Whitfield, Zack P. Whitfield, and Donald Wayne Whitfield. The Whitfields averred that by virtue of the anti-lapse statute, G.S. 31-42, a fee simple title to the two parcels of property vested in them to the exclusion of the other petitioners and respondents.

After hearing, the court entered its judgment in which it made findings of fact and concluded as a matter of law that the language of W. T. Perry's will devised a fee simple title to the realty owned by the testator to his wife, Annie S. Perry, and that William Lyon Whitfield, Zack P. Whitfield and Donald Wayne Whitfield, the surviving heirs of Sudie P. Whitfield and her husband, R. L. Whitfield, devisees under the will of Annie S. Perry, each owned an one-third undivided interest in the property that was the subject of the special proceeding. Any claims of the remaining petitioners and respondents by virtue of their being heirs of W. T. Perry were barred, and the action was dismissed.

Respondents James T. Perry and wife, Hattie Mae H. Perry gave notice of appeal from the court's judgment.

Currin and Currin, by Hugh M. Currin and Hugh M. Currin, Jr., for petitioner appellants Ruby P. Adcock and husband, Henry Carlton Adcock, and Elsie Christine P. Hanavan and husband, John F. Hanavan.

Royster, Royster and Cross, by E. E. Royster, for petitioner appellants Annie Belle C. Perry, widow, Nancy P. Jacobs and husband, Claude Jacobs, Jr., and John Thomas Perry, divorced.

R. Gene Edmundson for respondent appellants, James T. Perry and wife, Hattie Mae H. Perry.

Watkins, Finch and Hooper, by Thomas L. Currin, for respondent appellees.

MORRIS, Chief Judge.

Initially, we are concerned with appellants' disregard of the Appellant Rules of Procedure. Rule 10(b)(2), N.C. Rules of Appellate Procedure, requires an appellant to set out a separate exception to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

Rule 28(b)(3), N. C. Rules of Appellate Procedure, provides:

> Immediately following each question [in the appellate brief] shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

Neither of these rules has received appellant's attention. Were it not for the fact that the litigation involves title to real property, we would decline to consider the appeal. However, in consideration of the nature of the case and the substantial property rights affected by the judgment, we will treat this appeal as a petition for a writ of certiorari, allow it, and, in this instance, consider appellants' arguments.

The parties to this proceeding stipulated prior to trial,

> That the only issue for determination by the Court in this matter was whether or not [sic] Annie S. Perry was devised fee simple title to the real property which is the subject of this proceeding under and by virtue of the provisions of the Last Will and Testament of W. T. Perry, deceased.

Appellants contend that under a correct interpretation of W. T. Perry's will Annie S. Perry became seized of a life interest in her husband's estate with a limited power of disposition to deplete the assets only as needed for her own personal expenses. At Annie S. Perry's death remainder of the property was to pass to W. T. Perry's four children, "share and share alike."

The cardinal principle to be followed when construing a will is to give effect to the general intent of the testator as that intent appears from a consideration of the entire instrument. *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973); *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973); *Y.W.C.A. v. Morgan, Attorney General*, 281 N.C. 485, 189 S.E. 2d 169 (1972); *Kale v. Forrest*, 278 N.C. 1, 178 S.E. 2d 622 (1971); *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970). The intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will in isolation. *Joyner v. Duncan*, 299 N.C. 565, 264 S.E. 2d 76 (1980); *Vick v. Vick*, 297 N.C. 280, 254 S.E. 2d 576 (1979); *Clark v. Conner*, 253 N.C. 515, 117 S.E. 2d 465 (1960); *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957); *McWhirter v. Downs*, 8 N.C. App. 50, 173 S.E. 2d 587 (1970). Because the intent and purpose of no two testators can be exactly the same, each will must be separately construed to effect the intent of the particular testator. *Roberts v. Bank*, 271 N.C. 292, 156 S.E. 2d 229 (1967); *Morris v. Morris, supra.*

In construing a will every word and clause should be given effect when possible. Apparent conflicts in the words or terms of the will must be reconciled, and irreconcilable repugnancies must be resolved by giving effect to the general prevailing intent of the testator, with greater regard to be given to the dominant purpose of the testator than to the use of any particular words. *Joyner v. Duncan, supra; Mansour v. Rabil*, 277 N.C. 364, 177 S.E. 2d 849 (1970); *Quickel v. Quickel*, 261 N.C. 696, 136 S.E. 2d 52 (1964); *Worsley v. Worsley*, 260 N.C. 259, 132 S.E. 2d 579 (1963);

Andrews v. Graham, 255 N.C. 267, 120 S.E. 2d 734 (1961); *Andrews v. Andrews*, 253 N.C. 139, 116 S.E. 2d 436 (1960); *Finke v. Trust Co.*, 248 N.C. 370, 103 S.E. 2d 466 (1958); *Hubbard v. Wiggins*, 240 N.C. 197, 81 S.E. 2d 630 (1954); *Coppedge v. Coppedge*, 234 N.C. 173, 66 S.E. 2d 777 (1951); *Doub v. Harper*, 234 N.C. 14, 65 S.E. 2d 309 (1951). The inconsistent provisions of the testator's will will be subordinated to the testator's prevailing purpose.

In the case before us the trial court concluded as a matter of law, "[t]hat the intention of the testator W. T. Perry, as gathered from reviewing the entirety of his will, was to make a general devise of his real and personal property to Annie S. Perry . . . ." We agree, and we think that this intent of the testator to make an absolute devise of all his property, real and personal, to his wife is paramount to the provisions of his will which are antagonistic to that purpose.

In Item 2 of his will testator states:

> All of the balance and residue of my property, real and personal which I may own at the time of my death, I give, bequeath and devise unto my beloved wife, Annie Perry . . ."

G.S. 31-38 provides:

> When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Thus, we have a statutory presumption that a general devise of real estate is in fee. The words "give, bequeath and devise" used by testator, in light of G.S. 31-38 created a devise in fee simple absolute of all of his real property to his wife. Unless a will contains plain and express language indicating that the testator did not intend to devise a fee, the devise will be construed as one in fee simple. *Basnight v. Dill*, 256 N.C. 474, 124 S.E. 2d 159 (1962); *Clark v. Connor, supra; Bell v. Gilliam*, 200 N.C. 411, 157 S.E. 60 (1931). As stated by Chief Justice Stacy in *Taylor v. Taylor*, 228 N.C. 275, 45 S.E. 2d 368 (1947), "an unrestricted or indefinite devise of real property is regarded as a devise in fee simple. *Heefner v. Thornton*, 216 N.C., 702, 6 S.E. (2d), 506; *Barco v. Owens*, 212 N.C., 30, 192 S.E., 862." 228 N.C. at 276-77, 45 S.E. 2d

at 369. Indeed, after examining this will from its four corners we think this testator's general and dominant intention was to devise his wife, Annie S. Perry, a fee simple absolute in all of his real property and bequeath to her absolutely his personal property.

There are two provisions in this will which are not reconcilable with the testator's general intent as we have found it. It is these provisions which appellants contend restrict Annie S. Perry's interest in these properties to an estate for life. First, is the provision of the will which appears to limit Annie S. Perry's power of disposition of the property. In Item 2 of the will immediately following the general absolute devise of his property testator states:

> I do hereby give, grant and extend to the said Annie Perry the right to sell or mortgage any part of the real and personal property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family.

Obviously, this restriction on the devisee's powers of disposition is not in harmony with the immediately preceding general devise to her. The trial court concluded as a matter of law,

> [t]hat the language of Item Two of the will of W. T. Perry, following the general disposition of his estate to Annie S. Perry was precatory in nature, in explanation of why he had left the property to Annie S. Perry, and an attempt by the testator to express that the gift was for his wife's benefit and not that of their children or her other family members. . . ."

We agree with the trial court that this language was precatory. When this seemingly limited power of disposition is construed as being simply a statement of the testator's wish that his wife only mortgage or dispose of her real property to provide for her own necessities and that she not do so to benefit her children, the provision is in harmony with testator's dominant intent to devise his property to his wife in fee. This interpretation corresponds with the testator's evident testamentary scheme to provide for the

welfare of his wife. In general, precatory expressions are not construed to create a trust in the legatee or devisee unless it clearly appears from the instrument as a whole that such was the testator's intention. *Quickel v. Quickel, supra; Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793 (1938). Therefore, in the instant case, testator's initial devise to Annie S. Perry was absolute, and the subsequent language of Item 2 is merely an expression of testator's desire of how he wished his wife to dispose of the property. The later language does not limit the absolute devise in any manner and is not mandatory.

Second, Item 3 of testator's will states:

> After the death of my said wife, I give, bequeath and devise all of my property remaining to my four children, share and share alike. . . ."

It is this clause which appellants insist limited Annie S. Perry's interest to only a life estate in the property she received through her husband's will. Appellants contend that as children of the heirs of children of the testator this clause gave them a remainder in what was remaining of the testator's property after the life tenant's death.

This clause cannot easily be reconciled with the testator's general intent to give Annie S. Perry an absolute and unqualified interest in his property. The general rule with regard to the effect to be given provisions such as this was stated by Justice Walker in *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892 (1920), as follows:

> Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given . . .

180 N.C. at 371, 104 S.E. 2d at 893; *see Quickel v. Quickel, supra,* and cases cited therein; *Taylor v. Taylor, supra; Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506 (1940); *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862 (1937); *Jolley v. Humphries,* 204 N.C. 672, 169 S.E. 417 (1933). In accord with this rule we hold that the language of Item 3 of W. T. Perry's will in which he attempted to give a remainder interest to his children in the property which he had previously devised and bequeathed absolutely to his wife was

void because it was repugnant to the absolute devise of Item 2. We hold in accord with the trial court that by virtue of the will of W. T. Perry, Annie S. Perry received a fee simple absolute in the real property which was the subject of this special proceeding. She was likewise bequeathed an absolute interest in his personal property. Therefore, the judgment of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JULY 1981

BOYCE v. BOYCE No. 8015DC1013	Orange (79CVD647)	Affirmed
BULLARD v. ELLIS No. 8122SC28	Iredell (78CVS1003)	No Error
BUTLER v. NATIONWIDE MUTUAL No. 8015SC1211	Orange (80CVS329)	Affirmed
COX v. COX No. 8010DC1085	Wake (75CVD2944)	Affirmed
HORNEY v. HORNEY No. 8018DC1101	Guilford (80CVD2512)	Affirmed
IN RE COLEMAN No. 807DC1015	Edgecombe (79J86)	Affirmed
IN RE HOLLINGSWORTH No. 8112DC156	Cumberland (79J367)	Affirmed
IN RE WORLEY No. 8128DC128	Buncombe (78J182)	Affirmed
LEE v. LEE No. 8021SC1116	Forsyth (80CVS1814)	Affirmed
LOWE v. BRYANT No. 8117SC51	Surry (77CVS810) (77CVS811)	Appeal Dismissed
MANGUM v. NATIONWIDE MUTUAL No. 8010SC1215	Wake (78CVS2462)	Appeal Dismissed
MOORE v. J. P. STEVENS & CO. No. 8010IC695	Industrial Commission (Docket No. H-158)	Affirmed
MORRIS v. MORRIS No. 8026DC1131	Mecklenburg (78CVD6834)	No Error
PARROTT v. PATTERSON No. 8030DC1205	Clay (80CVD32)	No Error
STATE v. AYSCUE No. 819SC74	Vance (80CRS2026)	No Error
STATE v. BELLAMY No. 8127SC116	Gaston (80CRS7111)	No Error
STATE v. CARTER No. 8126SC7	Mecklenburg (80CR024195	No Error

STATE v. FORD No. 818SC5	Lenoir (80CRS5543)	No Error
STATE v. FURR No. 8120SC56	Stanly (80CRS3634)	No Error
STATE v. HARRIS No. 8014SC877	Durham (79CRS30808)	No Error
STATE v. HARRIS No. 813SC153	Pitt (80CRS6192) - (80CRS6637) -	Vacated No Error
STATE v. JARRELL No. 8129SC131	Transylvania (79CRS2569)	No Error
STATE v. JONES No. 818SC119	Wayne (80CR9828)	No Error
STATE v. OVERTON No. 8012SC910	Cumberland (80CRS8741) (80CRS8742) (80CRS8743)	Affirmed
YANCOVICH v. COOK No. 8025DC1199	Caldwell (80CVD144)	Affirmed

APPENDIX

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 9(c)(1) is amended by adding a third paragraph to read as follows:

As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c).

Rule 28(b) is amended as follows:

(1) By striking the third sentence from Section (b)(2).

(2) By adding a new Section (b)(3) reading as follows:

(3) A full 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 stenographic transcript, or the record on appeal, or both, as the case may be.

(3) By adding a new subsection (b)(4) reading as follows:

(4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, the appellant's brief must contain an appendix which sets out verbatim those portions of the certified stenographic transcript which form the basis for and are necessary to understand each question presented in the brief.

(4) By renumbering the present subsections (b)(3) and (4) and making them (5) and (6).

Rule 28(c) is amended as follows:

(1) By changing (3) and (4) in the first sentence to (5) and (6).

(2) By changing the second sentence thereof to read as follows:

It need contain no statement of the questions presented, statement of the case, statement of the facts, or appendixes, unless the appellee disagrees with the appellant's statements or appendixes, and desires to make a restatement or suggest errors in or supplement the appellant's appendixes, or unless the appellee desires to present questions in addition to those stated by the appellant. If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the stenographic transcript, or the record on appeal, or both, as the case may be. If the stenographic transcript is used in lieu of narrating the testimony pursuant to Rule 9(c)(1), the appellee's brief must contain appendixes which set out verbatim those portions of the certified stenographic transcript which form the basis for and are necessary to understand the new questions presented by the appellee.

This amendment shall become effective and relate to all appeals docketed on and after 1 October 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeal, *e.g.*, pleadings, jury instructions, judgments, etc. should be contained in the record on appeal as required by appropriate appellate rules.

Rule 10(b)(2) of the Rules of Appellate Procedure is amended by rewriting said section to read as follows:

Jury Instructions; Findings and Conclusions of Judge. No party may 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 objec-

tion out of the hearing of the jury and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

This amendment shall apply to every case the trial of which begins on or after 1 October 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: This amendment will make North Carolina's procedure for reviewing alleged errors in the jury charge similar to that of the federal courts and many, if not most, of the other states including Connecticut, Florida, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and South Carolina.

Rule 30 of the Rules of Appellate Procedure is amended by rewriting subdivision (f) to read as follows:

Pre-argument Review; Decision of Appeal Without Oral Argument.

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision

under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

This amendment will become effective 1 July 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: Rule 30(f) now provides that the Court of Appeals may dispense with oral arguments in certain cases. This amendment merely extends the rule to cases heard by the Supreme Court.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

In an action for breach of contract, negligence, fraud, abuse of process, joint venture and unfair trade practices allegedly growing out of the financial failure of a shopping center for which defendant bank provided the construction loan, summary judgment was properly entered for defendant on the basis of the affirmative defense of accord and satisfaction. *Shopping Center v. Life Insurance Corp.*, 633.

ADVERSE POSSESSION

§ 17.1. Color of Title; Deeds Generally

Deeds relied on by plaintiffs to establish color of title to a right-of-way across defendants' lands which were not in defendants' chain of title did not sufficiently afford defendants notice of plaintiffs' claim of right to the easement so as to overcome the presumption of permissive use and warrant summary judgment for plaintiffs as a matter of law. *Taylor v. Brigman*, 536.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The portion of a trial court's order denying defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint and denying defendant's Rule 56(b) motion for summary judgment was clearly unappealable. *Dorn v. Dorn*, 370.

Plaintiff could not immediately appeal from the trial court's order dismissing the action as to one defendant. *Bacon v. Leatherwood*, 587.

§ 6.6. Appeals Based on Motions to Dismiss

An order dismissing the complaint against two of the three defendants for failure to state a claim for relief was not immediately appealable. *Harris v. DePencier*, 161.

§ 39.1. Time for Docketing Appeal

Appeal is dismissed where the record on appeal was filed in the appellate court more than 150 days after the notice of appeal. *In re Farmer*, 97.

ARREST AND BAIL

§ 3.4. Legality of Warrantless Arrest for Narcotics Violation

An officer had probable cause to believe that a crime was being committed in his presence and to arrest defendant without a warrant for possession of narcotics. *S. v. Walden*, 125.

ASSAULT AND BATTERY

§ 15.6. Form of Instruction on Self-Defense

In a prosecution of defendant for assault on law enforcement officers, trial court's instructions on self-defense were improper. *S. v. Jones*, 606.

ATTORNEYS AT LAW

§ 7.5. Allowance of Fees as Part of the Costs

Trial court had no authority to order that legal fees incurred by an incompetent's guardian in defending a petition for an advancement from the incompetent's

AUTOMOBILES — Continued

§ 112. Competency of Evidence in Manslaughter Case

In a prosecution of defendant for involuntary manslaughter arising from an accident between the school bus he was driving and another vehicle, trial court did not err in admitting testimony by a mechanic at the school bus garage concerning tests performed on the brakes of the bus subsequent to the accident. *S. v. Wright*, 166.

An officer's testimony that his investigation revealed that a collision occurred in decedent's lane of travel constituted an opinion which invaded the province of the jury. *S. v. Wells*, 311.

§ 113.1. Sufficiency of Evidence in Manslaughter Case

The State's evidence was sufficient for the jury in a prosecution for manslaughter arising out of an automobile accident. *S. v. Wells*, 311.

BAILMENT

§ 3.3. Actions by Bailor Against Bailee

Where plaintiff left his motorcycle with a repair shop for servicing, during the time it was in the possession of the bailee it was stolen, and plaintiff brought this action to recover under an insurance policy which purportedly covered the loss of any customer who had a motorcycle stolen from the keeping of the bailee, the trial court erred in granting judgment on the pleadings for defendant insurer. *Smith v. King*, 158.

BASTARDS

§ 10. Support of Illegitimate Child

The district court had no jurisdiction to enter an order approving defendant's voluntary agreement for support of an illegitimate child where his acknowledgment of paternity was not simultaneously accompanied by a sworn affirmation of paternity by the child's mother. *Dept. of Social Services v. Williams*, 112.

BILLS AND NOTES

§ 19. Competency of Evidence in Action on Note

In a bank's action to recover on a note signed by defendant as an accommodation maker, a witness's speculation that a portion of the loan proceeds was used to pay insurance premiums owed to defendant's agency was inadmissible hearsay. *Fidelity Bank v. Garner*, 60.

BILLS OF DISCOVERY

§ 6. Compelling Discovery in Criminal Case

Court did not err in failing to compel the district attorney to furnish defendants with copies of any statements made by a State's witness where charges against the witness had been dismissed and the witness was no longer a codefendant. *S. v. Thomas and S. v. Christmas and S. v. King*, 186.

BROKERS AND FACTORS

§ 4.1. Liability of Real Estate Broker to Principal

While an option to purchase real estate, given by the seller to a broker employed to sell the property, is generally valid, the broker cannot enforce the option without making a full disclosure to his principal of any information which he has relating to other prospective sales or the value of the property. *Real Estate Licensing Bd. v. Gallman*, 118.

§ 8. Licensing of Brokers

Findings of fact by the Real Estate Licensing Board were sufficient to support its conclusion that respondent made substantial and willful misrepresentations and acted for more than one party in a transaction without the knowledge of all parties for whom he acted. *Real Estate Licensing Bd. v. Gallman*, 118.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

The State's evidence was sufficient for the jury in a prosecution for second degree burglary. *S. v. Andrews*, 26.

The State's evidence was sufficient for the jury on the issue of one defendant's guilt of first degree burglary of a dwelling occupied by four law officers and on the issue of a second defendant's guilt of first degree burglary as an aider and abettor. *S. v. Thomas*, 186.

§ 6.4. Instructions on Breaking and Entering

Trial court did not err in failing to define the terms "breaking" or "entering" in the absence of a special request. *S. v. Chambers*, 713.

Trial court did not err in refusing to instruct the jury that mere presence of the defendant at or near a location where a crime was allegedly committed, such as the breaking of a door, was insufficient evidence upon which to convict defendant of a crime. *Ibid.*

Trial court sufficiently charged the jury that in order to be found guilty of breaking or entering a repair shop, defendant must have broken or entered the shop without the owner's consent. *Ibid.*

§ 7. Instructions on Lesser Included Offenses

A dwelling was occupied within the meaning of the first degree burglary statute where four law officers were present in the dwelling at the time of a breaking and entering, and the court did not err in failing to submit second degree burglary. *S. v. Thomas*, 186.

In a prosecution of three defendants for first degree burglary, the trial court erred in failing to submit to the jury the issue of one defendant's guilt of misdemeanor breaking and entering but did not err in failing to submit such an issue as to the other two defendants. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10.2. Sufficiency of Evidence of Undue Influence

Plaintiff's claim instituted against two of her brothers to set aside the deeds made by her father to defendants on the ground of undue influence was improperly dismissed by the trial court. *Hayes v. Cable*, 617.

CONSTITUTIONAL LAW

§ 12.1. Regulation of Trades and Professions

G.S. 20-288(e) which added to the motor vehicle dealer licensing law requirements the posting of a $15,000 bond was not unconstitutional and the exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of the statute did not deny plaintiff equal protection of the law. *Butler v. Peters, Comr. of Motor Vehicles*, 357.

§ 31. Affording an Accused the Basic Essentials for Defense

Defendant, an indigent, did not show that the expenses of a private investigator and of an alleged expert in the area of reliability of eyewitness identification were necessary expenses of representation that the State was required to provide. *S. v. Sellars*, 380.

§ 49. Waiver of Right to Counsel

There was no merit to defendant's contention that he was deprived of his right to counsel where the record affirmatively disclosed a knowing and written waiver of counsel. *S. v. Jones*, 606.

§ 68. Right to Call Witnesses and Present Evidence

Defendant was not denied his constitutional right to compel the attendance and testimony of witnesses for his defense by the court's refusal to order a mistrial because of the absence of a witness who had administered a voice stress test to defendant and who had been subpoenaed by defendant. *S. v. Rogers*, 676.

§ 81. Consecutive Sentences

The imposition of consecutive terms was not cruel or unusual punishment. *S. v. Sellars*, 380.

CONTEMPT OF COURT

§ 2.1. Acts Committed in Courtroom

Where the court at the end of a bond modification hearing found defendant in direct contempt for vocally disrupting the hearing the preceding day, the proceeding was substantially contemporaneous with the contempt and the court could properly act against defendant summarily. *S. v. Johnson*, 592.

CONTRACTS

§ 14.1. Contract for Benefit of Third Person

Where plaintiff left his motorcycle with a repair shop for servicing, during the time it was in the possession of the bailee it was stolen, and plaintiff brought this action to recover under an insurance policy which purportedly covered the loss of any customer who had a motorcycle stolen from the keeping of the bailee, the trial court erred in granting judgment on the pleadings for defendant insurer. *Smith v. King*, 158.

§ 19. Novation and Substitution

It was apparent from the parties' agreement and their acts that such agreement rescinded an earlier agreement and constituted a settlement between the parties for claims involving construction of federally subsidized rental units. *Housing, Inc. v. Weaver*, 662.

CONTRACTS — Continued

§ 27.1. Sufficiency of Evidence of Existence of Contract

Trial court erred in entering summary judgment for defendant where a question of fact existed as to whether defendant's deceased husband, as an individual, owed plaintiff an amount due on a paving contract or whether the obligation was that of a realty company bearing the same name as defendant's husband. *Gelder and Assoc., Inc. v. Huggins*, 336.

In an action to recover damages for an anticipatory breach of contract for the sale of certain real property to plaintiff realtor, there was no merit to defendant's argument that there was never a meeting of the minds between the parties as to the inclusion of a given sentence and as to whether the sentence constituted a counter offer by plaintiff. *Shepard, Inc. v. Kim, Inc.*, 700.

§ 33. Allegations of Interference With Contractual Rights

Defendant's counterclaims sufficiently alleged a claim for damages for interference with a contractual relationship by preventing the F.H.A. from entering a loan agreement with defendant which it otherwise would have entered. *Brewer v. Hatcher*, 601.

CORPORATIONS

§ 4.1. Authority and Duties of Stockholders

Plaintiff minority shareholder made out a prima facie case that defendant majority shareholders breached the fiduciary duty owed to plaintiff as a minority shareholder in transferring the assets of the corporation to a corporation wholly owned by defendants. *Loy v. Lorm Corp.*, 428.

§ 6. Right of Stockholders to Maintain Action

Plaintiff minority shareholder was not required to make a demand upon the board of directors of a corporation before bringing a derivative action against directors of the corporation. *Loy v. Lorm Corp.*, 428.

§ 11. Estoppel of Corporation, and Ratification of Acts of Agents

In an action to recover damages for an anticipatory breach of contract for the sale of real property, defendant could not claim that a sentence inserted in the contract of sale by plaintiff was a counter offer by plaintiff which was not accepted by defendant, since defendant's agent in N.C., by corporate resolution, was authorized to execute the agreement which included the sentence in question with plaintiff. *Shepard, Inc. v. Kim, Inc.*, 700.

§ 25. Contracts

Evidence on motion for summary judgment raised issues of fact as to whether the individual defendants agreed prior to incorporation to permit plaintiff to buy a 25% stock interest in the corporation when he became financially able to do so in return for plaintiff's agreement to supervise construction of a restaurant and to manage it when completed, and whether the agreement was binding on defendant corporation under the theory it was intended to be a preincorporation shareholders' agreement or under the theory that the corporation adopted the shareholders' agreement. *Loy v. Lorm Corp.*, 428.

CRIMINAL LAW

§ 7.1. Entrapment

Trial court in a first degree burglary case did not err in failing to instruct on entrapment where a State's witness had advised the victim of a plan to burglarize the victim's home on a certain date. *S. v. Thomas and S. v. Christmas and S. v. King*, 186.

§ 9.4. Instructions on Aiding and Abetting

Trial court's instructions on aiding and abetting, including a requirement that defendant must have "shared the criminal purpose" of the perpetrator, were adequate. *S. v. Moses*, 412.

§ 21. Preliminary Proceedings

The trial court did not err in denying one defendant's motion that hearings on pretrial motions filed in his behalf be set prior to the date of trial. *S. v. Thomas*, 186.

§ 21.1. Preliminary Hearing

Defendant failed to show that he was prejudiced by the continuance of his probable cause hearing, and his subsequent indictment on the same day that the probable cause hearing was continued rendered unnecessary a probable cause hearing. *S. v. Sellars*, 380.

§ 22. Arraignment

No calendaring of defendant's arraignment was necessary and his trial the week of his arraignment violated no statutory mandate applicable to him. *S. v. Sellars*, 380.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Two cases reached contrary conclusions on the question of whether a defendant was placed in double jeopardy by his conviction of larceny and felonious possession of the same stolen property. *S. v. Andrews*, 26, and *S. v. Perry*, 48.

§ 34.6. Admissibility of Other Offenses to Show Knowledge or Intent

Evidence that defendant presented prescriptions for a controlled substance to a pharmacist on two previous occasions was admissible in a prosecution for attempting to obtain the controlled substance by use of a forged prescription. *S. v. Fleming*, 563.

§ 35. Evidence that Offense Was Committed by Another

Trial court did not err in refusing to admit into evidence testimony presumably showing that a person other than defendant had committed the crime in question. *S. v. Makerson*, 149.

§ 42.6. Chain of Custody of Evidence

The State showed a sufficient chain of custody of a forged prescription for controlled substances allegedly presented by defendant to a pharmacist. *S. v. Fleming*, 563.

§ 50.1. Admissibility of Opinion Testimony

In a prosecution for involuntary manslaughter arising from an accident involving a school bus, the trial court did not err in admitting opinion testimony by a witness who was not offered or qualified as an expert regarding his knowledge of and familiarity with the brake systems of school buses in general and with the particular bus involved. *S. v. Wright*, 166.

CRIMINAL LAW — Continued

§ 62. Lie Detector Tests

Since the results of a polygraph test and a voice stress test would not be admissible, the fact that defendant took the stress test and was willing to take the polygraph test was not competent evidence and was therefore properly excluded by the trial judge. *S. v. Makerson*, 149.

The results of a voice stress test given to defendant were not admissible in evidence absent a valid stipulation between the prosecutor and defendant that the test results would be admissible. *S. v. Rogers*, 676.

§ 66.1. Competency of Witness to Identify Defendant; Opportunity for Observation

A robbery victim's in-court identification of defendant was not unreliable because the victim never gave the police a detailed description of her assailant and she was only in his presence for several minutes. *S. v. Rogers*, 676.

§ 66.9. Suggestiveness of Photographic Identification Procedure

A pretrial photographic identification of defendant by a robbery victim was not impermissibly suggestive because an officer suggested to the victim the possible name of the person who robbed her. *S. v. Moses*, 412.

§ 66.11. Confrontation at Scene of Crime or Arrest

A pretrial identification procedure was not impermissibly suggestive because a robbery victim viewed defendant within an hour of the alleged crime while defendant was sitting handcuffed in a squad car with blood running down his face. *S. v. Rogers*, 676.

§ 66.16. Independent Origin of In-Court Identification from Photographic Identification

Trial court properly admitted into evidence in-court identifications of defendant by two witnesses and the identifications were not tainted by pretrial photographic procedures. *S. v. Sellars*, 380.

§ 66.18. When Voir Dire on Identification Testimony Required

No voir dire hearing on the admissibility of identification testimony was required at defendant's second trial in the absence of a showing by defendant that he could offer evidence additional to that given at a hearing at his first trial. *S. v. Moses*, 412.

Trial court did not err in refusing to hold voir dire examinations during the second trial of defendant in order to determine the admissibility of witnesses' identification testimony. *S. v. Sellars*, 380.

§ 69. Telephone Conversations

In a prosecution for intimidating a State's witness, the trial court erred in failing to strike testimony by the prosecutrix's brother, in response to a question as to whether he had received any calls from defendant, that "the next day she called my number, which was the only number that she had for [the prosecutrix]," since no proper foundation was laid for the testimony. *S. v. Isom*, 331.

§ 71. Shorthand Statements of Fact

A witness's testimony concerning his work duties "at the time when the breaking and entering started" was admissible as a shorthand statement of fact. *S. v. Chambers*, 713.

CRIMINAL LAW — Continued

§ 75.9. Volunteered and Spontaneous Statements by Defendant

Defendant's statement that he had committed the crimes in question and that other occupants of a trailer should not be bothered was volunteered by defendant and was admissible in evidence. *S. v. Tripp*, 244.

§ 76.7. Voir Dire Hearing on Confession; Evidence Sufficient to Support Findings

Evidence on voir dire at defendant's first trial supported the court's order denying defendant's motion to suppress in-custody statements, and testimony presented on voir dire at the second trial contained no additional evidence which required reconsideration of the order entered at the first trial. *S. v. Thompson*, 629.

§ 85.2. State's Character Evidence Relating to Defendant

There was no merit to defendant's contention that the trial court erred in admitting rebuttal character evidence of defendant's poor character without proper foundation. *S. v. Wright*, 166.

§ 86.5. Impeachment of Defendant; Particular Questions

In a prosecution for involuntary manslaughter arising from an accident between a school bus driven by defendant and another vehicle, trial court did not err in allowing the State to cross-examine defendant regarding complaints made against him about his bus driving record and his suspension as a school bus driver. *S. v. Wright*, 166.

§ 86.8. Credibility of State's Witnesses

Trial court properly refused to permit defense counsel to cross-examine a State's witness as to whether he had committed certain breakings and enterings and larcenies after the witness asserted his right against self-incrimination. *S. v. Moses*, 412.

§ 88.1. Scope of Cross-Examination

Defendant's constitutional right to cross-examination was not violated by the court's refusal to permit defense counsel to ask a State's witness questions concerning his receipt of money from the police department after the robbery in question where the court determined at an in camera hearing that the witness had received no money for information he gave police concerning the robbery in question. *S. v. Moses*, 412.

§ 90.1. Discrediting Own Witness

Any error in permitting the State to contradict its own witness by an officer's testimony that the witness told him that defendant committed the robbery in question was not prejudicial to defendant. *S. v. Moses*, 412.

§ 91. Speedy Trial

Trial court properly excluded from the speedy trial period a 14-day delay during which a State's witness was unavailable for trial. *S. v. Melton*, 305.

Defendant was not denied his statutory right to a speedy trial though 195 days elapsed from his indictment to his trial since 148 days were properly excluded due to the pendency of defendant's motion for change of venue. *S. v. Sellars*, 380.

§ 91.6. Motion for Continuance to Obtain Additional Evidence

Defendants were not denied an opportunity to prepare their defense by the denial of their motions for continuance while their motions for discovery of a witness's statement were still pending. *S. v. Thomas*, 186.

CRIMINAL LAW — *Continued*

§ 92.1. Consolidation of Charges Against Two Defendants

There was no merit to defendant's contention that the court erred in consolidating his trial for armed robbery with that of a codefendant because certain evidence was admissible only against the codefendant. *S. v. Moses*, 412.

§ 101. Conduct or Misconduct Affecting Jury

Trial court did not err in denying defendant's motion for a mistrial made on the ground that events at trial caused the jury to conclude that defendant was somehow responsible for an attempt to intimidate or tamper with a witness. *S. v. Perry*, 48.

§ 102. Argument of Counsel

Trial court erred in denying defendant's motion that jury selection and opening and closing arguments of counsel be recorded, but defendant failed to show that he was prejudiced by the denial. *S. v. Tripp*, 244.

§ 111.1. Particular Miscellaneous Instructions

Trial court's instruction that "the fact that defendant has been indicted constitutes no evidence of his guilt of anything whatsoever" did not contravene the statute prohibiting reading the indictment to the jury. *S. v. Rogers*, 676.

Trial court did not violate the statute prohibiting reading the indictment to the jury by advising the prospective jurors that defendant had been accused in a bill of indictment returned by the grand jury alleging that he broke and entered a certain building and that when he did so he had the intent to commit larceny. *S. v. Chambers*, 713.

§ 112.4. Charge on Circumstantial Evidence

Trial judge did not err in failing to add the phrase "consistent with innocence" at the end of his charge on circumstantial evidence. *S. v. Chambers*, 713.

§ 113.1. Recapitulation or Summary of Evidence

There was no merit to defendant's contention that the trial court erred by summarizing the evidence favorable to the State while failing to summarize at all evidence favorable to defendant. *S. v. Tripp*, 244.

§ 113.4. Definitions of Words Used in Charge

Trial court did not err in failing to define the terms "breaking" or "entering" in the absence of a special request. *S. v. Chambers*, 713.

§ 113.7. Charge on Acting in Concert

The court's charge on acting in concert was supported by the evidence. *S. v. Andrews*, 26.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court did not express an opinion on the evidence in instructing that there was direct evidence tending to show that defendant had no authority to be in a repair shop. *S. v. Chambers*, 713.

§ 114.3. No Expression of Opinion in Other Instructions

Trial court in a breaking and entering case did not express an opinion on the evidence in instructing the jury that there was no evidence "in this case of any intent to commit armed robbery, or any other type of theft besides larceny and/or common law robbery." *S. v. Rogers*, 676.

CRIMINAL LAW — Continued

§ 116.1. Charge on Defendant's Failure to Testify

Defendant was not prejudiced by the trial court's repetitious instructions on defendant's right to refrain from testifying or presenting evidence. *S. v. Chambers*, 713.

§ 122. Additional Instructions After Initial Retirement of Jury

Defendant was not prejudiced by the failure of the trial court to admonish the jury pursuant to G.S. 15A-1236 prior to an overnight recess. *S. v. Chambers*, 713.

§ 128.1. Order of Mistrial

Any error in the trial court's failure to make findings of fact in declaring a mistrial was not prejudicial to defendant. *S. v. Moses*, 412.

§ 128.2. Particular Grounds for Mistrial

Trial court did not err in refusing to grant a mistrial when one prospective juror stated that he believed a defendant was guilty until proven innocent. *S. v. Thomas and S. v. Christmas and S. v. King*, 186.

Defendant was not denied his constitutional right to compel the attendance and testimony of witnesses for his defense by the court's refusal to order a mistrial because of the absence of a witness who had administered a voice stress test to defendant and who had been subpoenaed by defendant. *S. v. Rogers*, 676.

§ 143.11. Violation of Probation Condition by Possession of Drugs

In a proceeding to determine whether defendant had violated a condition of his probation, superior court erred in granting defendant's motion to suppress contraband seized from defendant by Florida authorities. *S. v. Lombardo*, 316.

§ 162. Necessity for Objection

Defendant's allegation that the admission of evidence violated a constitutional right does not prevent the operation of the rule that admission of incompetent evidence is not ground for a new trial where no objection was made at the time the evidence was offered. *S. v. Rogers*, 676.

DAMAGES

§ 16.6. Damages for Fraud

Plaintiff's evidence was insufficient to justify submission of an issue of punitive damages for fraud in an action in which plaintiff alleged that he paid defendant dentist $250 to cap a tooth and that defendant refused to complete the work after grinding down plaintiff's tooth. *Mesimer v. Stancil*, 361.

DEEDS

§ 19.3. Real Covenants

Trial court erred in entering summary judgment for plaintiff developer of a condominium complex where a genuine issue of material fact existed as to whether acreage in dispute was part of the common area of the condominium or whether it was reserved by plaintiff for future construction. *Southland Associates, Inc. v. Peach*, 340.

§ 20.7. Enforcement of Subdivision Restrictive Covenants

Plaintiffs' evidence was insufficient for the jury on the issue of defendant subdivision developer's breach of a covenant restricting use of lots in the subdivision

DIVORCE AND ALIMONY — Continued

§ 24.1. Amount of Child Support

Trial court did not err in allowing defendant credit against his child support obligation for certain expenses for clothing, food and day care which he incurred for the children during their visitation with him. *Jones v. Jones*, 104.

Evidence was sufficient to support the amount of child support awarded by the trial court, except that the court erred in ordering defendant to pay for tutors and private school tuition. *Falls v. Falls*, 203.

Trial court's award of child support was properly supported by the evidence. *Knott v. Knott*, 543.

§ 24.4. Enforcement of Child Support; Contempt

Evidence before the trial judge was sufficient to support his conclusion that defendant was not in willful contempt of court by deducting from his child support payments made to plaintiff amounts representing voluntary expenditures for needs of the parties' children while they were visiting him. *Jones v. Jones*, 104.

§ 24.5. Modification of Child Support Order

Trial court erred in awarding annual increases in child support based on the U.S. Consumer Cost of Living Index. *Falls v. Falls*, 203.

§ 25.12. Child Visitation Privileges

There was no merit to defendant's contention that the trial court failed to make a positive determination of the visitation rights of defendant and that the trial court's order left defendant's visitation rights in the hands of the children themselves and was therefore improper. *Falls v. Falls*, 203.

§ 27. Attorney's Fees Generally

Trial court in a child custody and support proceeding erred in awarding attorney's fees to plaintiff wife in the absence of evidence of the nature and reasonable worth of the attorney's services. *Falls v. Falls*, 203.

EASEMENTS

§ 6.1. Easements by Prescription; Evidence

Deeds relied on by plaintiffs to establish color of title to a right-of-way across defendants' lands which were not in defendants' chain of title did not sufficiently afford defendants notice of plaintiffs' claim of right to the easement so as to overcome the presumption of permissive use and warrant summary judgment for plaintiffs as a matter of law. *Taylor v. Brigman*, 536.

EVIDENCE

§ 14.1. Physician-Patient Privilege; Authority of Trial Court

Only the judge presiding at the trial on the merits may grant a motion to take depositions of physicians who attended a party. *Carter v. Insurance Co.*, 520.

§ 29.2. Business Records

A bank officer could properly identify and read from certain documents relating to a loan which he negotiated. *Fidelity Bank v. Garner*, 60.

A corporation's tax returns, financial statements and other records were competent to establish damages for breach of contract to permit plaintiff to purchase stock in the corporation. *Loy v. Lorm Corp.*, 428.

EXECUTORS AND ADMINISTRATORS

FRAUD

FRAUDS, STATUTE OF

HOMICIDE

HUSBAND AND WIFE

HUSBAND AND WIFE — Continued

Trial court's finding that defendant was obligated to pay an alimony arrearage of $18,200 plus interest as required by the parties' separation agreement was supported by the evidence, and the court properly ordered specific performance of a provision of the parties' separation agreement requiring defendant to procure and keep in effect a policy of life insurance for the benefit of plaintiff. *Ibid.*

INDIANS

§ 1. Generally

The courts of this State have jurisdiction to try a Cherokee Indian for an alleged traffic offense which occurred on a highway within the boundaries of the Cherokee Indian Reservation. *S. v. Dugan*, 136.

INDICTMENT AND WARRANT

§ 17.2. Variance Between Averment and Proof; Time

There was no fatal variance between an indictment charging possession of burglary tools on 14 March and evidence that the offense occurred on 19 March. *S. v. Andrews*, 26.

INSURANCE

§ 50. Proximate Cause of Accident

The evidence on motion for summary judgment in an action to recover under an accident policy presented a triable issue of fact as to whether plaintiff's accident was the independent and exclusive cause of his injuries or whether a degenerative joint disease resulting from a football injury some 40 years earlier contributed to plaintiff's injuries. *Carter v. Insurance Co.*, 520.

§ 115. Insurable Interest in Property

The named insured in a fire insurance policy had an insurable interest in the insured property although insured and his wife had conveyed the property to the wife as trustee for their children. *Jerome v. Insurance Co.*, 573.

§ 116. Fire Insurance Rates

The N.C. Rate Bureau could withdraw a voluntary filing for dwelling fire and extended coverage rates after the Commissioner of Insurance had set the filing for a public hearing, and an order entered by the Commissioner after such withdrawal disapproving the fire insurance filing and approving a decrease in extended coverage rates was null and void. *Comr. of Insurance v. Rate Bureau*, 79.

§ 119. Loss Payable Clauses in Fire Insurance

A fire insurance policy did not become void because the mortgagee failed to notify the insurer of a change in ownership of the insured property as required by the standard mortgage clause. *Jerome v. Insurance Co.*, 573.

A mortgagee's knowledge that insured property was owned by a person other than the named insured did not constitute knowledge of an increase in hazard of which the mortgagee was required to notify the insurer. *Ibid.*

§ 143.1. "All Risks" Insurance

A gutter downspout is, as a matter of law, a part of the plumbing system of a home within the meaning of an "all risk" policy provision covering loss from ac-

INSURANCE — Continued

cidental discharge or overflow of water from within a plumbing system. *Holcomb v. Insurance Co.*, 474.

§ 149. Liability Insurance

An intentional assault by a municipal employee was covered by a liability policy purchased by the municipality. *Edwards v. Akion*, 688.

JURY

§ 5.1. Selection

Trial court erred in denying defendant's motion that jury selection and opening and closing arguments of counsel be recorded, but defendant failed to show that he was prejudiced by the denial. *S. v. Tripp*, 244.

§ 7.9. Prejudice and Bias; Preconceived Opinions

The trial court did not err in denying defendant's challenge for cause of a prospective juror who variously stated that she had formed an opinion, had formed "sort of" an opinion, and had not formed an opinion as to the guilt or innocence of defendant. *S. v. Wright*, 166.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

Evidence was sufficient for the jury in a kidnapping case. *S. v. Sellars*, 380.

LARCENY

§ 7. Sufficiency of Evidence

Testimony by one trustee of a church rather than all three trustees was sufficient to show that heaters were taken from the church without permission. *S. v. Perry*, 48.

§ 9. Verdict

Where the jury returned a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, the conviction of felonious larceny should be vacated and the case should be remanded for entry of a sentence consistent with a verdict of guilty of misdemeanor larceny. *S. v. Perry*, 48.

MASTER AND SERVANT

§ 10. Duration and Termination of Employment

In an action for an injunction ordering defendant to reemploy plaintiff and for back pay from the date of plaintiff's discharge from employment with defendant, trial court properly determined that defendant breached its employment agreement with plaintiff, but plaintiff was entitled only to nominal damages therefor, and an injunction ordering plaintiff's reinstatement was improper. *Bennett v. Eastern Rebuilders, Inc.*, 579.

§ 33. Liability of Employer Under Respondeat Superior

A jury verdict that defendant's employees were not negligent negated any liability of defendant to plaintiffs on the theory of respondeat superior. *Morrison v. Kiwanis Club*, 454.

MASTER AND SERVANT — Continued

§ 65.2. Back Injuries

There was sufficient competent evidence to support the conclusion of the Industrial Commission that plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant which resulted in a fifteen percent permanent partial disability of the back. *Buck v. Procter & Gamble Co.*, 88.

§ 68. Occupational Diseases

Medical evidence presented by plaintiff was sufficient to establish that his chronic obstructive respiratory disease was caused by the conditions of his employment in the weave room of a textile plant. *Humphries v. Cone Mills Corp.*, 612.

§ 72. Partial Disability

There was no merit to plaintiff's contention that an injury to her hip could not be considered an injury to the leg, which is a "scheduled injury" under G.S. 97-31, and that she was entitled to compensation for total permanent disability under G.S. 97-29 rather than compensation for a 60% permanent partial disability. *Gasperson v. Buncombe County Schools*, 154.

MORTGAGES AND DEEDS OF TRUST

§ 41.1. Title and Rights Under Invalid or Defective Sale

The purchaser at a foreclosure sale had no basis to claim that the sale was invalid because it had been postponed for a period of time in excess of the twenty days permitted by statute. *Gore v. Hill*, 620.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

A local act of the General Assembly whereby the property of plaintiffs was annexed to defendant town was reasonably related to a valid legislative purpose and did not unlawfully discriminate against property owners in the newly annexed area, though plaintiffs would not receive sewer services upon annexation. *Abbott v. Town of Highlands*, 69.

§ 9. Rights, Powers and Duties of Officers and Employees

While the Civil Service Commission of the City of Raleigh had authority to entertain respondent's appeal from a decision of the City that he had not been the subject of discrimination in violation of City policy, the Commission had no authority to order the City to pay respondent's attorney fees or, in the alternative, punitive damages, or to order the City to prepare and submit revised promotional policies and procedures. *In re Altman*, 291.

The Civil Service Commission of the City of Raleigh had no authority to entertain an appeal of the City's refusal to appoint respondent as City Fire Marshal. *Ibid.*

§ 12.3. Waiver of Governmental Immunity

An intentional assault by a municipal employee was covered by a liability policy purchased by the municipality. *Edwards v. Akion*, 688.

§ 21.5. Injuries in Connection with Collection of Garbage

In an action against a city to recover for injuries sustained by plaintiff when she was assaulted by a city sanitation worker, genuine issues of material fact were

NEGLIGENCE — Continued

of defendant's shopping center, trial court erred in granting summary judgment for defendant. *Green v. Wellons, Inc.*, 529.

§ 58.1. Instructions in Actions by Invitees

In an action to recover damages for injuries sustained by plaintiff when he fell in defendant's parking lot, defendant was entitled to a new trial where the court's instructions were inadequate. *Everhart v. LeBrun*, 139.

OBSTRUCTING JUSTICE

§ 1. Generally

The State's evidence was sufficient for the jury in a prosecution of defendant for intimidating a State's witness by threatening by telephone to kill the witness's daughter if the witness did not drop charges against defendant for communicating threats. *S. v. Isom*, 331.

§ 2. Sufficiency of Warrant

A warrant was sufficient to charge defendant with the offense of intimidating a State's witness in violation of G.S. 14-226. *S. v. Isom*, 331.

PARENT AND CHILD

§ 2.1. Liability of Parent for Injury or Death of Child

Allegations of defendant third party plaintiff's complaint were sufficient to show that the injury sustained by the minor plaintiff arose out of her mother's operation of a motor vehicle so that the doctrine of parent-child immunity would not bar the defendant third party plaintiff's claim against the child's mother for contribution. *Snow v. Nixon*, 131.

§ 7. Parental Duty to Support Child

The district court had no jurisdiction to enter an order approving defendant's voluntary agreement for support of an illegitimate child where his acknowledgment of paternity was not simultaneously accompanied by a sworn affirmation of paternity by the child's mother. *Dept. of Social Services v. Williams*, 112.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15.1. Competency of Expert Testimony

An expert's testimony establishing the standard of care which would have been exercised by a prudent physician "under the same or similar circumstances" rather than "with similar training and experience" was harmless error. *Lowery v. Newton*, 234.

Plaintiff's counsel was properly permitted to ask an expert medical witness to state his opinion as to what actually caused plaintiff's injury rather than what could have caused the injury. *Ibid.*

§ 15.2. Who May Testify as Experts

In a medical malpractice action against a plastic surgeon for negligence in the removal of a tumor from plaintiff's neck, a medical expert specializing in the field of neurological surgery was competent to testify regarding the standard of care in surgery on plaintiff. *Lowery v. Newton*, 234.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

Trial court in a personal injury action erred in entering summary judgment for defendant company on the basis of releases of the individual defendant executed by plaintiffs. *McBride v. Tractor Co. and Odell v. Tractor Co.*, 513.

RETIREMENT SYSTEMS

§ 3. Membership in Retirement Systems

The Board of Trustees of the Teachers' and State Employees' Retirement System of N.C. did not have discretionary power to extend or waive statutory deadlines for the reinstatement of a withdrawn account or for purchase of out-of-state service. *In re Ford*, 569.

ROBBERY

§ 2. Indictment

There was no merit to defendant's contention that the indictment charging him with armed robbery charged him with two offenses in violation of G.S. 15A-924 since the fact that in the robbery defendant obtained money both from the prosecuting witness and the motel where she worked did not create separate offenses. *S. v. Sellars*, 380.

RULES OF CIVIL PROCEDURE

§ 4. Process

A county board of education was not properly served with process where process was left with the wife of the chairman of the board at his usual place of abode. *Long v. Board of Education*, 625.

§ 12.1. When and How to Present Defenses and Objections

Where defendant filed his answer, reserving his rights under his earlier notice of special appearance, but the questions of insufficiency of process or insufficiency of service of process were not presented in the earlier notice, defendant, by filing his answer without raising these objections to jurisdiction, waived these objections, and his answer constituted a general appearance in this case, removing the question of personal jurisdiction. *Southgate v. Russ*, 364.

§ 17. Parties Plaintiff and Defendant; Capacity

The trial court had authority to substitute a general guardian or trustee as party plaintiff for a guardian ad litem in an action brought on behalf of an incompetent. *Gaskins v. McCotter*, 322.

§ 41. Dismissal of Actions

The trial court did not abuse its discretion in denying respondent's motion to dismiss petitioners' partition proceeding filed in 1970 for failure to prosecute. *Jones v. Stone*, 502.

§ 50.3. Grounds for Directed Verdict

The question of whether a motion for directed verdict should have been allowed on the ground of contributory negligence was not before the appellate court where defendants failed to state contributory negligence as a ground for their motion in the trial court. *Jones v. Allred*, 38.

RULES OF CIVIL PROCEDURE — Continued

§ 56.4. Summary Judgment; Sufficiency of Opposing Party's Supporting Material

The trial court does not abuse its discretion when it refuses to accept late affidavits in opposition to a motion for summary judgment absent a showing of excusable neglect. *Shopping Center v. Life Insurance Corp.*, 633.

SALES

§ 17.2. Cases Involving Warranties of Merchantability and Fitness for Particular Purpose

Expert testimony did not raise an issue not pleaded in an action for breach of implied warranty of merchantability for latent defects in an air compressor which allegedly caused a fire in plaintiff's machine shop. *Southern of Rocky Mount v. Woodward Specialty Sales*, 549.

§ 18. Issues and Instructions in Breach of Warranty Actions

Evidence did not require the court to instruct the jury that it could consider evidence that plaintiff had abused the goods in question in determining whether defendant breached its implied warranty of merchantability of the goods. *Southern of Rocky Mount v. Woodward Specialty Sales*, 549.

Trial court's instruction in an action for breach of warranty of merchantability did not imply that the jury could not consider the age of the product in determining whether the defect complained of existed at the time of the sale. *Ibid.*

SCHOOLS

§ 4. Boards of Education; Vacancies in School Offices

A county board of education was not properly served with process where process was left with the wife of the chairman of the board at his usual place of abode. *Long v. Board of Education*, 625.

§ 13.2. Dismissal of Teacher

Defendant was required to make findings of fact and conclusions of law in entering an order in which plaintiff, a tenured teacher, was notified that the decision of the superintendent to dismiss her was upheld. *Powers v. Board of Education*, 631.

SEARCHES AND SEIZURES

§ 7. Search and Seizure Incident to Arrest

A gym bag containing stolen property was properly seized pursuant to a search of defendant's car incident to defendant's lawful arrest and based on probable cause. *S. v. Andrews*, 26.

§ 8. Warrantless Arrest

A search of defendant's person immediately prior to his arrest was lawful as incident to the arrest since probable cause to arrest existed prior to the search. *S. v. Walden*, 125.

§ 9. Arrest for Traffic Violations

An officer's warrantless search of defendant's truck made incident to defendant's warrantless arrest for driving under the influence was improper and the trial court should have granted defendant's motion to suppress marijuana found in the truck. *S. v. Cooper*, 349.

SEARCHES AND SEIZURES — Continued

§ 11. Search and Seizure of Vehicles

Officers had a valid reason to stop defendant's car and lawfully seized a gun holster and money which were in plain view in the car. *S. v. Moses*, 412.

A search by police officers of a closed medicine bottle found in defendant's car exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle. *S. v. Hall*, 492.

§ 34. Search of Vehicle; Plain View

A gym bag and its contents were properly seized from defendant's car under the plain view doctrine. *S. v. Andrews*, 26.

§ 39. Execution of Search Warrant

In a proceeding to determine whether defendant had violated a condition of his probation, superior court erred in granting defendant's motion to suppress contraband seized from defendant by Florida authorities. *S. v. Lombardo*, 316.

§ 41. Conduct of Officers; Knock and Announce Requirements

Trial court did not err in denying defendant's motion to suppress physical evidence seized from a trailer where officers originally had a legal right to be in the trailer, as they were invited inside and were at no time asked to leave, and any seizure of persons in the trailer resulting from one officer's remaining at the scene while the other officer obtained a search warrant was reasonable and permissible. *S. v. Tripp*, 244.

STATE

§ 12. State Employees

The State Personnel Commission had no jurisdiction to consider an appeal from the dismissal of respondent as a State employee where the evidence showed that respondent had not been employed by the State for five years. *Employment Security Commission v. Lachman*, 368.

TAXATION

§ 19.1. Construction of Exemptions

Raw tobacco was not exempt from taxation as being held or stored for shipment to a foreign country where the tobacco was to be manufactured into cigarettes and other tobacco products which would then be shipped to a foreign country. *In re Certain Tobacco*, 299.

§ 25. Assessment and Levy of Ad Valorem Taxes

A property owner was obligated to pay ad valorem taxes on its property and it could not transfer its obligation to pay the taxes to the mortgagee. *City of Charlotte v. Properties, Inc.*, 464.

§ 25.10. State Board of Assessment

A county tax supervisor and an assistant county attorney were properly authorized to file appeals from decisions of the County Board of Equalization and Review. *In re Certain Tobacco*, 299.

TRIAL

§ 3.2. Grounds for Motion for Continuance

Court did not abuse its discretion in denying defendant's motion for continuance based on alleged surprise as to the testimony of an expert witness where the testimony related to an issue raised by the complaint. *Southern of Rocky Mount v. Woodward Specialty Sales*, 549.

§ 11. Argument and Conduct of Counsel

Trial court did not err in failing to declare a mistrial when plaintiff's counsel argued to the jury that a defendant who had been convicted and pardoned for insurance fraud "had been previously convicted of lying to a jury." *Fidelity Bank v. Garner*, 60.

§ 48. Power of Court to Set Aside Verdict

Trial judge did not err in setting aside the verdict of the jury on the issue of damages and substituting his findings in lieu thereof upon which he entered judgment. *Housing, Inc. v. Weaver*, 662.

TRUSTS

§ 6.3. Trustee's Authority to Mortgage and Sell Trust Property

A trustee's failure to sign a deed of trust in her capacity as trustee did not affect the validity of the execution of that deed of trust. *Jerome v. Insurance Co.*, 573.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

In plaintiff's action to recover against the insurer of a bailee from whom plaintiff's motorcycle was stolen, the trial court's judgment on the pleadings in favor of defendant was proper to the extent that it overruled plaintiff's claim for unfair trade practices. *Smith v. King*, 158.

Plaintiffs' evidence was insufficient for the jury on the issue of defendant subdivision developer's unfair and deceptive trade practices in the sale of a residential lot to plaintiffs by selling a lot to a third party when it knew the third party intended to use the lot for nonresidential purposes in violation of restrictive covenants. *Overstreet v. Brookland, Inc.*, 444.

UNIFORM COMMERCIAL CODE

§ 12. Implied Warranties; Merchantability

Expert testimony did not raise an issue not pleaded in an action for breach of implied warranty of merchantability for latent defects in an air compressor which allegedly caused a fire in plaintiff's machine shop. *Southern of Rocky Mount v. Woodward Specialty Sales*, 549.

§ 13. Particular Cases of Implied Warranties

There was no merit to defendant's contention that no implied warranty arose in the sale of an air compressor to plaintiff because the compressor was shipped to plaintiff's plant directly from the manufacturer's factory and did not physically pass from defendant to plaintiff. *Southern of Rocky Mount v. Woodward Specialty Sales*, 549.

UNIFORM COMMERCIAL CODE — Continued

Plaintiff's evidence was sufficient for the jury to find breach of the implied warranty of merchantability of an air compressor sold by defendant to plaintiff. *Ibid.*

Evidence did not require the court to instruct the jury that it could consider evidence that plaintiff had abused the goods in question in determining whether defendant breached its implied warranty of merchantability of the goods. *Ibid.*

Trial court's instruction in an action for breach of warranty of merchantability did not imply that the jury could not consider the age of the product in determining whether the defect complained of existed at the time of sale. *Ibid.*

§ 36.1. Letters of Credit

Trial court properly entered summary judgment for defendants where the sole thrust and theory of plaintiff's complaint and claim for relief was an attempt to require defendants to apply proceeds of a letter of credit, which plaintiff had purchased, according to the underlying contract between plaintiff and defendants. *Sunset Investments, Ltd. v. Sargent*, 284.

UTILITIES COMMISSION

§ 32. Property Included in Rate Base

The Utilities Commission did not err in including in the rate base of a radio common carrier the cost of a new mobile telephone terminal installed after the end of the test period without making any offsetting adjustments to revenues produced by the new terminal. *Utilities Commission v. The Public Staff*, 275.

§ 37. Working Capital as Property Included in Rate Base

The Utilities Commission did not err in using one-twelfth of the annual operation and maintenance expenses instead of one-twenty-fourth of these expenses in calculating the working capital allowance for a radio common carrier. *Utilities Commission v. The Public Staff*, 275.

§ 38. Current and Operating Expenses

G.S. 62-153 does not prohibit the Utilities Commission from considering charges to a public utility for services rendered by affiliated corporations pursuant to contracts not filed with the Commission as expenses of the utility for purposes of ratemaking. *Utilities Commission v. Intervenor Residents*, 222.

The Utilities Commission must determine the reasonableness of charges to a public utility by an affiliated corporation in one of three permissible ways. *Ibid.*

The Utilities Commission properly approved a service contract between a water and sewer facility and an affiliated corporation. *Ibid.*

The Utilities Commission properly included in a radio common carrier's test period operating expenses certain costs related to the provision of dispatch services by its answering service to its radio common carrier customers. *Utilities Commission v. Public Staff*, 275.

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey

A contract to convey land was not required to be delivered in order to be valid. *Shepard, Inc. v. Kim, Inc.*, 700.

WILLS

§ 28.5. Consideration of Whole Will

Trial court properly concluded as a matter of law that the intention of the testator, as gathered from a review of the entire will, was to make an absolute devise of all his property to his wife. *Adcock v. Perry*, 724.

§ 31.1. Rule in Shelley's Case, "Heirs"

Where testator devised a life estate in realty to his son with the remainder "to be divided among [the son's] heirs at law," the Rule in Shelley's case did not apply to give the son fee simple title to the realty. *Jones v. Stone*, 502.

WORD AND PHRASE INDEX

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