NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 58

6 JULY 1982

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21 SEPTEMBER 1982

RALEIGH
1983

CITE THIS VOLUME
58 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

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Judges

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1. Appointed Judge 6 December 1982 to succeed John T. Kilby who retired 5 December 1982.

2. Appointed Chief Judge 2 March 1983 to succeed James O. Israel, Jr. who retired 1 March 1983.

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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

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GENERAL STATUTES CITED AND CONSTRUED

G.S.	
75-1.1	Cameron v. New Hanover Memorial Hospital, 414
90-21.13(a)(1)	Nelson v. Patrick, 546
90-72	State v. White, 558
90-73	State v. White, 558
90-87(15)	State v. Piland, 95
90-90(a)4	State v. Proctor, 631
90-95(h)(3)	State v. Proctor, 631
90-95(h)(6)	State v. Long, 467
90-101(g) & (h)	State v. Piland, 95
90-202.12	Cameron v. New Hanover Memorial Hospital, 414
97-2	Baldwin v. Piedmont Woodyards, Inc., 602
97-2(5)	York v. Unionville Volunteer Fire Dept., 591
97-2(9)	Priddy v. Cone Mills Corp., 720
97-17	Baldwin v. Piedmont Woodyards, Inc., 602
97-31	York v. Unionville Volunteer Fire Dept., 591
97-38	Baldwin v. Piedmont Woodyards, Inc., 602
97-53(13)	Priddy v. Cone Mills Corp., 720
97-88	Buck v. Proctor & Gamble, 804
105-164.4(1)(g)	Deep River Farms v. Lynch, Sec. of Revenue, 165
108-61.2	Malloy v. Daniel, 61
108A-92	Alamance County v. Dept. of Human Resources, 748
115-142	Rhodes v. Board of Education, 130
115-363	Harrell v. Wilson County Schools, 260
115-375	Harrell v. Wilson County Schools, 260
126-36	Dept. of Correction v. Gibson, 241
131-126.11A	Cameron v. New Hanover Memorial Hospital, 414
131-126.11B	Cameron v. New Hanover Memorial Hospital, 414
131-170	Cameron v. New Hanover Memorial Hospital, 414
136-29	In re Huyck Corp. v. Mangum, Inc., 532
136-126	Givens v. Town of Nags Head, 697
136-131	Givens v. Town of Nags Head, 697
143-291	In re Huyck Corp. v. Mangum, Inc., 532

G.S.	
143-422.2	Dept. of Correction v. Gibson, 241
150A-48	American Motors Sales Corp. v. Peters, 684
156-81(a) & (i)	White v. Pate, 402
160A-36	Scovill Mfg. Co. v. Town of Wake Forest, 15
160A-36(c)	Scovill Mfg. Co. v. Town of Wake Forest, 15
160A-37(e)(1)	Scovill Mfg. Co. v. Town of Wake Forest, 15
160A-42(1) & (2)	Scovill Mfg. Co. v. Town of Wake Forest, 15
160A-49(f)	Moore v. Swinson, 714
160A-296(2)	Cooper v. Town of Southern Pines, 170
160A-298(c)	Cooper v. Town of Southern Pines, 170

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
13	Harris v. Harris, 314
13(a)	Stines v. Satterwhite, 608
14(a)	Jones v. Collins, 753
14(c)	In re Huyck Corp. v. Mangum, Inc., 532
15(c)	Thorpe v. Wilson, 292
37	Carpenter v. Cooke, 381
	Midgett v. Crystal Dawn Corp., 734
37(a)(2)	First Citizens Bank v. Powell, 229
37(d)	First Citizens Bank v. Powell, 229
41(b)	Carpenter v. Cooke, 381
53(e) & (f)(2)	Davis v. Davis, 25
54(b)	Harris v. Harris, 175
58	In re Allen, 322
59	Sizemore v. Raxter, 236
59(a)(1)	Horne v. Trivette, 77
68(a)	Scallon v. Hooper, 551
68.1	Pierce v. Pierce, 815
70	Harris v. Harris, 175

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 34	American Motors Sales Corp. v. Peters, 684
Art. IV, § 17(3)	State v. Greer, 703

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
9(b)(3)	State v. Long, 467
9(c)(1)	State v. Wilson, 818
28(b)(4)	State v. Wilson, 818

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

Case	*Reported*	*Disposition in Supreme Court*
Broughton v. Broughton	58 N.C. App. 778	Denied, 307 N.C. 269
Cameron v. New Hanover Memorial Hospital	58 N.C. App. 414	Denied, 307 N.C. 127 Appeal Dismissed
Carpenter v. Cooke	58 N.C. App. 381	Denied, 306 N.C. 740 Appeal Dismissed
Carver v. Carver	55 N.C. App. 716	Allowed, 307 N.C. ---
Cassidy v. Cheek	58 N.C. App. 742	Allowed, 307 N.C. 269
Connolly v. Sharpe	58 N.C. App. 606	Denied, 307 N.C. 127 Appeal Dismissed
Davis v. Davis	58 N.C. App. 25	Denied, 307 N.C. 127
Development Corp. v. James	58 N.C. App. 506	Denied, 306 N.C. 704
First Citizens Bank v. Powell	58 N.C. App. 229	Allowed, 306 N.C. 740
Givens v. Town of Nags Head	58 N.C. App. 697	Denied, 307 N.C. 127 Appeal Dismissed
Gunther v. Blue Cross/Blue Shield	58 N.C. App. 341	Denied, 306 N.C. 556
Hallan v. Hallan	58 N.C. App. 820	Denied, 307 N.C. 269
Harrell v. Wilson County Schools	58 N.C. App. 260	Denied, 306 N.C. 740 Appeal Dismissed
Harris v. Harris	58 N.C. App. 314	Allowed, 306 N.C. 740
Helvy v. Sweat	58 N.C. App. 197	Denied, 306 N.C. 741
Hofler v. Hill	58 N.C. App. 201	Allowed, 306 N.C. 741
Hofler v. Hill	58 N.C. App. 239	Allowed, 306 N.C. 741
Horne v. Trivette	58 N.C. App. 77	Denied, 306 N.C. 741
In re Collins	58 N.C. App. 568	Denied, 306 N.C. 741
In re Kasim	58 N.C. App. 36	Denied, 306 N.C. 742
James v. James	58 N.C. App. 371	Denied, 306 N.C. 742
Martin v. Mars Mfg. Co.	58 N.C. App. 577	Denied, 306 N.C. 742
McCauley v. Austin	58 N.C. App. 821	Denied, 307 N.C. 270
McCollum v. Grove Mfg. Co.	58 N.C. App. 283	Allowed, 306 N.C. 742
Melton v. Wagner	58 N.C. App. 239	Denied, 306 N.C. 743
Mendlovitz v. Mendlovitz	58 N.C. App. 413	Denied, 306 N.C. 743

Case	*Reported*	*Disposition in Supreme Court*
Merritt v. CP&L	58 N.C. App. 820	Denied, 307 N.C. 270
Miller Machine Co. v. Miller	58 N.C. App. 300	Denied, 306 N.C. 743
Orange Water & Sewer v. Town of Carrboro	58 N.C. App. 676	Denied, 307 N.C. 127
Perry v. Perry	58 N.C. App. 606	Denied, 307 N.C. 128
Powell v. Shull	58 N.C. App. 68	Denied, 306 N.C. 743
Rhodes v. Board of Education	58 N.C. App. 130	Denied, 306 N.C. 744 Appeal Dismissed
Scallon v. Hooper	58 N.C. App. 551	Denied, 306 N.C. 744
Scovill Mfg. Co. v. Town of Wake Forest	58 N.C. App. 15	Denied, 306 N.C. 559
Shortt v. Knob City Investment Co.	58 N.C. App. 123	Denied, 306 N.C. 744
Sizemore v. Raxter	58 N.C. App. 236	Denied, 306 N.C. 744
Southern Railway Co. v. ADM Milling Co.	58 N.C. App. 667	Denied, 307 N.C. 270
State v. Atkins	58 N.C. App. 146	Denied, 306 N.C. 744
State v. Bivins	58 N.C. App. 822	Denied, 307 N.C. 270
State v. Brown	58 N.C. App. 606	Allowed, 307 N.C. 271
State v. Christopher	58 N.C. App. 788	Allowed, 307 N.C. 271
State v. Coltrane	58 N.C. App. 210	Allowed, 306 N.C. 745
State v. Crawford	58 N.C. App. 160	Denied, 306 N.C. 745 Appeal Dismissed
State v. Davis	58 N.C. App. 330	Denied, 306 N.C. 745
State v. Easterling	58 N.C. App. 239	Denied, 306 N.C. 745
State v. Gooch	58 N.C. App. 582	Allowed, 306 N.C. 560
State v. Gray	58 N.C. App. 102	Denied, 306 N.C. 746
State v. Greer	58 N.C. App. 703	Allowed, 307 N.C. 470
State v. Hall	54 N.C. App. 672	Denied, 307 N.C. 470
State v. Harris	58 N.C. App. 239	Denied, 306 N.C. 746
State v. Harris	58 N.C. App. 239	Denied, 306 N.C. 746
State v. James	58 N.C. App. 239	Denied, 306 N.C. 746
State v. Justice	58 N.C. App. 240	Denied, 306 N.C. 746 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Knight	58 N.C. App. 240	Denied, 306 N.C. 747
State v. Kornegay	56 N.C. App. 258	Denied, 306 N.C. 747
State v. Lang	58 N.C. App. 117	Denied, 306 N.C. 747
State v. Lang	58 N.C. App. 117	Denied, 306 N.C. 747
State v. Lindsey	58 N.C. App. 606	Denied, 306 N.C. 747
State v. Lingerfelt	58 N.C. App. 606	Denied, 307 N.C. 272
State v. Mackey	58 N.C. App. 385	Denied, 306 N.C. 748 Appeal Dismissed
State v. Paul	58 N.C. App. 723	Denied, 307 N.C. 128
State v. Peterson	58 N.C. App. 240	Denied, 306 N.C. 748
State v. Piland	58 N.C. App. 95	Denied, 306 N.C. 562 Appeal Dismissed
State v. Proctor	58 N.C. App. 631	Denied, 306 N.C. 749
State v. Proctor	58 N.C. App. 413	Denied, 306 N.C. 749
State v. Richardson	58 N.C. App. 822	Allowed, 306 N.C. 749
State v. Sellers	58 N.C. App. 43	Denied, 306 N.C. 749 Appeal Dismissed
State v. Strange	56 N.C. App. 263	Denied, 307 N.C. 128 Appeal Dismissed
State v. Tate	58 N.C. App. 493	Denied, 306 N.C. 750 Appeal Dismissed
State v. Tillman	58 N.C. App. 821	Denied, 307 N.C. 129
State v. Whaley	58 N.C. App. 233	Denied, 306 N.C. 563
State v. Whitley	58 N.C. App. 539	Denied, 306 N.C. 750 Appeal Dismissed
State v. Wilhite & Rankin	58 N.C. App. 654	Denied, 307 N.C. 129 Appeal Dismissed
State v. Wilkerson & Wilkerson	58 N.C. App. 240	Denied, 306 N.C. 750
State v. Williams	58 N.C. App. 821	Denied, 307 N.C. 472
State v. Williams & Griffin	58 N.C. App. 607	Denied, 306 N.C. 751
State v. Willoughby	58 N.C. App. 746	Denied, 307 N.C. 129
State ex rel. Utilities Commission v. Public Staff	58 N.C. App. 480	Allowed, 306 N.C. 751
Steed v. First Union National Bank	58 N.C. App. 189	Denied, 306 N.C. 751

Case	*Reported*	*Disposition in Supreme Court*
Sunbow Industries, Inc. v. London	58 N.C. App. 751	Denied, 307 N.C. 272
Tastinger v. Tastinger	58 N.C. App. 240	Denied, 306 N.C. 751
Tate v. Gardner	58 N.C. App. 821	Denied, 307 N.C. 473 Appeal Dismissed
Town of Atlantic Beach v. Young	58 N.C. App. 597	Allowed, 306 N.C. 752
Turner v. Brooks	58 N.C. App. 821	Denied, 307 N.C. 272
Whedon v. Whedon	58 N.C. App. 524	Denied, 306 N.C. 752
White v. Pate	58 N.C. App. 402	Allowed, 306 N.C. 752
Wilkie v. Wilkie	58 N.C. App. 624	Denied, 306 N.C. 752

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

QUALITY INNS INTERNATIONAL, INC., A DELAWARE CORPORATION v. BOOTH, FISH, SIMPSON, HARRISON AND HALL, A NORTH CAROLINA PARTNERSHIP, KONRAD K. FISH, ROY M. BOOTH, H. MARSHALL SIMPSON, A. WAYNE HARRISON, RICHARD D. HALL, JR., FREDERICK C. E. MURRAY, E. JACKSON HARRINGTON, JR. AND ROBERT A. BENSON

No. 8118SC1063

(Filed 6 July 1982)

1. **Attorneys at Law § 5.1; Judgments § 41; Mortgages and Deeds of Trust § 27— manner of conducting foreclosure sale—consent judgment as res judicata**

A consent order agreed to by plaintiff showing that a motel foreclosure sale did not leave a surplus because the amount of the approved bid was less than the outstanding indebtedness was *res judicata* on the issue of a surplus from the sale and estopped plaintiff from asserting that defendant attorney was negligent in giving plaintiff creditor advice as to how much to bid at the foreclosure sale so as to avoid a surplus payable to the defaulting debtor and in conducting the sale as substitute trustee in a manner so that a surplus was created.

2. **Attorneys at Law § 5.1— malpractice action—errors of judgment—summary judgment**

In an action against attorneys to recover damages on theories (1) that defendant attorneys lacked that degree of knowledge and skill ordinarily possessed by attorneys handling real estate transactions and (2) that defendants failed to use reasonable care and diligence in handling plaintiff's problems with respect to recovering the personal property in a motel, summary judgment was properly entered for defendants where the forecast of evidence showed that the problem with which defendants were entrusted grew from an uncertain and unsettled area of the law relating to "wrap-around" mortgages, that there was no bad faith on the part of defendants, and that plaintiff seeks to hold defendants liable in damages for asserted errors of judgment.

APPEAL by plaintiff from *Collier, Judge.* Order entered 14 May 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 May 1982.

In its complaint, plaintiff set out two claims for relief. As to its first claim, plaintiff's unverified complaint alleged, in summary, the following events and circumstances:

> 5. On . . . August 30, 1973, the plaintiff executed a note payable to First Union National Bank in the face amount of Six Hundred Thousand Dollars ($600,000.00) . . . . The terms of the First Union Note provided that the plaintiff would pay the principal and interest in monthly installments of Six Thousand, Ninety Dollars ($6,090.00) beginning on October 1, 1973, and ending on October 1, 1983. As security for the First Union Note, the plaintiff executed a Deed of Trust conveying certain property . . . in Greensboro, North Carolina . . . known as the "Quality Inn Central" . . . ("Motel") to Eugene B. Graham, III, as Trustee for First Union . . . . The First Union Deed of Trust was recorded on August 31, 1973, in Book 2668 at Page 688 of the Guilford County Registry.
>
> 6. On or about December 6, 1974, the plaintiff sold the Motel to Peter M. Watts and Saundra C. Watts . . . ("Watts"). As part of this transaction, Watts executed and delivered to the plaintiff a Note in the principal amount of Six Hundred Eighty-Four Thousand, Three Hundred and Fifty-Three Dollars and Seven Cents ($684,353.07) . . . . The payment schedule contained in the Watts Note was, in part, designed to coincide with that of the First Union Note, on which the plaintiff remained primarily liable. The Watts Note was secured by the Watts Deed of Trust, which conveyed to William Dunlop White, Jr., as Trustee, the same property conveyed by the First Union Deed of Trust.
>
> 7. The plaintiff and Watts intended that the Watts Deed of Trust would constitute a "wrap around" mortgage which would encompass the obligation evidenced by the First Union Note and the First Union Deed of Trust. The plaintiff was obligated to use the payments received under the Watts Note to reduce its obligation under the First Union Note.

8. On . . . April 21, 1976, Watts conveyed the Motel to Petlin, Incorporated. As part of this transaction, Petlin assumed all of the obligations of Watts under the Watts Note and Watts Deed of Trust.

9. Or [sic] . . . June 9, 1977, Petlin, Incorporated conveyed the Motel to Greenway Motel, Inc. . . . ("Greenway"). As part of this transaction, Greenway assumed the Watts Note and the Watts Deed of Trust.

10. After this conveyance, Greenway began making all of the installment payments required under the Watts Note and Deed of Trust to the plaintiff until September, 1977, after which time Greenway failed to make any further payments. After this default in the payment of the Watts Note, the plaintiff requested defendant Fish, as Substitute Trustee under the Watts Deed of Trust, to institute foreclosure proceedings.

11. A foreclosure hearing was held on October 3, 1978, and, as a result thereof, the Clerk of Superior Court of Guilford County entered an order authorizing the Substitute Trustee to sell the Motel. The unpaid balance of the Watts Note at the time was approximately Six Hundred One Thousand Six Hundred Dollars ($601,600.00).

12. Prior to the foreclosure sale, officers of the plaintiff consulted with defendant Fish, as attorney for the plaintiff, with regard to the amount which the plaintiff should bid at the sale. It was the intention of the plaintiff, as expressed to defendant Fish, to bid an amount below the amount of the outstanding indebtedness on the Watts Note so as not to create a surplus payable to the debtor in default. Defendant Fish advised the plaintiff as to the required application of the proceeds of the sale and approved of the plaintiff's decision to enter a bid of Five Hundred Eighty-Five Thousand Dollars ($585,000.00) at the sale.

13. Prior to the foreclosure sale, defendant Fish, as Trustee, published and posted a Notice of Sale, advertising that the Motel was to be sold on October 26, 1978. The Notice provided that the sale would be "subject to" the First Union Deed of Trust. No mention was made in the Notice of the

plaintiff's obligation and intention to apply the proceeds of the sale to the outstanding balance due on the First Union Note.

14. On or about October 26, 1978, defendant Fish, as Trustee, conducted the foreclosure sale of the Motel. At the sale, defendant Fish announced that the Motel was being sold "subject to" the First Union Deed of Trust. Defendant Fish did not state that the plaintiff was obligated and intended to apply the proceeds of the sale to the outstanding balance due on the First Union Note. The plaintiff was the highest and only bidder at the sale, with a bid of Five Hundred and Eighty-Five Thousand Dollars ($585,000.00).

15. On or about November 6, 1978, an attorney for Greenway wrote a letter to defendant Fish, as Trustee, demanding payment of Five Hundred Five Thousand Dollars ($505,000.00) which it claimed as a surplus created by the plaintiff's bid of Five Hundred Eighty-Five Thousand Dollars ($585,000.00). Greenway contended that since the sale was "subject to" the First Union Deed of Trust, the amount of the indebtedness on the Watts Note was reduced by operation of the sale to an amount less than Fifty Thousand Dollars ($50,000.00).

16. As a result of this claim by Greenway, and the plaintiff's conflicting demand that the entire proceeds of the sale be delivered to it, defendant Fish, as Trustee, filed a motion in the foreclosure proceeding requesting direction from the Court as to how to proceed in completing the sale. At the same time, defendant Fish and defendant Law Firm withdrew as counsel for the plaintiff in the foreclosure proceeding.

17. The plaintiff hired new counsel to represent it in the foreclosure proceeding and incurred substantial costs and expenses, including attorney's fees, in resisting Greenway's claim for the alleged "surplus" resulting from the foreclosure sale. This issue was ultimately resolved by the execution of a settlement agreement between Greenway and the plaintiff which required the plaintiff to pay a substantial sum of money to Greenway.

18. The substantial expenses incurred by the plaintiff in resisting and ultimately settling Greenway's claim were necessitated by the merits of the claim. In part, Greenway's claim was based on the failure of defendant Fish, as Trustee, to announce publicly, either in the published Notice of Sale or at the sale itself, that, while the Motel was being sold "subject to" the First Union Deed of Trust, the Watts Deed of Trust "wrapped around" the First Union Deed of Trust and that the plaintiff was obligated to apply the proceeds of the sale to the outstanding balance on the First Union Note. This omission by defendant Fish constituted a breach of his fiduciary duty as Trustee and further reflected a failure on his part to use reasonable care and diligence in the performance of his duties as Trustee. Defendant Fish is therefore liable to the plaintiff for the damages proximately caused by this omission, including, but not limited to, the expenses the plaintiff incurred in resisting and settling Greenway's claim for the surplus of the foreclosure sale.

In its second claim, plaintiff alleged, in summary, the following events and circumstances:

. . .

20. Upon Greenway's default on the Watts Note, the plaintiff employed defendant Law Firm for the purpose of enforcing all of its rights pertaining to the Motel. In particular, the plaintiff instructed defendant Law Firm to institute foreclosure proceedings on the Watts Deed of Trust, to enforce the plaintiff's security interest in certain personal property located on the Motel premises, and to seek to have a receiver appointed to operate the Motel during the pendency of the foreclosure proceedings.

. . .

23. In consulting defendant Fish prior to the foreclosure sale with regard to an appropriate bid, the plaintiff was relying on the judgment and expertise in real estate matters of defendant Fish and defendant Law Firm. In advising the plaintiff, defendant Fish never discussed with officials of the plaintiff the possibility that a bid of Five Hundred Eighty-Five Thousand Dollars ($585,000.00) would create a substan-

tial surplus payable to the debtor in default. Further, defendant Fish did not mention the possible defects in the published Notice of Sale or in the announcement which he, as Trustee, would make at the sale. Had the plaintiff been aware of these potential problems, it would have taken some action to eliminate any potential claim by the debtor for a surplus arising out of its bid.

24. By making a bid of Five Hundred Eighty-Five Thousand Dollars ($585,000.00) at the foreclosure sale after consulting with defendant Fish and relying on his advice, the plaintiff exposed itself to Greenway's claim for the surplus resulting from the sale. . . .

25. Notwithstanding the plaintiff's request that defendant Law Firm enforce its security interest in certain personal property located on the Motel premises, no member of defendant Law Firm took any action to institute appropriate proceedings in this regard. Further, the plaintiff was never informed by defendant Law Firm that no such action would be taken.

26. Defendant Law Firm's failure to enforce the plaintiff's security interest enabled Greenway to maintain possession and use of the personal property during the pendency of the foreclosure proceeding, thus diminishing the value of the property and causing injury to the plaintiff.

27. Defendant Law Firm assigned the task of seeking the appointment of a receiver for the Motel to defendant Benson, at that time an employee of the firm. Defendant Benson was unsuccessful in his efforts to have a receiver appointed primarily because the petition he prepared was not limited to the Motel property but sought to place the entire Greenway corporation in receivership.

28. This failure by defendant Law Firm to have a receiver appointed for the Motel enabled Greenway to operate the Motel during the pendency of the foreclosure proceeding, thus resulting in substantial injury to the plaintiff.

29. Defendant Fish continued to act as both attorney for the plaintiff and as Trustee under the Watts Deed of Trust

after the institution of the foreclosure proceedings on said deed of trust and after it became apparent that Greenway could contest the proceeding. Defendant Fish and defendant Law Firm did not withdraw as counsel for the plaintiff until after the foreclosure sale, at which point it became necessary for the plaintiff to employ new counsel. The plaintiff therefore incurred substantial additional expenses in hiring and educating new counsel.

30. The acts and omissions of defendant Fish, Benson and the other members of defendant Law Firm with regard to the foreclosure on the Watts Deed of Trust, the enforcement of the plaintiff's security interest in the personal property located on the Motel premises, and the appointment of a receiver for the Motel reflect either a want of that degree of knowledge and skill ordinarily possessed by attorneys handling commercial real estate transactions or a failure to use reasonable care and diligence in handling these matters. The defendants are therefore guilty of legal malpractice and negligence and are liable to the plaintiff for those damages proximately caused by these acts and omissions, ...

In their answer, defendant moved to dismiss, admitted that at the 3 October 1978 hearing, the Clerk of Superior Court had determined the unpaid balance on the note to be $601,600.00, and admitted that Fish, as substitute trustee, had conducted the foreclosure sale at which plaintiff bid $585,000.00, and denied the other material allegations of plaintiff's complaint. Defendant also asserted the defenses of contributory negligence and lack of consideration, asserting that plaintiffs have neither paid defendants for Fish's services as trustee nor for legal advice rendered prior to 3 October 1978. Defendant also counterclaimed for trustee's fees. As to defendant's counterclaim, plaintiff denied its material allegations, and asserted that defendant Fish was negligent in performing his duties as trustee and thus was not entitled to trustee's fees.

After the pleadings were joined, both parties conducted discovery. Plaintiff directed interrogatories to defendant Konrad Fish and deposed Fish and Robert A. Benson. Defendant also directed interrogatories to plaintiff and took depositions of Thomas S. Stukes and Richard A. Lieppe, partners in the law

firm of Smith, Moore, Smith, Schell and Hunter, and William T. Rightsell, Greenway's counsel. Defendant then moved for summary judgment. Defendant's motion was supported by affidavits of Fish and R. D. Douglas, III and J. T. Carruthers, Jr., Greensboro attorneys in real estate practice. In opposition to defendant's motion, plaintiff submitted an affidavit of Everett F. Casey, Staff Attorney for plaintiff.

Upon review of the materials before him, Judge Collier granted defendants' G.S. 1A-1, Rule 56(c) motion for summary judgment. From entry of that judgment, plaintiff appeals. Additional facts will be discussed, as necessary, in the body of the opinion.

Pfefferkorn & Cooley, P.A., by David C. Pishko, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts, M. Jay DeVaney, and Beth H. Daniel, for defendant-appellee.

WELLS, Judge.

Plaintiff's claims for relief are grounded in tort, asserting defendants' negligence in the performance of their duties as trustee under the deed of trust and as lawyers owing a duty to plaintiff as a client. In regard to summary judgment in a negligence action, our Supreme Court has stated:

> As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 946 (2d ed. 1980). Hence, it is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. *Caldwell v. Deese*, supra; Gordon, the New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87, 92 (1969).

Vassey v. Burch, 301 N.C. 68, 269 S.E. 2d 137 (1980); *see also Easter v. Hospital*, 303 N.C. 303, 278 S.E. 2d 253 (1981). In *Lowe*

v. Bradford, 305 N.C. 366, 289 S.E. 2d 363 (1982), our Supreme Court explicated the burden of proof on a summary judgment motion:

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970). If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 421-22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E. 2d at 798. . . .
>
> If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to "set forth *specific facts* showing that there is a genuine issue for trial." Rule 56(e), Rules of Civil Procedure (emphasis added). The non-moving party "may not rest upon the mere allegations of his pleadings." *Id.*

[1] Plaintiff's first claim relates to defendant Fish's conduct as substitute trustee in the Watts' deed of trust, and to the manner in which Fish conducted the foreclosure sale. In essence, plaintiff asserts that it sought to have the property foreclosed in a manner so as to avoid creating a surplus payable to Greenway, and that as a result of the advice plaintiff received from Fish as to how much plaintiff should bid at the sale, a surplus was in fact created, which surplus Greenway claimed. Plaintiff further asserts that as a result of Greenway's assertion of its claim to an alleged surplus, plaintiff was damaged by having to pay Greenway $30,000.00 to settle Greenway's claim, plus incurring addi-

tional legal fees and other expenses in connection with Greenway's claim. The record shows, however, that following Greenway's claim to an alleged surplus resulting from the foreclosure, Fish filed a motion before the Clerk, seeking instructions as to how to dispose of the proceeds of the foreclosure sale. The matter was subsequently transferred to the civil issue docket of the Superior Court. On 25 June 1979, Judge Collier entered a consent order disposing of all issues in the foreclosure proceedings. The order consented to by plaintiff, provides, in pertinent part, as follows:

> [U]pon the Motion in the Cause of the Trustee . . . and upon the Consent Order . . . for trial of all issues, and it appearing to the Court that Quality Inns International, Inc. ("Quality") and Greenway Motels, Inc. ("Greenway") have compromised and settled all matters and disputes between them and have agreed that the subject foreclosure sale should be confirmed and that the Substitute Trustee should thereupon prepare and file his final report of sale and deliver a deed to Quality upon payment of the bid as herein provided . . . ;
>
> NOW, THEREFORE, BY CONSENT IT IS ORDERED, ADJUDGED, AND DECREED that:
>
> 1. Pursuant to said agreement of compromise and settlement between Greenway and Quality, *Greenway has agreed to withdraw and hereby withdraws all its objections and claims in this proceeding. Accordingly, the foreclosure sale in this proceeding is confirmed in all respects*;
>
> . . .
>
> 3. The Substitute Trustee shall . . . prepare and file his final report of sale and deliver a deed to Quality upon payment of its bid. *Said final report shall indicate a last and highest bid by Quality in the amount of Five Hundred and Eighty Five Thousand Dollars ($585,000.00) against indebtedness at the time of foreclosure sale in the amount of Six Hundred Four Thousand Five Hundred Eighty Seven and 46/100 Dollars ($604,587.46).* Quality shall be entitled to pay said bid by crediting said bid, after payment of costs, to the above stated indebtedness and shall not be required to pay said bid in cash. . . . (Emphasis added.)

Judge Collier's order shows that the foreclosure sale did not leave a surplus, as the amount of the bid approved was less than the outstanding indebtedness. Judge Collier's order is *res judicata* on the issue of a surplus from the sale.[1] *See 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), *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980). Having consented to the order, plaintiff is estopped in this action to assert that the manner in which defendant Fish carried out the foreclosure sale resulted in a surplus. *See Lockleair v. Martin*, 245 N.C. 378, 96 S.E. 2d 24 (1956). An essential element of plaintiff's claim, a surplus, being nonexistent, summary judgment for defendants as to this issue was properly granted. *See Lowe*, supra.

Plaintiff's second claim for relief alleges that defendants were negligent in failing to take timely and adequate measures to secure plaintiff's rights in the personal property of the motel, and that defendants, as attorneys for plaintiff, were negligent in advising plaintiff as to how much to bid at the foreclosure sale. Plaintiff's contention as to the latter claim, as we read the somewhat confusing complaint, is that plaintiffs intended to submit a sufficiently low bid at the real property foreclosure sale so as to leave Greenway indebted to plaintiff, so that plaintiff could then recover or repossess the personal property to cover the remaining debt, and that when a surplus was created by plaintiff's bid, this means of recovery of the personalty was lost to plaintiff, causing financial loss. We need not reach the merits of this claim, since, for the reasons previously stated in our opinion, we find that plaintiff is estopped by judgment to plead the existence of a surplus. We therefore overrule this assignment of error.

[2] The specific allegation of negligence upon which plaintiff bases its final claim for relief is that defendants delayed taking legal action to secure plaintiff's rights to the personal property and revenues of the motel during the foreclosure proceeding, thus causing a financial loss to plaintiff. The evidence of the timing and circumstances of the events relevant to this point is conflicting.

1. As to estoppel by judgment generally, *see King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Phillips v. Phillips*, 46 N.C. App. 558, 265 S.E. 2d 441 (1980). As to consent judgments operating as *res judicata* generally, *see* Annot., 91 A.L.R. 3d 1170.

Plaintiff's evidence tends to show that during the summer of 1978, plaintiff became concerned that Greenway was violating the terms of the separate security agreement covering the personal property of the motel, by selling the motel's television sets and by failing to apply the motel's revenues to motel maintenance. In plaintiff's answer to defendants' interrogatories, plaintiff claimed that defendant Benson was first asked to seek appointment of a receiver for the motel on 15 August 1978. However, Everett Casey stated in his affidavit that he first asked Benson to file a petition for a receiver on 6 September. Casey also stated in his affidavit that he only mailed Benson a copy of the Greenway security agreement on 15 September. On 21 September, Casey also asked Benson to institute a claim and delivery proceeding. Defendants did file petitions for appointment of a receiver on 6 October and 26 October. Apparently no action was taken on the first petition, and the second petition was denied. A subsequent petition made by Smith, Moore, Smith, Schell and Hunter was granted, and on 10 November 1978 the motel was placed under the control of a receiver.

By their interrogatories and affidavits from Benson and Fish, defendants produced a forecast of evidence showing the following. Benson advised plaintiff that their security agreement on the personalty had never been incorporated into the real property deed of trust; thus, plaintiff could not recover the personal property by foreclosing on that deed of trust. Benson stated that he prepared the documents for a claim and delivery proceeding, but Casey told him not to go ahead with it until after the foreclosure. Benson also stated that he and Casey discussed the relative merits of having a receiver appointed many times. Benson advised Casey that they did not need a receiver to make them whole; the foreclosure proceeding was an adequate remedy. Benson also advised that the foreclosure hearing was scheduled for 3 October; it would be difficult to get a receiver appointed before the foreclosure hearing; and any appointment might delay the foreclosure proceeding. On approximately 15 September, Casey told Benson to wait indefinitely on filing the petition; on 3 October, Weldon Humphrey told Benson that he, Humphrey, was trying to get a receiver. On 10 October, after receiving a copy of the security agreement which was mailed 15 September, Benson wrote to Greenway, notifying them of the default and demanding

that Greenway return the personal property. Finally, Benson stated that at all times, he believed he was following plaintiff's instructions while advising them to the best of his ability, and that in fact, plaintiff did not suffer any loss, financial or otherwise in regard to the personal property.

Plaintiff seeks to proceed against defendants on two theories, or types, of malpractice: one, that defendants lacked that degree of knowledge and skill ordinarily possessed by attorneys handling real estate transactions, and two, that defendants failed to use reasonable care and diligence in handling plaintiff's problems with respect to recovering the personal property in the motel. The forecast of evidence presented by defendants in support of their summary judgment motion clearly shows that the genesis of plaintiff's problems with respect to plaintiff's entitlement to the personal property in the motel was in plaintiff's uncertainty as to how to proceed with the foreclosure of the real property. Defendant's forecast shows that defendants were aware that plaintiff regarded the Watts deed of trust as a "wrap-around" mortgage, or at least intended it to be such, but that plaintiff was uncertain as to how to effectively foreclose such a mortgage so as to not create a surplus to which Greenway might assert claim or which Greenway might use to retain possession of the personal property of the motel. Plaintiff's own forecast of evidence also reflects uncertainty of the law and appropriate strategy on plaintiff's part. Affidavits and depositions of skilled lawyers for both parties reflect that the so-called "wrap-around" mortgage is an area of real property law not well understood by property lawyers in North Carolina, and further, that the foreclosure of such a mortgage is fraught with questions and uncertainty.[2]

The test of lawyer liability in such cases was set out by our Supreme Court in *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954), as follows:

> Ordinarily when an attorney engages in the practice of law and contracts to prosecute an action in behalf of his

2. Our research has disclosed only one commentary as to this type of real estate financing, *see* "Wrap-around Financing: A Technique for Skirting the Usury Laws?" 1972 Duke L.J. 785 (1972), and only one case dealing with a "wrap-around" mortgage, *J. M. Realty Investment Corp. v. Stern*, 296 So. 2d 588 (Fla. Dist. Ct. App. 1974).

client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. (Citations omitted.)

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. (Citations omitted.)

Accord, Mallen and Levit, Legal Malpractice, § 213 (2nd ed. 1981).[3] *See also* Mallen and Davis, "Attorneys' Liability For Errors of Judgment—at the Crossroads," 48 Tenn. L. Rev. 283 (1981); "Attorney Malpractice," 63 Colum. L. Rev. 1292 (1963); 7 Am. Jur. 2d, Attorneys at Law, § 201; Annot., 59 A.L.R. 3d 1176, § 2[a]; Annot., 45 A.L.R. 2d 5, § 3.

The forecast of evidence in this case clearly shows that plaintiff seeks to hold defendants liable in damages for asserted errors of judgment. The forecast of evidence shows that there was no bad faith on defendants' part, and that the problem with which defendants were entrusted grew from an uncertain and unsettled area of law. Defendants were therefore entitled to judgment as a matter of law on plaintiff's malpractice claim.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and ARNOLD concur.

3. Mallen and Levit discuss lawyer judgmental liability at length in Chapter 9 of their above cited work. Their discussion emphasizes the perils associated with judgmental hindsight applied to unsettled questions of law in legal malpractice cases.

SCOVILL MANUFACTURING COMPANY, INC., SCHRADER FLUID POWER DIVISION, HAYWOOD BARHAM, BETTY L. BARHAM, KENNETH COTTRELL, SHIRLEY COTTRELL, CLARA LEE DAVIS, WIDOW, SUZANNE MILLS ERSKINE, WAYNE ERSKINE, JOHN E. FINCH, ROSE S. FINCH, WILLIAM S. FORT, SARAH FORT, BETTY J. FRANKOW, DAVID M. FRANKOW, MANNIE K. JACKSON, EDWARD R. JACKSON, HARVEY M. JONES, JR., GERALDINE J. JONES, WALLACE E. LOOPER, CAROL H. LOOPER, JOHN G. MILLS, JR., WIDOWER, JOHN G. MILLS, III, JOANNA MILLS, WILLIAM R. MIMS, NANCY F. MIMS, A. K. MOORE, LINDA C. MOORE, AND MAE S. WITHERS, WIDOW v. THE TOWN OF WAKE FOREST, NORTH CAROLINA, THOMAS J. BYRNE, MAYOR AND MEMBER OF THE BOARD OF COMMISSIONERS OF THE TOWN OF WAKE FOREST, NORTH CAROLINA, AND FRED CHANDLEY, JOHN B. COLE, MRS. DESSIE HARPER, GUY G. HILL AND MISS AILEY YOUNG, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF WAKE FOREST, NORTH CAROLINA

SCOVILL MANUFACTURING COMPANY, INC., SCHRADER-BELLOWS DIVISION, HAYWOOD BARHAM, BETTY L. BARHAM, KENNETH COTTRELL, SHIRLEY COTTRELL, CLARA LEE DAVIS, WIDOW, SUZANNE MILLS ERSKINE, WAYNE ERSKINE, JOHN E. FINCH, ROSE S. FINCH, WILLIAM S. FORT, SARAH FORT, MANNIE K. JACKSON, EDWARD R. JACKSON, HARVEY M. JONES, JR., GERALDINE J. JONES, WALLACE E. LOOPER, CAROL H. LOOPER, JOHN G. MILLS, JR., WIDOWER, JOHN G. MILLS, III, JOANNA MILLS, WILLIAM R. MIMS, NANCY F. MIMS, FRED S. DICKERSON, LINDA B. DICKERSON, GLADYS C. DICKERSON, WIDOW, JOSEPH MARION HARRISON, SHIRLEY D. HARRISON, CARL KEARNEY, LOIS KEARNEY, EVELYN R. KEARNEY v. THE TOWN OF WAKE FOREST, NORTH CAROLINA, THOMAS J. BYRNE, MAYOR AND MEMBER OF THE BOARD OF COMMISSIONERS OF THE TOWN OF WAKE FOREST, NORTH CAROLINA, AND FRED CHANDLEY, JOHN B. COLE, RUFUS H. FORREST, GUY G. HILL AND MISS AILEY YOUNG, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF WAKE FOREST, NORTH CAROLINA

No. 8110SC963

(Filed 6 July 1982)

1. Municipal Corporations § 2.2— annexation ordinance—utility easement characterized as industrial use—no error

In an annexation proceeding, an area to be annexed which was comprised of a utility easement was properly classified as property in use for industrial purposes since the transmission of electrical power is an industrial activity for an urban use as described by G.S. 160A-36(c).

2. Municipal Corporations § 2.1— annexation—characterizing property as six lots rather than one tract—proper

In holding that 65.05% of the residential and undeveloped lots in an area to be annexed consisted of lots and tracts of five acres or less in size pursuant to G.S. 160A-36(c), the trial judge did not err in finding that one petitioner's

land was comprised of six separate lots rather than one tract of 9.5 acres where the estimates were based on recorded plats, tax maps and deeds, an aerial photograph, and personal observations of the land surveyor. G.S. 160A-42(1) and (2).

3. Municipal Corporations § 2.1— metes and bounds of annexation area—described in ordinance—reference by court to description

There was no merit to the petitioners' contention that the trial judge's order did not contain a "direct statement" that the ordinance described the external boundaries of the annexation area by metes and bounds, as required by G.S. 160A-37(e)(1), since the judge made repeated reference to the ordinance and its accompanying attachment which set out the metes and bounds description of the proposed annexation area.

4. Evidence § 48.3— failure to object to qualification of expert

Where petitioners failed to challenge the competency of the testimony of a licensed registered engineer and land surveyor, and where the record shows that the trial judge properly could have found the witness to be an expert, petitioners waived their objection and it will not be considered on appeal.

5. Municipal Corporations § 2.1— annexation—use of planimeter in determining acreage—no showing of error over five percent

In an annexation proceeding, petitioners failed to show error in a surveyor's testimony concerning his use of a planimeter in determining the acreage of the proposed annexation area since under G.S. 160A-42(1), the reviewing court shall accept the estimates unless petitioners show on appeal that such estimates are in error in the amount of five percent or more, and petitioners failed to do so.

6. Municipal Corporations § 2.5— annexation—failure to show material injury

In an annexation proceeding, petitioners failed to show that they will suffer material injury by reason of the proposed annexation where the record revealed that the grievances and feared injury by petitioners were primarily speculation that the increased services inuring to their property from the proposed annexation either would not materialize or would not be sufficient to offset any increase in their tax burden.

7. Municipal Corporations § 2.2— failure to specify 60 percent of area subdivided into lots and tracts of five acres or less—sufficient compliance with all essential statutory provisions

An ordinance concerning annexation did not comply with G.S. 160A-37(e)(1) which mandates that the ordinance shall contain specific findings that the area to be annexed meets the requirements of G.S. 160A-36 where it did not state that 60 percent of the net residential and undeveloped land in the proposed annexation area was subdivided into lots and tracts of five acres or less. However, the failure to comply with the statutory procedure did not result in its invalidation where there was substantial compliance with the statute in delineating the proposed annexation area and there was no reasonable probability that anyone had been or could have been misled.

8. **Municipal Corporations § 2.3— survey map incorrectly admitted into evidence—no request to limit use of exhibit**

Although petitioners were correct that a survey map of the area to be annexed, which was not prepared under a court order, was incorrectly admitted into evidence, they failed to make a timely request at trial to limit the use of the exhibit, and there was no error.

APPEAL by petitioners from *Godwin, Judge.* Order entered 21 April 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 29 April 1982.

On 10 March 1977, the Board of Commissioners of the City of Wake Forest, a city with a population of less than five thousand, adopted its ordinance #77-3 purporting to annex certain described territory lying west of the corporate limits. Pursuant to G.S. 160A-38, petitioners filed a petition seeking review in Wake County Superior Court on 8 April 1977. By order dated 11 December 1978, the superior court remanded the matter to Wake Forest for amendment of the boundaries of the area to be annexed in order to comply with G.S. 160A-36(c). This Court subsequently affirmed the action of the trial court. *Scovill Manufacturing Company, Inc. v. Town of Wake Forest,* No. 7910SC229 (Unpublished Opinion dated 5 February 1980).

On 8 February 1979, within a period of three months after the order of remand was entered, the board of commissioners adopted ordinance #79-2 which amended the boundaries of the area to be annexed. On 9 March 1979, petitioners again sought review in superior court. From an order affirming the ordinance, petitioners appeal to this Court.

Lake & Nelson, by Broxie J. Nelson, for corporate petitioner-appellant.

Harris & Harris, by Jane P. Harris, for individual petitioner-appellants.

Ellis Nassif and Manning, Fulton & Skinner, by Howard E. Manning and Howard E. Manning, Jr., for respondent-appellees.

HILL, Judge.

Where the record upon judicial review of an annexation proceeding demonstrates substantial compliance with statutory re-

quirements by the municipality, the burden is placed on petitioners to show by competent evidence a failure to meet those requirements or an irregularity in the proceedings which resulted in material prejudice to their substantive rights. *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E. 2d 873 (1974). The findings of fact of the superior court are binding on appeal if supported by competent evidence, even though there is evidence to the contrary. *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979).

Our review of the annexation proceedings in the present case leads us to conclude that Wake Forest's report and ordinance show *prima facie* full compliance with the applicable statutes. The burden is now on petitioners to show otherwise or prove a procedural irregularity which materially prejudiced their substantive rights.

[1] Petitioners first argue that the trial judge erred in finding that 9.03 acres of the area known as the "Carolina Power & Light Company [hereinafter referred to as CP&L] easement" are used for industrial purposes within the meaning of G.S. 160A-36(c). Although the easement is crossed by power lines, petitioners contend that since the area also is used for hunting and other similar activities, the land should be classified as woodlands and vacant area instead of designated as being in industrial use.

G.S. 160A-36(c) requires that the land proposed for annexation must be developed for "urban purposes," which is defined as an area that

> is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

Both the "use" test and the "subdivision" test must be met before an area can be classified as urban. *Lithium Corporation of America, Inc. v. Town of Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964). Petitioners allege that modification of the amount of land qualifying under the "use" test would result in an inability to

meet the "subdivision" test, thus rendering the proposed annexation area ineligible for annexation.

The land in question consists of 12.32 acres, and the "CP&L easement" itself is 160 feet in width for its full length, running North to South, in the area to be annexed. The easement contains three separate electrical transmission lines and supporting structures, with pole lines carrying between 66,000 and 115,000 volts of electricity. CP&L patrols the easement three times a year by helicopter and once on foot. The entire tract is mowed with tractors and bush-hogs or on foot every three years unless more frequent servicing is necessitated. CP&L does not allow any activity on the easement which would interfere with the transmission lines or which would be subject to danger because of the lines. No structures such as houses or other buildings are allowed on the area covered by the easement. CP&L does permit certain activities on the land, such as hunting or golf, so long as they create no interference with its utilization of the easement or do not present a hazard.

We find no error in the trial judge's classification of the entire area comprising the "CP&L easement" as being in industrial use. Petitioners argue that strict construction of an annexation statute which is in derogation of a property right would require that the presence on the land of a concurrent activity which is not an eligible "use" for annexation purposes would necessarily bring about the reclassification of an otherwise qualified use. We do not agree.

Our Supreme Court has held that an area proposed for annexation is improperly classified as property in use for industrial purposes where there is no evidence that the land in question is being used either directly or indirectly for industrial purposes. *Southern Railway Co. v. Hook*, 261 N.C. 517, 135 S.E. 2d 562 (1964). When compliance with the statutory requirements is in doubt, the determination of whether an area is used for a purpose qualifying it for annexation will depend upon the particular facts of each case. *Cf. Lithium Corporation of America, Inc. v. Town of Bessemer City, supra* (municipal compliance with standards of G.S. 160-453.4(c)). Notwithstanding some rather ingenious arguments by petitioners, we find that the transmission of electrical power over this land by CP&L is an industrial activity for

an urban use. We hold that when an area, such as in the present case, is used for an active industrial purpose, the land is properly classified as in industrial use within the meaning of the annexation statute. *See Food Town Stores, Inc. v. City of Salisbury,* 300 N.C. 21, 265 S.E. 2d 123 (1980); *Adams-Millis Corp. v. Town of Kernersville,* 6 N.C. App. 78, 169 S.E. 2d 496, *cert. denied,* 275 N.C. 681 (1969). Petitioners have made no showing that any portion of the land comprising the easement was not actually being used by CP&L for an industrial purpose. There has been no showing that the extent of industrial use was insignificant as compared to any nonindustrial use. As a result, petitioners have failed to carry their burden to demonstrate a misclassification of the land by respondents. *Food Town Stores, Inc. v. City of Salisbury, supra.* We find no merit in petitioners' argument that respondents are estopped to have the proposed annexation area upheld as industrial since Wake Forest previously classified and advertised the property as "institutional." *Cf. Thompson v. City of Salisbury,* 24 N.C. App. 616, 211 S.E. 2d 856, *cert. denied,* 287 N.C. 264, 214 S.E. 2d 436 (1975) (acreage zoned residential was properly classified under annexation statute as commercial). This assignment of error is overruled.

[2] Petitioners also argue that the proposed annexation area fails to meet the "subdivision" test of G.S. 160A-36(c). In holding that 65.05% of the residential and undeveloped lots in the area consisted of lots and tracts of five acres or less in size, the trial judge found that land owned by petitioner Cottrell was comprised of residential property, two lots containing less than five acres in the aggregate and four separate undeveloped tracts of five acres or less. Petitioners argue that the judge should have considered the Cottrell property as one tract of 9.5 acres because the land was purchased as a whole, is now used and regarded by the owners as a single entity, and is treated for tax purposes as an entire unit. We find no error.

The determination of what constitutes a lot or tract in making an appraisal of an area to be annexed can be reached by any method "calculated to provide reasonably accurate results." G.S. 160A-42. *Cf. Adams-Millis Corp. v. Town of Kernersville, supra* (applying land estimate requirements under former G.S. 160-453.10). In the present case, testimony was presented that estimates of this land were based on recorded plats, tax maps and

deeds, an aerial photograph, and personal observations of the land surveyor. *See* G.S. 160A-42(1) & (2). It appears from the evidence before us that the Cottrell property consists of six adjoining lots with a residence located on one lot and associated landscaping on another. The methods utilized by respondent in appraising this land for annexation—counting separate numbered lots as individual units and considering adjoining lots used for a single purpose as one tract—are procedures specifically approved by this Court in *Adams-Millis Corp.* We hold that the lots in question were properly classified.

[3] Petitioners would have us find error in the lack of a "direct statement" in the trial judge's order that the ordinance described the external boundaries of the annexation area by metes and bounds, as required by G.S. 160A-37(e)(1), even though in his findings the judge made repeated reference to the ordinance and its accompanying attachment which set out the metes and bounds description of the proposed annexation area. A true copy of the annexation ordinance with the attached metes and bounds description was introduced at trial by respondents and is included in this record on appeal. We find no merit in petitioners' argument. Although petitioners next argue that the metes and bounds description is shown to be inaccurate by certain testimony presented in the record, we find sufficient competent evidence to support the description in substantial compliance with the statutory requirements. *See Conover v. Newton, supra.* This assignment of error is overruled.

Petitioners next contend that the trial judge erred in excluding certain testimony of their witness, Glenn D. Ward, who was stipulated to be an expert civil engineer and land surveyor. The testimony in question pertained to the amount of acreage in the "CP&L easement", along with the effect on the proposed annexation if the acreage concurrently used by the golf course were excluded, and the effect of treating the Cottrell property as one lot. Inasmuch as we have concluded that the entire "CP&L easement" was properly classified as in industrial use and that the judge properly classified the Cottrell property into several lots, the exclusion of this testimony will not be held prejudicial.

Petitioners argue that the trial judge erred in overruling their objections to certain testimony by respondents' witness,

James S. Murphy, stipulated to be an expert land surveyor. Although petitioners now object, on grounds of hearsay, to Murphy's verification of his testimony by reference to exhibits he did not personally prepare, since no objection was made at trial, these arguments may not be raised for the first time on appeal. *State Bar v. Combs*, 44 N.C. App. 447, 261 S.E. 2d 207, *disc. rev. denied*, 299 N.C. 740, 267 S.E. 2d 663 (1980). We also find no error in this witness's explanation of the retracement of the coordinate points since this testimony was merely a description of the procedures used in his work. We find no merit in petitioners' argument that their cross-examination of the witness and further testimony by another witness revealed defects in Murphy's description. Such inaccuracies would go merely to the weight of the testimony and not its admissibility. Again, since no objection was presented at trial, we find no error in the fact that the testimony of this witness was not elicited by hypothetical examination. *Id.* We therefore find no merit in petitioners' arguments.

[4, 5] Petitioners contend that the trial judge erred in admitting into evidence certain testimony of Joe Kelly Donaldson, a licensed registered engineer and land surveyor. Their first objection is that the witness was never qualified nor examined hypothetically for expert opinion. However, the record reveals that this witness was offered as an expert and was asked numerous questions regarding his qualifications, all with no objection from petitioners. Since the record shows that the trial judge properly could have found this witness to be an expert, the failure of petitioners to challenge his competency in apt time waives their objection and it will not be considered on appeal. *Lawrence v. Insurance Co.*, 32 N.C. App. 414, 232 S.E. 2d 462 (1977). Petitioners further object to Donaldson's testimony concerning his use of a planimeter in determining the acreages of the proposed annexation area, contending that the planimeter was too inexact to be admitted into evidence. As noted above, G.S. 160A-42 provides that municipalities may determine proper land subdivision by "methods calculated to provide reasonably accurate results." G.S. 160A-42(1) also provides that the reviewing court shall accept these estimates unless petitioners show on appeal that such estimates are in error in the amount of five percent or more. In addition to utilizing a planimeter, Donaldson computed the

acreages by use of tax maps, an aerial photograph, recorded plats and deeds. He then double-checked all of his computations by comparing the entire acreage with the sum of acreage for the individual lots. Petitioners make no argument that these estimates are in error in the amount of five percent or more. This assignment of error therefore is overruled.

[6] Petitioners object to the trial judge's finding and conclusion that they will not suffer material injury by reason of the proposed annexation. We find no error. A review of the record reveals that the grievances and feared injury by petitioners were primarily speculation that the increased services inuring to their property from the proposed annexation either would not materialize or would not be sufficient to offset any increase in their tax burden. These complaints are not sufficient grounds to show that respondents failed to meet statutory requirements, or that there was an irregularity in the proceedings which resulted in material injury to petitioners. *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981). This assignment of error is overruled.

[7] Petitioners argue that the ordinance #79-2 does not comply with G.S. 160A-37(e)(1) which mandates that the ordinance shall contain specific findings that the area to be annexed meets the requirements of G.S. 160A-36. Although the ordinance in question did specify that the area to be annexed was developed for urban purposes and that over 60% of the lots and tracts met the use requirements of the statute, it did not further state that 60% of the net residential and undeveloped land in the proposed annexation area was subdivided into lots and tracts of five acres or less. Petitioners are correct that both the "use" and "subdivision" tests must be met in order for an area to meet the statutory standard for annexation. *Adams-Millis Corp. v. Town of Kernersville, supra.* However, not every failure to comply with statutory procedures in annexation proceedings will result in their invalidation. Where there has been substantial compliance with the statutes in delineating the proposed annexation area and there is no reasonable probability that anyone has been or could have been misled, the annexation proceedings will be upheld. *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971). In the present case, the ordinance did specifically state compliance with all other statutory mandates and made reference to an accurate map

of the proposed annexed territory to be recorded in the office of the Register of Deeds of Wake County and the office of the Secretary of State. Copies of the ordinance and a map of the area to be annexed were filed in superior court and served on petitioners on 22 February 1979. The attached map showed the division of the acreage into lots and tracts which met with the statutory directives. Petitioners do not contend that any omission in the ordinance caused them to be misled or misinformed regarding the area to be annexed. Under these facts, there was sufficient compliance with all essential statutory provisions. We find no error.

Petitioners argue that the trial judge erred in finding that ordinance #79-2 was duly filed in superior court on 22 February 1979 while an appeal was pending concerning the prior ordinance #77-3. The hearing on ordinance #77-3 resulted in an order remanding the ordinance and plan of annexation to the "municipal governing board" pursuant to G.S. 160A-38(g)(2) for the amendment of boundaries. On 22 February 1979, within three months after the entry of the remand order as required by G.S. 160A-38(g), Wake Forest filed its amended annexation ordinance. Respondents in this action merely were following statutory procedures. We further note that the record fails to reveal that petitioners applied to the superior court for a stay in its final determination, or a stay of the annexation ordinance, pending outcome of the appeal to this Court, as allowed under G.S. 160A-38(h). This assignment of error has no merit.

[8] Petitioners argue that the trial judge erred in admitting into evidence a survey map of the area to be annexed. They contend that such an exhibit not prepared under a court order may be used only for illustrating the testimony of witnesses who could authenticate its accuracy and not used as substantive evidence. Although petitioners are correct in their statement of the rule of law in this matter, in the absence of a timely request at trial to so limit the use of the exhibit, we find no error. *Cf. Sidden v. Talbert*, 23 N.C. App. 300, 208 S.E. 2d 872, *cert. denied*, 286 N.C. 337, 210 S.E. 2d 58 (1974) (in absence of timely request, failure to instruct that photograph was admitted solely for illustrative purpose held no error).

In light of our holding in this case, we find no error in the trial judge's denial of petitioners' motion to remand the annexation ordinance to the "municipal governing board" for further action.

For the reasons stated, the judgment of the superior court upholding the annexation is

Affirmed.

Judges HEDRICK and BECTON concur.

ALVIN LEWIS DAVIS v. WILLIAM S. DAVIS AND VIRGINIA C. DAVIS

No. 8125SC1034

(Filed 6 July 1982)

1. Partnership § 1.1— formation of partnership—sufficiency of evidence

Plaintiff's evidence was sufficient to permit the jury to find that plaintiff and the male defendant orally agreed to form a partnership or formed a partnership by their acts and declarations where it tended to show that the parties discussed plaintiff's coming into the business operated by the male defendant; the parties thereafter worked together in the business; plaintiff understood their oral agreement to provide that he would own 30% and the male defendant would own 70% of the business; the male defendant considered plaintiff as "management" because he could not trust an employee; plaintiff did in fact receive a share of the profits of the business; and the male defendant prepared partnership tax returns for the business in which he listed himself and plaintiff as owners of the partnership.

2. Partnership §§ 1.2, 9.1— formation of partnership—accounting—issues and instructions

The trial court did not err in submitting issues as to whether plaintiff owned a 30% partnership interest in a certain business, whether partnership earnings were used to purchase a lot and building, and whether plaintiff was entitled to an accounting for 30% of the profits and assets of the partnership business, and the trial court's instructions adequately explained and applied the law to the facts related to those issues.

3. Partnership § 9.1— partnership accounting—responsibilities and powers of referee—court order

The trial judge did not err in defining the scope of responsibilities and the powers of the referee appointed to conduct an accounting of partnership profits and assets. G.S. 1A-1, Rule 53(e) and (f)(2).

4. Partnership § 9.1— costs of partnership accounting taxed against defendants

The trial judge did not err in ordering the defendants to pay all costs of an accounting of the partnership profits and assets, "including but not limited to, referee's compensation and expenses, fees of accountant, appraisers, and stenographer." G.S. 6-21(6).

APPEAL by defendants from *Rouse, Judge.* Judgment entered 17 April 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 May 1982.

In his verified complaint, plaintiff alleged that "on or about August 1, 1977, the plaintiff and the defendant, William S. Davis, entered into a partnership, on a 30%-70% ownership basis, to carry on a business known as 'Davis Duplicating Machines and Supplies.' " Plaintiff further alleged that defendant William S. Davis [hereinafter referred to as William] breached the partnership agreement making it impractical for plaintiff to "carry on the business in partnership with him," in that William and defendant Virginia C. Davis [hereinafter referred to as Virginia], his wife, acquired real property in their names alone with partnership funds, and that William now denies that a partnership was created "and that plaintiff is not a 30% owner of the partnership business and property." Plaintiff prayed for a decree of dissolution of the partnership to be carried out by a referee, an accounting of partnership funds and property, and the taxing of costs against defendants.

Defendants answered, saying that on or about 15 July 1977, William suggested to plaintiff that plaintiff consider joining with him in a "partnership arrangement" in his business. Defendants alleged that William

> offered the Plaintiff a thirty percent ([plaintiff]) — seventy percent (William) profit sharing arrangement in the proposed partnership, such that the Plaintiff would receive thirty percent of the net profits of the business and, ultimately, the Plaintiff would own thirty percent of the assets of the business, after the Plaintiff had left in the business a sufficient amount of his undistributed share of the net profits of the business to equal thirty percent of the total capital investment in the business.

Plaintiff told William that "he would 'try it on a trial basis . . ..' " However, defendants alleged, the parties never agreed on the

terms of a partnership agreement, "never executed a written partnership agreement and never had a meeting of the minds on a verbal partnership agreement."

The jury rendered a verdict for plaintiff, and defendants appeal from the judgment entered thereon.

Randy D. Duncan for plaintiff-appellee.

Oma H. Hester, Jr., for defendant-appellants.

HILL, Judge.

Plaintiff testified that he and William agreed to the terms of their business "that William would own seventy percent and I would be the thirty percent owner, as partners . . .." Plaintiff explained,

> When we agreed on the agreement, towards the middle of July, there was thirty percent he gave me and he was going to keep seventy percent for himself of the company. We agreed on the percentage of the company as to ownership and I even questioned him about why he was willing to give me thirty percent of the company and why he didn't hire somebody. He gave me a couple of reasons. One, he could not trust an employee and he had worked too hard to build up for an employee to break it down. He also wanted me and my vehicle in there . . ..

Thus, plaintiff brought his automobile into the business and began to learn about the care and maintenance of the machines they sold and serviced. William and plaintiff worked together in the business, and William introduced plaintiff "many, many times to our customers as his partner." However, the parties agreed that William always would have the last word on decisions "since he was the biggest percentage owner of the company . . .."

The business grew and eventually moved from William and Virginia's house to another location. Although William and plaintiff talked over the financial arrangements in acquiring a new location for the business, he testified that "I learned later that William and Virginia had went to purchase the property and the reason they gave me was because he had to tie up a piece of property that he owned elsewhere in the business to be able to get

the loan he got." Plaintiff's name was not on the deed. Plaintiff further testified as follows:

> From August 1977, my brother and I got along fine for probably six months and I wanted a partnership in writing and William told me two or three different times that our agreement was binding in a court of law. His exact words were what is the hurry, our agreement is binding in a court of law. We never signed an agreement.

William filed partnership tax returns in 1977 and 1978 on which he listed himself and plaintiff as owners of the partnership. However, until the end of 1979, no written partnership agreement was drawn. Plaintiff testified that the agreement William had drawn was "fully in his favor and not mine. It was not like we had agreed before I came to the company." Plaintiff was asked to leave the business shortly thereafter.

Plaintiff's other brother, Charles E. Davis, testified that William said that he "owned the business, that he felt like he shouldn't give [plaintiff] any more than thirty percnet [sic] . . .." Davis stated that his brothers told him individually that William offered plaintiff thirty percent of the business.

William testified that the terms upon which plaintiff would come into the business with him "were that initially he would get thirty percent of the net profits of the business after all expenses." However, plaintiff told William that "he was not certain that he wanted to come in and he wanted to try it on a trial basis . . .." William stated that he and plaintiff never agreed upon a partnership, although such a written agreement was attempted. William further testified as follows:

> What [plaintiff] was asking for was thirty percent and he did not believe he got thirty percent of the net profit. . . . He said that he wanted a guarantee . . . that he was not going to receive only thirty percent of the liability of the company. We had discussed before the possible liabilities and he said that he was not going to receive that on that thirty percent, and I told him that I would look it over and that I would try to make this more acceptable to him. [Plaintiff] had no interest in the assets of the business. He already had been paid more than thirty percent from the net profits of the business.

William stated that the down payment on the building acquired for the business was made from business funds and that the deed is in his and Virginia's names. He denied that he discussed the purchase of the building with plaintiff.

[1] In their first argument, by Assignment of Error Nos. 28, 29 and 30, defendants contend that the trial judge erred in failing to grant their motions for directed verdict and for judgment notwithstanding the verdict on the ground that the evidence was insufficient for the jury to find that plaintiff owned a partnership interest of 30% in Davis Duplicating Machines and Supplies. The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as a directed verdict motion. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). Thus, in passing upon such motions, the trial judge must consider the evidence in the light most favorable to the non-movant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn of America, Inc., supra; Summey v. Cauthen, supra.* A directed verdict motion by defendants may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake, supra.*

Under the North Carolina Uniform Partnership Act, a partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36(a). G.S. 59-37 provides, in part, as follows:

> In determining whether a partnership exists, these rules shall apply:
>
> . . . .
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

. . . .

b. As wages of an employee or rent to a landlord . . ..

Therefore, in order for plaintiff to prevail, there must be evidence from which the jury could conclude that the parties agreed "to carry on as co-owners a business for profit" in 70% and 30% shares. *See Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18, *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979).

> "Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation,' [citations omitted]."
>
> Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied," [citation omitted]. . . . "A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such."

Eggleston v. Eggleston, 228 N.C. 668, 674, 47 S.E. 2d 243, 247 (1948), *quoted in Reddington v. Thomas*, 45 N.C. App. 236, 240, 262 S.E. 2d 841, 843 (1980).

Considering the evidence recounted above in the light most favorable to plaintiff, as we must, we find that it was sufficient for the jury to infer that either the parties orally agreed to form a partnership with William as the 70% owner of the business and plaintiff as its 30% owner, or that by their conduct, express or implied, a partnership was formed.

Plaintiff's evidence clearly shows that the parties discussed his coming into the business which led to their subsequent

engagement together in business transactions. Plaintiff understood their oral agreement to provide that he would own 30% of the business, but William stated that the terms of their agreement "were that initially he would get thirty percent of the net profits of the business after all expenses." In addition, there is evidence that William considered plaintiff as "management" because he could not trust an employee. The evidence that plaintiff received a share of the profits of the business therefore is *prima facie* evidence that he is a partner because there is no other evidence that the share of the profits paid to plaintiff was considered employee's wages. *See* G.S. 59-37(4)(b).

Further, "[t]he filing of a partnership tax return is significant evidence of the existence of a partnership. [Citation omitted.] Under the State and Federal income tax laws, a business partnership return may only be filed on behalf of an enterprise entered to carry on a business. G.S. 105-154; 26 U.S.C. § 761." *Reddington v. Thomas, supra* at 240, 262 S.E. 2d at 843. There is evidence in the present case that William prepared the tax return for the business indicating himself and plaintiff as co-owners. This constitutes a significant admission by William against his interest in denying the existence of a partnership. *See Eggleston v. Eggleston, supra; Reddington v. Thomas, supra.*

Although William testified that he and plaintiff never agreed on the terms of a partnership, the evidence of the acts and declarations of the parties was sufficient for the jury to infer that a partnership existed in which William and plaintiff were the owners in 70% and 30% shares. Thus, the trial judge did not err in denying defendants' motions for directed verdict and for judgment notwithstanding the verdict.

[2] Defendants' second and third arguments assign as error the trial judge's formulation of the issues submitted to the jury and the instructions given thereon. The issues and answers were as follows:

> 1. Did the plaintiff, Alvin Lewis Davis, own a partnership interest of 30% in the business, Davis Duplicating Machine [sic] and Supplies, from August 1, 1977, through December 1979?
>
> ANSWER: Yes.

2. If so, were earnings from the business, Davis Duplicating Machine [sic] and Supplies, used during the period the partnership was in effect to purchase and make payments on the building and lot described in deed record book 1174, page 261, Catawba County Registry?

ANSWER: Yes.

3. If so, is the plaintiff, Alvin Lewis Davis, entitled to an accounting for 30% of the profits and assets of the business known as Davis Duplicating Machine [sic] and Supplies for the period the partnership was in effect?

ANSWER: Yes.

It is the duty of the trial judge to declare and explain the law arising on the evidence given in the case. G.S. § 1A-1, Rule 51(a); *N.C. Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E. 2d 565 (1980); *Rector v. James*, 41 N.C. App. 267, 254 S.E. 2d 633 (1979). This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960); *Howell v. Howell*, 24 N.C. App. 127, 210 S.E. 2d 216 (1974). *See also* G.S. § 1A-1, Rule 49(b). Therefore, the trial judge must explain and apply the law to the specific facts pertinent to the issue involved. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972).

Harrison v. McLear, 49 N.C. App. 121, 123-24, 270 S.E. 2d 577, 578 (1980). *See generally Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968).

As to the first issue, defendants argue that "[i]t was prejudicial for the trial Court to submit to the jury an issue in such vague and ambiguous language as 'a partnership interest of 30% of the business,'" and that the judge failed to define "partnership interest" in his charge. It is clear that the first issue merely raised the question for the jury to determine whether or not a partnership existed in which plaintiff owned a 30% share. Our review of the judge's charge reveals that it adequately explained

and applied the law as we have stated it above to the facts related to this issue.

As to the second issue, the evidence is uncontroverted that funds from Davis Duplicating Machines and Supplies were used to purchase the building acquired as the new location of the business. It is clear that this issue raised the question for the jury to determine whether or not William breached his duty to the partnership. Our review of the judge's charge on this issue also reveals that it adequately explained and applied the law to the facts. *See generally McGurk v. Moore,* 234 N.C. 248, 67 S.E. 2d 53 (1951).

The third issue relates to plaintiff's prayer for an accounting of partnership funds and property. G.S. 59-52 provides, in part, that "[a]ny partner shall have the right to a formal account as to partnership affairs: (1) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners, . . . (4) Whenever other circumstances render it just and reasonable." Of course, by its terms, this issue would not be determined by the jury if it answered the first issue "no." Thus, the judge's statement that "when a partnership is terminated as this one was, that is terminated by one partner, the other partner would have certain rights with respect to an accounting of the profits and assets of the alleged partnership business" is an accurate statement of the law applied to the facts from which arose plaintiff's prayer for an accounting. *See generally Casey v. Grantham,* 239 N.C. 121, 79 S.E. 2d 735 (1954); *McGurk v. Moore, supra.*

For these reasons, we find no error in the trial judge's formulation of the issues submitted to the jury and the instructions given thereon. We have carefully examined defendants' other exceptions relating to the trial judge's charge to the jury and likewise find no error. These arguments are without merit.

In defendants' fifth, sixth, seventh, and eighth arguments, they contend that the trial judge made various errors in drawing the final judgment and order for accounting. The trial judge's order states, in part, as follows:

> (a) [In lieu of a receiver, the defendant, William S. Davis, shall within ten (10) days, post a $10,000.00 secured bond securing payment to the plaintiff of any sums found to be due him.]

. . . .

(b) H. Dwight Bartlett is hereby appointed Referee with all the powers and authority contained in G.S. 1A-1, Rule 53, including but not limited to, the employment of a certified public accountant and property appraisers to assist the Referee.

(c) The Referee shall conduct an accounting of the profits and assets of the business known as Davis Duplicating Machines and Supplies. He shall take such evidence as deemed necessary, [determine the value, if any, of the 30% interest of the plaintiff, Alvin Lewis Davis, in said business,] and make his report to the Court within ninety (90) days.

. . . .

(d) The [defendants] are ordered and directed to turn over all records to the Referee upon request and to cooperate fully with the Referee in making the accounting.

. . . .

(e) [Defendants shall pay all costs of this action as taxed by the Clerk, including but not limited to, expert witness fees of $50.00 to William J. Lawing, and $50.00 to Alex Barringer.]

. . . .

(f) [Defendants shall pay all costs of the accounting,] including but not limited to, referee's compensation and expenses, fees of accountant, appraisers, and stenographer.

. . . .

(g) [The defendants shall deposit with the Clerk of Superior Court of Catawba County within five days from filing of this judgment the sum of ONE THOUSAND ($1,000.00) DOLLARS to defray the necessary expenses of the referee.]

[3] Defendants' fifth argument states that the trial judge erred in defining the scope of responsibilities and powers of the referee appointed to conduct the accounting. Generally, the powers of a referee are governed by the order of reference. "Subject to the specifications and limitations stated in the order, every referee has power to administer oaths in any proceeding before him, and

has generally the power vested in a referee by law." G.S. 1A-1, Rule 53(e). However, "[w]hen matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant or other qualified accountant who is called as a witness." G.S. 1A-1, Rule 53(f)(2).

Under these general rules, we find no error in the trial judge's statements in sections "(c)" and "(d)" of the order regarding the referee's responsibilities and authority to conduct an accounting in this case.

[4] Defendants also argue that the judge erred in ordering that they must "pay all costs of the accounting, including but not limited to, referee's compensation and expenses, fees of accountant, appraisers, and stenographer." Nevertheless, G.S. 6-21(6) clearly states that the compensation of referees "shall be taxed against either party, or apportioned among the parties, in the discretion of the court . . .." Furthermore, it is well settled that "[i]f an action is equitable in nature the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other, or require the parties to share the costs." *Hoskins v. Hoskins*, 259 N.C. 704, 707, 131 S.E. 2d 326, 328 (1963).

In the present case, the compensation of the referee was taxed against defendants in the trial judge's discretion by virtue of G.S. 6-21(6). Since plaintiff's prayer for an accounting of partnership funds and property is equitable in nature, the remaining costs of the accounting also were taxed in the judge's discretion; the exercise of such discretion is not reviewable on appeal. *Hoskins v. Hoskins, supra.* These arguments are therefore without merit.

We have carefully examined defendants' remaining arguments relating to the judgment and find them to be frivolous and without merit, not warranting further discussion in this opinion. Likewise, we have reviewed defendants' numerous assignments of error based upon certain evidentiary rulings made by the trial judge and find that those rulings exhibit no error.

For all the reasons stated, in the trial of this case, we find

No error.

Judges HEDRICK and BECTON concur.

MOHAMMED KASIM, KAARENIA ANNA KASIM FOR THE ADOPTION OF MOHAMMED RASUL KASIM

No. 8110SC1026

(Filed 6 July 1982)

1. **Adoption § 2.1— motion to dismiss adoption proceeding—no right of natural mother to intervene—more than six months since consent to adoption**

In an action in which the adoptive father moved to dismiss the adoption proceeding on the grounds that he and his wife had permanently separated, the trial court properly denied the natural mother's motion to intervene since she attempted to withdraw her consent more than nine months after entry of an interlocutory decree granting tentative approval for the adoption of the child. G.S. 48-11.

2. **Adoption § 2.1— consent of natural mother for couple to adopt—withdrawal of one parent from adoption petition does not require dismissal of the proceedings**

Where a natural mother gave her consent for a couple to adopt her child and, after an interlocutory decree granting tentative approval for the adoption of the child was filed, one spouse withdrew from the adoption petition, the withdrawal of petitioner from the adoption petition did not, in and of itself, require dismissal of the proceedings under G.S. 48-20(a) and 48-1. Therefore, the trial judge erred in dismissing the proceedings without first determining whether, in the best interest of the child, the adoption proceeding by the remaining spouse should be dismissed or allowed to continue to a final order.

APPEAL by petitioner Kaarenia Anna Kasim from *Godwin, Judge.* Appeal by Mary Kay Yorio from denial of her Motion to Intervene. Order entered 24 April 1981, in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1982.

Howard & Morelock, by Fred M. Morelock, for petitioner-appellant.

Bode, Bode & Call, by Robert V. Bode and Howard S. Kohn, for appellant Mary Kay Yorio.

James R. Fullwood for appellee Wake County Department of Social Services.

CLARK, Judge.

Kaarenia Anna Kasim and her husband Mohammed Kasim filed a petition for the adoption of Mohammed Rasul Kasim, a minor child. The natural mother Mary Kay Yorio consented to the adoption by the two petitioners, as did the Wake County Department of Social Services, guardian ad litem for the child. After the interlocutory decree but before the final order of adoption, Mohammed Kasim, the adoptive father, moved to dismiss the adoption proceeding on the grounds that he and Kaarenia Kasim had permanently separated. Mary Kay Yorio filed a motion to intervene. From the order dismissing the proceeding, petitioner Kaarenia Anna Kasim appealed, raising the question of whether the trial court properly dismissed the proceeding. Mary Kay Yorio appealed from the order denying her motion to intervene. For the reasons set forth below, we reverse the order dismissing the proceedings and remand to Superior Court. We affirm the determination that Mary Kay Yorio had no right to intervene in the matter at this time.

I

The facts of this case, undisputed except as noted, are as follows: On 29 April 1978, Mary Kay Yorio gave birth to a male child. From the time the child was about seven days old, Kaarenia Anna Kasim had physical custody of him. In April 1979, Mrs. Kasim and her husband Mohammed Kasim petitioned to adopt the child, and Ms. Yorio consented in a writing filed 9 April 1979, to the adoption by Mr. and Mrs. Kasim. Ms. Yorio also signed an affidavit declaring that she was unmarried at the time the child was born and that the child had not, to her knowledge, been legitimated. In a supplemental petition to the adoption, Mr. and Mrs. Kasim asserted that the natural father of the child was unknown, and they sought an order declaring abandonment and the appointment of the Wake County Department of Social Services (D.S.S.) as guardian ad litem. After service of process by publication, an order was entered declaring the child abandoned and appointing D.S.S. guardian ad litem. According to the record D.S.S. consented to the adoption by petitioners by writing received in the Wake County Clerk's office 25 July 1979.

On 24 July 1979, the Assistant Clerk of Superior Court entered an interlocutory decree granting tentative approval for

the adoption of the child. On 10 April 1980, however, Mohammed Kasim (Kasim) filed a motion to dismiss the adoption petition. In his motion, Kasim asserted that he was the natural father of the child; that he had not read or understood the supplemental petition for adoption which indicated that the natural father of the child was unknown; that the child had lived with him from birth until 17 November 1979, when he and Mrs. Kasim separated; and that, since the separation, the child had remained with Mrs. Kasim. In addition to wanting the adoption petition dismissed, Kasim wanted stricken the order declaring the minor child abandoned by his natural father, and he requested a hearing to establish the proper parties to have custody and control of the child.

Prompted by this motion, Ms. Yorio on 7 May 1980, filed a motion to intervene in the action. In her motion, she claimed that her consent to the adoption was conditioned upon adoption of the child by both petitioners and that she was ready, willing, and able to resume custody of the minor child.

Mrs. Kasim responded to both motions by denying that Mohammed Kasim was the natural father of the child, by reasserting the finding that the father had abandoned the child, by denying that Ms. Yorio was able to resume custody of the child, and by asserting that it was in the best interests of the minor child that a final order of adoption be entered by the court. She requested entry of an order allowing her to adopt the child or, in the alternative, the denial of Kasim's motion to dismiss as it related to her and continued placement of the child with her so that she could demonstrate her abilities as a sole adoptive parent. She also sought denial of Kasim's and Ms. Yorio's motions.

By order dated 27 August 1980, the Clerk of Superior Court, Wake County, entered an order denying both Ms. Yorio's motion to intervene and Kasim's motion to set aside the order of abandonment. The Clerk also dismissed the adoption proceeding. Both Mrs. Kasim and Ms. Yorio appealed to Superior Court where Judge Donald Smith affirmed the denial of Ms. Yorio's motion to intervene but concluded that the Clerk had erred in dismissing Mrs. Kasim's petition without a full and fair hearing of all facts bearing on a determination of the best interests of the child. Judge Smith directed the parties to schedule a hearing for this determination.

The hearing was set before Judge Godwin on 21 April 1981. After hearing evidence from Mrs. Kasim, Judge Godwin entered an order finding, among other facts, the following:

> 14. That Mrs. Kasim is a fit and proper person to have custody of the minor child and is a fit and proper person to adopt the child and absent the legal and procedural defects in the proceeding, as set forth herein, it would be in the best interests of the child for the adoption to be complete and for Mrs. Kasim to be allowed to adopt the child.
>
> 15. That the natural mother's consent to adoption was given for one specific adoption proceeding, that is, the adoption of the child by Mohammed Kasim and wife Kaarenia Anna Kasim. That the natural mother has not consented to the adoption of the child by the particular person, Kaarenia Anna Kasim, individually, and that such consent is required by law prior to Kaarenia Anna Kasim being allowed to adopt the child individually as a sole parent.
>
> . . . .
>
> 17. That while the Court finds as a fact that Kaarenia Anna Kasim is a fit and proper person to have custody of the child and to adopt the child and that, absent the defect in the current proceedings, that it would be in the best interest of the child for the adoption to be completed in the individual name of Kaarenia Anna Kasim, the Court finds that there is no consent given by the natural mother, with knowledge that Kaarenia Anna Kasim, individually, as a sole parent, would be the adopting party. That because of this defect in the adoption procedure both the child and Mrs. Kasim would be subject to interference from future legal claims of the natural mother and, it is, therefore, in the best interest of the child that the adoption proceeding be dismissed.

Judge Godwin concluded that the General Statutes of this State do not provide any procedure which would, under the circumstances of this case, allow the adoption to continue to a final order. He, therefore, dismissed the petition. Mrs. Kasim appealed from this order while Ms. Yorio appealed from Judge Smith's determination that she had no right to intervene. Mr. Kasim has not appealed from the denial of his motion to set aside the order of abandonment.

II

[1] Under G.S. 48-11, no parental consent shall be revocable by the consenting party after the entry of an interlocutory decree or of a final order when entry of an interlocutory order has been waived according to the provisions of G.S. 48-21. G.S. 48-11 adds the proviso that no consent shall be revocable after six months from the date of the giving of the consent. The purpose of this statute seems obvious: to give stability to the adoptive process. It allows prospective adoptive parents as well as the child to settle into a stable home environment, to be disturbed only upon those occasions when, prior to the final order, county directors of social services or adoptive agencies conduct studies of the provisions being made for the child. It also gives the natural parents a period of intense review of their decision to allow the adoption. Once the statutory period terminates, the right of the natural parents to revoke consent terminates* absent a showing of fraud in obtaining the consent.

In the instant case, the consent to adoption signed by Mary Yorio, the natural mother, was filed on 9 April 1979. The final paragraph of that consent stated, "I understand the Consent to Adoption can be revoked within the next six months provided the Interlocutory Decree or Final Order of Adoption has not been issued." Nevertheless, on 6 May 1980, Ms. Yorio attempted to withdraw her consent by filing a motion to intervene in which she sought custody of the minor child. Not only was the attempted withdrawal beyond the six-month period, but it also occurred more than nine months after entry of the interlocutory decree. There was no allegation that Ms. Yorio's consent was obtained by fraud. At the time of the action, indeed at the time the decree was entered, Ms. Yorio's right to withdraw her consent had terminated. The withdrawal of her consent to the adoption, for a reason other than fraud, was ineffective. Ms. Yorio's motion to intervene was properly denied.

III

[2] Having determined that Ms. Yorio's consent was irrevocable by her, we still must consider the question of whether, as Judge

* Under G.S. 48-23(2) natural parents are divested of all rights with respect to the child upon entry of the final order of adoption.

Godwin found, the consent Ms. Yorio gave to Mr. and Mrs. Kasim to adopt was not "sufficient legal consent" for Mrs. Kasim, individually, as a sole parent, to adopt the child. In entering the order dismissing the adoption proceeding, Judge Godwin concluded that the consent was not sufficient, that an improper consent rendered the adoption proceeding procedurally defective, and that, since the proceeding was procedurally defective, the best interests of the child necessitated dismissal of the proceeding.

G.S. 48-4(a) requires that, if a petitioner for adoption has a husband or wife living and competent to join in the petition, then such spouse must join in the petition.* This provision reflects the policy that a child should not be brought into a house where it is unwanted by the husband or the wife. *A Survey of Statutory Changes*, 25 N.C.L. Rev. 376, 408-412 (1947). Chapter 48 is silent on the question of what effect the withdrawal of one spouse from the petition has on the proceedings when the interlocutory decree has already been entered. Under G.S. 48-18(b), provision is made for the possibility that after the interlocutory decree has been entered, but before the final order, one of the two spouses dies. In this case, the petition of the surviving petitioner shall not be invalidated by the death of the other petitioner. The court may proceed to grant the adoption to the surviving petitioner. This statute is consistent with the fact that, under Chapter 48, single persons as well as married couples may adopt. G.S. 48-18(b) overlooks the possibility that the written consent of the natural parent might not allow for adoption by a surviving spouse.

No North Carolina case has addressed the question before us. The cases cited by appellant Yorio, *In Re Holder*, 218 N.C. 136, 10 S.E. 2d 620 (1940), and *Ward v. Howard*, 217 N.C. 201, 7 S.E. 2d 625 (1940), are inapposite in determining the question before us. First, those cases were decided before the current Chapter 48 was enacted, and the previous Chapter 48 contained no statement of legislative intent which establishes guidelines for construction of the chapter. Secondly, neither case presents the question of the validity of a consent upon withdrawal of one of the petitioners to whom consent was given.

* It should be noted that, at the time of Judge Godwin's order, Mr. and Mrs. Kasim were legally divorced.

In the absence of a specific statutory provision or case law related to the effects of a voluntary withdrawal from the petition, we must look for guidance to other provisions of Chapter 48. Under G.S. 48-20(a), the dismissal of an adoption proceeding is discretionary:

> If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adoption to the petitioners, the court *may* dismiss the proceeding. [Emphasis added.]

This grant of discretion to the court in its determination of whether the proceeding should be dismissed allows the court to consider myriad factors which might bear on the question of dismissal. The factors considered should relate to the stated legislative policy which is the framework of adoption in this State:

> (1) The primary purpose of . . . Chapter [48] is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes by natural parents who may have some legal claim because of a defect in the adoption procedure.
>
> . . . .
>
> (3) When the interest of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed.

G.S. 48-1.

After reviewing the legislative intent behind Chapter 48, we conclude that the withdrawal of one petitioner from the adoption petition does not, in and of itself, require dismissal of the proceedings. The withdrawal, however, is a factor to be considered in determining the best interests of the child. The question of the child's best interests should be paramount in the court's consideration of a motion to dismiss the proceeding.

The conclusions Judge Godwin entered in dismissing the proceedings were made as a matter of law. Under our reading of adoption law, the conclusions that the consent was improper, that it rendered the proceeding procedurally defective, and that the best interests of the child necessitated dismissal because of the possibility of continuing interference by the natural mother "who may have some legal claim because of the defect in the adoption procedure," overlooked clear legislative policy which places the interests of the child above procedural defects. Additionally, the order appealed from overlooked the fact that, under G.S. 48-28, Ms. Yorio, a party to the adoption proceedings (G.S. 48-7), may not, after the final order, question the validity of the adoption proceeding by reason of any defect therein. Judge Godwin's conclusions were clearly errors of law and cannot stand.

We reverse the order of Judge Godwin, and we remand this case to Wake County Superior Court for a determination of whether, in the best interests of the child, the adoption proceeding by Mrs. Kasim should be dismissed or allowed to continue to a final order.

Reversed and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROBERT LEE SELLERS

No. 8126SC1241

(Filed 6 July 1982)

1. Criminal Law § 75.7— routine questions relating to identification—Miranda warnings not required

Routine questions posed to defendant by the arresting officer asking him his name, address, date of birth, height, weight, color of eyes and place of employment did not constitute the type of interrogation required to be preceded by the *Miranda* warnings, notwithstanding defendant's address was relevant to a charge against him of driving while his license was permanently revoked, since the State had the burden of proving that defendant received notice of the revocation prior to the date of his arrest.

2. **Automobiles and Other Vehicles § 126.5; Criminal Law § 75.7— statements in refusing breathalyzer test—Miranda warnings not required**

Defendant's statements in refusing to take a breathalyzer test, "No, I'm not taking it. I probably would blow a thirty. I'm drunk. I would maybe blow a thirty," were not the result of custodial interrogation requiring the *Miranda* warnings and were admissible in evidence.

3. **Automobiles and Other Vehicles § 3.5— driving while license was revoked—presumption from mailing of notice of revocation—instructions**

In a prosecution of defendant for driving while his license was permanently revoked, the trial court's instructions, when read as a whole, sufficiently apprised the jury that the mailing to defendant of notice of the permanent revocation of his license pursuant to G.S. 20-48(a) created only a rebuttable and not a conclusive presumption that he received the notice and thereby acquired knowledge of the license revocation.

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Freeman, Judge.* Judgments entered 31 March 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 May 1982.

Defendant was charged with driving while under the influence of intoxicating liquors and driving while his license was permanently revoked. He pleaded guilty to those charges in district court and appealed to superior court for a trial *de novo.* Defendant was found guilty of "driving a motor vehicle on a public highway while his driver's license was revoked permanently," and reckless driving. He appeals the judgments of imprisonment entered upon those verdicts.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Philip A. Telfer, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that Charlotte police officer W. F. Christmas first observed defendant after midnight on 6 May 1980 standing beside a 1969 Cadillac automobile in a service station parking lot. Christmas observed that defendant's pants were torn. "He said he had been in a fight with his brother, that it was a family quarrel, and that his brother and whoever was with him had already gone back home or had left the scene."

Christmas further testified that defendant smelled strongly of alcohol, his eyes were bloodshot, and he staggered when he walked. Christmas advised defendant not to drive his car; that if he were caught driving in his present condition he would "go to jail for drunk driving." Christmas left defendant and later observed him driving the 1969 Cadillac. The Cadillac was drifting from lane to lane. Christmas stopped the automobile, got defendant out of the car, patted him down, and placed him under arrest for "driving under the influence."

After his arrest, defendant was taken to the Mecklenburg County jail where he was asked to take some performance tests and a breathalyzer test to determine if he was intoxicated. Defendant could accomplish none of the performance tests satisfactorily. Christmas then read defendant's *Miranda* rights to him; however, Christmas testified that defendant "did not wish to answer questions."

A *voir dire* examination of Christmas then was conducted to determine the admissibility of certain statements defendant made to Christmas before and after the reading of defendant's *Miranda* rights. On *voir dire*, Christmas testified that defendant refused to take the breathalyzer saying, two or three times to the breathalyzer operator, " 'No, I'm not taking it. I probably would blow a thirty. I'm drunk. I would maybe blow a thirty.' " The trial judge found as a fact that this statement "was not the result of any custodial interrogation," concluded that defendant's statement was a "spontaneous utterance," and denied defendant's motion to suppress the statement.

Thereafter, additional *voir dire* evidence was given concerning questions that Christmas asked defendant following his refusal to waive his *Miranda* rights. Christmas testified as follows:

> . . . I took him up to fill out the arrest sheet. I asked him his name, his address, his date of birth, his height, his weight, where he was born, the color of his eyes, place of employment. I may have asked him [sic] home phone number. I can't recall if I asked that, but that was general information we ask everybody being processed, and that's all. After he refused, I never once asked him anything about his driving or anything to do with it.

The trial judge found as facts that "defendant was read the Miranda rights and refused to answer any further questions. That no further questions relating to the crime were asked and that the defendant was asked his name, address, date of birth. That he answered those questions." The judge concluded that the questions asked by Christmas "are not covered by the Miranda warning and that they are admissible into evidence . . .." Again, defendant's motion to suppress was denied.

After obtaining defendant's name, address, and date of birth, Christmas requested a copy of defendant's driving record from the Division of Motor Vehicles. The records revealed that a notice of revocation of driving privileges had been mailed to defendant at "504 Spruce Street, Charlotte, North Carolina, zip code 28208." The notice was dated 13 August 1979 and contained a partially illegible certification. It stated that effective 12:01 a.m. on 24 July 1979, defendant's driving privilege is " 'permanently revoked for conviction of three or more moving violations while license suspended or revoked.' " Christmas then testified that when he arrested defendant on 6 May 1980, he asked defendant to produce his driver's license; however, defendant, without explanation, failed to do so.

Defendant's evidence tends to show that his permanent address was 504 Spruce Street but that he did not live there between November 1978 and November 1979. At that time, he lived with Irene Hart at 3623 Bahama Drive. Defendant's mother, Mrs. Eloise Sellers, testified that she remembered receiving a letter from the Division of Motor Vehicles for defendant at 504 Spruce Street, but she forgot to give it to him. Defendant testified that he never received the letter and that he did not know that his license had been permanently revoked on 6 May 1980. However, defendant did receive a letter sent to his mother's house from the Division of Motor Vehicles dated 26 February 1980 stating that defendant's " 'driver's license privilege was suspended . . .' "

Defendant stated that he was not drunk at the time of his arrest. His failure to successfully accomplish the performance tests was due to the injuries he suffered during the fight with his brother.

In his first argument, defendant contends that he was deprived of his right to remain silent, his right to counsel, and his

right to due process of law when the prosecutor was permitted to introduce testimony concerning his post-arrest refusal to waive his rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The record reveals that Christmas was permitted to testify that defendant indicated that he did not wish to answer questions without a lawyer present. However, defendant did not object to this testimony at the points indicated by Exception Nos. 3, 4 and 7, the bases for this assignment of error. There being no objection to the testimony below, defendant has waived his right to raise the question on appeal. G.S. 15A-1446(b). This assignment of error is overruled.

[1] Next, defendant contends that his constitutional rights were violated by admission into evidence of his responses to routine questions posed by Christmas after he indicated his refusal to waive his *Miranda* rights. Specifically, defendant argues that the questions constitute interrogation within the meaning of *Miranda* and that his responses, especially that of his address, were related to the crimes for which he was arrested. We acknowledge that defendant's address is relevant to the charge of driving while his license was permanently revoked since the State had the burden of proving that defendant had knowledge of the revocation prior to the date of his arrest in order to sustain a conviction. *See State v. Chester*, 30 N.C. App. 224, 226 S.E. 2d 524 (1976); G.S. 20-48(a). However, we do not accept defendant's argument that the use of his answers to routine questions following a refusal to waive *Miranda* rights is violative of his constitutional rights.

The issue of whether routine questions asked by officers must be preceded by a reading of *Miranda* rights has not been addressed by our courts so far as we can determine. However, other states have found that such questioning is not the type of interrogation proscribed by *Miranda*. *See State v. Cozad*, 113 Ariz. 437, 556 P. 2d 312 (1976); *Mills v. State*, 278 Md. 262, 363 A. 2d 491 (1976); *People v. Riviera*, 26 N.Y. 2d 304, 258 N.E. 2d 699 (1970).

This case is distinguishable from *State v. Blakely*, 22 N.C. App. 337, 206 S.E. 2d 352 (1974), which defendant cites. In that case, defendant was arrested and advised of his *Miranda* rights. He stated that he understood his rights and then answered ques-

tions on an "alcoholic influence report form." Defendant subsequently was charged with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. These circumstances are far different from the present case. Here, the routine questions posed by Christmas from the arrest sheet did not deal with the alleged crime *per se*, but only dealt with the matter of the identification of defendant.

Therefore, unless the routine questions posed are such as they may reasonably be likely to produce incriminating responses, the routine questions are not proscribed by *Miranda*. The trial judge's conclusion of law is supported by the facts found, and the latter are supported by the evidence. This argument has no merit.

[2] Defendant's third argument challenges the admissibility of the statements he made to the breathalyzer operator, and in the presence of Christmas, when he refused to take the breathalyzer test. According to Christmas, defendant said, " 'No, I'm not taking it. I probably would blow a thirty. I'm drunk. I would maybe blow a thirty.' " As noted above, the trial judge found that "this statement was not the result of any custodial interrogation," concluded as a matter of law that it was a "spontaneous utterance," and denied defendant's motion to suppress the statements. We find no error in the admission of this evidence.

Although *Miranda* has been held inappropriate to a breathalyzer test administered pursuant to our statutes, our Supreme Court's further observation in *State v. Sykes*, 285 N.C. 202, 206, 203 S.E. 2d 849, 852 (1974), bears repeating:

> We observe in passing that *State v. Beasley*, 10 N.C. App. 663, 179 S.E. 2d 820 (1971), and *State v. Tyndall*, 18 N.C. App. 669, 197 S.E. 2d 598 (1973), should not be interpreted to hold that the rules of *Miranda* are inapplicable to *all* motor vehicle violations. We said in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971): "One who is detained by police officers under a charge of driving under the influence of an intoxicant has the same *constitutional* and statutory rights as any other accused."

(Emphasis original.) *See also State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976). Likewise, it has been held that upon proper foundational proof, a willful refusal to submit to the taking of a

breath sample is admissible into evidence. *Etheridge v. Peters*, 301 N.C. 76, 269 S.E. 2d 133 (1980). Nevertheless, defendant argues that his statements regarding his refusal to take the breathalyzer test are "testimonial and communicative with[in] the meaning of the privilege against self-incrimination and are therefore governed by Miranda." We conclude that under the principles stated above, defendant's argument is merely a distinction without a difference. His statements are admissible evidence. The trial judge's finding of fact is supported by the evidence, and his conclusion is supported by the finding of fact.

In any event, the admission of the statements is harmless since defendant testified that he made the statements he now says should have been excluded. This argument has no merit.

[3] In his fourth argument, defendant contends that the prosecutor's closing argument and the trial judge's charge to the jury concerning his knowledge of the permanent revocation of his driver's license by proof of mailing deprived him of his right to a fair trial by jury and due process of law. Defendant does not dispute the fact that the judge properly charged the jury on the element of knowledge. Rather, defendant argues that a reasonable juror could have interpreted the judge's charge on this issue to create a *conclusive* presumption that he received notice and thereby acquired knowledge of the license revocation.

G.S. 20-48(a) provides, in part, as follows:

> Whenever the Division [of Motor Vehicles] is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice.

Our Supreme Court has held that "[f]or purposes of a *conviction* for driving while license is suspended or revoked, mailing of the notice under G.S. 20-48 raises only a prima facie presumption that

defendant received the notice and thereby acquired knowledge of the suspension or revocation. [Citations omitted.] Thus, defendant is not by this statute denied the right to rebut this presumption." *State v. Atwood*, 290 N.C. 266, 271, 225 S.E. 2d 543, 545-46 (1976) (emphasis original). *See also State v. Chester, supra.* Of course, the burden is on the State to prove that defendant had knowledge at the time of his arrest that his driver's license was revoked.

> [T]he State satisfies this burden when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge. When there is some evidence to rebut this presumption, the issue of guilty knowledge is raised and must be determined by the jury under appropriate instruction from the trial court.

Id. at 227, 226 S.E. 2d at 526.

In the present case, defendant excepted to the following portion of the prosecutor's closing argument to the jury:

> There was a receipt at the bottom of [the revocation] letter that was discussed in testimony as to the fact that it was mailed to [504 Spruce Street], and I would argue to you that, in fact, that notice—that letter is all the notice that the Department of Motor Vehicles could give, and that's all the Department of Motor Vehicles needs to give, is to mail it to his address where he lives and where he resides, and then I would argue to you that *the presumption arises that he was notified of it and he is held by it, held to abide by the information that is in that letter, and that letter notified him of his permanent revocation and notified him of penalties, and he continued to drive . . ..*

(Emphasis added.) The trial judge charged the jury, in part, as follows:

> In order for you to find that notice of revocation was given of which the defendant had knowledge, the State must prove three things beyond a reasonable doubt. First, that the notice was deposited in the United States mail at least four days before the alleged driving of the motor vehicle by the defendant. Second, that the notice was mailed in an envelope with postage prepaid. And, third, that the envelope was addressed

to the defendant at his address as shown on the records of the Department of Motor Vehicles.

. . . .

Now, to find the defendant guilty of this charge, driving while license permanently revoked, the State must comply with these three requirements and prove each one beyond a reasonable doubt. *The notice provision permits, but does not compel, you to find that the defendant received the notice and thereby requires knowledge of the permanent revocation. The State must prove the essential elements of the charge, including the defendant's knowledge of the permanent revocation, beyond a reasonable doubt.*

So, I will finally charge you that if you find from the evidence and beyond a reasonable doubt that on or about May 6, 1980, the defendant drove a 1969 Cadillac on Wilkinson Boulevard . . . while his driver's license was permanently revoked, *and that defendant knew on that date that his license was permanently revoked, because at least four days before the alleged revocation, the Department of Motor Vehicles deposited notice of the permanent revocation in the United States mail in an envelope with postage prepaid and addressed to the defendant at his address as shown by the records of the defendant,* . . . then it would be your duty to return a verdict of guilty as charged. *However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

(Emphasis added.)

When read as a whole, the trial judge's charge to the jury adequately states the law as it applies to the notice requirements of G.S. 20-48(a). Although the emphasized portions of the charge quoted above note the presumption that mailing of the notice of revocation was received by defendant and that he thereby had knowledge of it, those portions of the charge also indicate that such a presumption does not "compel" a finding of receipt, and thereby knowledge. Thus, the portion of the prosecutor's closing argument quoted above and the omission of a specific statement by the trial judge in his charge that the jury need not find knowledge of permanent revocation by compliance with G.S.

20-48(a) are not prejudicial error in light of the entire charge to the jury. This argument therefore is without merit.

Defendant's fifth argument assigns as error the trial judge's denial of his motion to dismiss the charge of driving while license permanently revoked because there is insufficient evidence that defendant had knowledge that his license was permanently revoked. We conclude, however, that the evidence recounted above is sufficient to withstand defendant's motion to dismiss this charge.

Finally, defendant contends that the prosecutor, by arguing that defendant refused to take a breathalyzer test, and the trial judge, by charging the jury regarding his refusal to take a breathalyzer test, erred in their injecting of facts before the jury not contained in the evidence. By virtue of our disposition of defendant's third argument, this argument has no merit.

For the reasons stated above, in defendant's trial, we find

No error.

Judge BECTON concurs.

Judge HEDRICK concurs in result only.

STATE OF NORTH CAROLINA v. HAROLD THOMAS YANCEY

No. 819SC1351

(Filed 6 July 1982)

1. Criminal Law § 66.3— denial of motion to suppress identification testimony—denial of motion for lineup—no error

Under G.S. 15A-281, the trial court did not err in denying defendant's motion to suppress the identification testimony of a witness and in denying defendant's motion for a lineup since the court found that a nontestimonial procedure would not have constituted a material aid in determining whether the defendant committed the offense and since there was substantial evidence identifying the defendant which did not depend on the witness's ability to recognize him at trial.

2. Constitutional Law § 48— denial of request to replace attorney—no error

There was no error in the denial of defendant's request to replace his attorney where the fault the defendant found with his attorney was in regard to trial tactics and did not rise to such a level that they should destroy the relationship between attorney and client. Nor did the court err in failing to advise the defendant of his right to represent himself after the court had refused to appoint new counsel.

3. Larceny § 8— instructions—guilty if one of four items taken from house—no deprival of unanimous verdict

In a prosecution for felonious breaking or entering and felonious larceny where the evidence showed that four items were taken from a house, the court did not deprive the defendant of a unanimous jury verdict when he instructed the jury that they could find the defendant guilty if they found he had taken any one of the items.

4. Criminal Law §§ 86.1, 97— testimony to impeach defendant and corroborate witness—no right to further rebuttal in defendant

Where a witness for the State testified that she had seen the defendant in court on Monday, defendant testified that he had not been in court on Monday, and after defendant rested, the State called a deputy sheriff who testified he had brought the defendant into the courtroom on Monday, the court did not err in failing to allow the defendant to put on evidence to show he was not in the courtroom and to contradict the testimony of the deputy sheriff since the testimony of the sheriff was offered to impeach the testimony of the defendant and to corroborate the testimony of the State's witness and was not new evidence which would have created in defendant the right to further rebuttal under G.S. 15A-1226.

5. Jury § 2— special venire summoned by sheriff—sheriff suitable

In a prosecution for felonious breaking or entering and felonious larceny where, before the jury was selected, the panel was exhausted and the court ordered the sheriff pursuant to G.S. 9-11(a) to summon five persons to report as supplemental jurors, there was no merit to defendant's contention that the sheriff was not suitable because (1) it was a criminal case in which several deputy sheriffs were testifying; (2) there was evidence in the record that the defendant believed the sheriff was harassing him and seeking to connect him with additional charges; and (3) there was a speculative possibility that the sheriff might have been related to the victim since they shared the same last name.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 7 August 1981 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 28 May 1982.

The defendant was tried for felonious breaking or entering and felonious larceny. Prior to the commencement of the trial the defendant moved that John Pike, his court-appointed attorney, be

removed. The defendant stated to the court that this attorney had failed to have his appearance bond reduced, refused to get a lineup for him, and did not object to the identification testimony of Elizabeth Currin at the preliminary hearing. The court found without further evidence that Mr. Pike had proven himself to be competent in criminal trials in Granville County and demonstrated excellence in the defense of his clients, that the defendant had stated no basis in fact to establish that Mr. Pike had not prepared an adequate defense, that the defendant's first complaint in regard to his attorney was on a Friday before his case was calendared for trial on Monday, and the court was of the opinion the motion by the defendant to remove his attorney was a dilatory tactic. This motion was denied.

The defendant made a motion that the identification testimony of Elizabeth Currin be suppressed because his request for a nontestimonial identification procedure pursuant to G.S. 15A-281 had not been granted. The district attorney made a statement that the State would not rely on the testimony of any one witness to establish the identity of the defendant as the perpetrator of the crime. The court found that the results of a nontestimonial identification procedure would not constitute a material aid in determining whether the defendant committed the offense and denied the motion to suppress. The court also denied a motion by the defendant that he be given a nontestimonial identification procedure.

Before the jury was selected, the panel was exhausted and the court ordered the sheriff pursuant to G.S. 9-11(a) to summon five persons to report as supplemental jurors "without using the jury list, but using his best judgment and acting with impartiality to obtain persons of intelligence, courage and good moral character." The defendant objected to the special venire and moved for a mistrial. A hearing was conducted after the jury was selected but before they were impaneled. The sheriff testified that he did not attempt to get a list from the clerk of superior court or the register of deeds, but attempted to get people that were readily available and could come on short notice. He testified that so far as he knew he summoned persons who were of good character and respected members of the community. The court made findings of fact in accordance with the evidence ad-

duced at the *voir dire* hearing, overruled the objection to the special panel selected and denied the motion for mistrial.

At the trial the evidence for the State showed that on 24 June 1981, William Currin owned a house on Route 1, Oxford, North Carolina, but had been living in his daughter's home for a year. Elizabeth Currin testified that she is the sister-in-law of William Currin; that at approximately 12:45 p.m. on 24 June 1981, she passed the house of William Currin in her automobile; that at that time, she observed a white Ford with the trunk open parked in front of the house; that she saw a tall black male with a bushy Afro hairstyle and mustache wearing a light blue shirt step out of a ditch and place an object in the trunk of the vehicle; that she recorded the license number which was VWH-131; that she observed this man for approximately two minutes from a distance of from 10 to 12 feet; that she then continued toward highway 96; that she stopped before entering highway 96 and the automobile she had seen at her brother-in-law's house stopped beside her and she had a chance to observe the driver at a distance of approximately five feet; that after she entered highway 96, the vehicle passed her; she called the Sheriff's Office, gave them the information she had and asked that they investigate. She identified the defendant as the person she saw at her brother-in-law's house.

William Currin testified that he went to his house on 24 June 1981 to determine if anything had been taken. The glass on the carport door had been broken, the house ransacked, and a stereo, class ring, more than a dollar's worth of pennies, and two silver candleholders were missing. He also identified his checkbook which had been in his home and which he had given no one permission to take. He testified he had not given the defendant permission to enter his home or take anything from it. Mr. Currin's son-in-law testified he had checked the house at 8:00 a.m. on 23 June 1981 and found everything in order.

The State introduced evidence through the testimony of several officers that on 24 June 1981 Detective David Smith of the Granville County Sheriff's Department took a statement from Elizabeth Currin. He checked on the license number she gave him and found that the records showed the automobile with that license plate was owned by Melody Roach of Roxboro. Steve Clayton, a detective with the City of Roxboro Police Department,

went to the home of Melody Roach and the defendant drove the automobile into her yard while Officer Clayton was there. The defendant told him he had come from Oxford. Officer Clayton searched the vehicle and found nothing except less than 10 pennies. At approximately 7:45 p.m. on 24 June 1981 Dale Bullock served a warrant on the defendant charging him with breaking or entering and larceny from the house of Mr. Currin. Defendant threw the warrant on the ground and said he knew "that white bitch got my license number and he said that is the reason that this is happening." Officers Bullock and Clayton heard the defendant make this statement.

The defendant agreed to go to the Magistrate's Office and drove Melody Roach's automobile to the office followed by the officers. On the way to the Magistrate's Office, the defendant passed the home of Rancher Preddy and Mr. Preddy saw some papers thrown from the automobile. Mr. Preddy motioned to a police vehicle following the defendant and a policeman retrieved the papers which included checks and a card with the name "William Currin" on them.

Defendant testified that he did not break into or take anything from William Currin's house. He testified he did not throw anything from the automobile as he was being followed by the officers. He had other witnesses who corroborated his testimony as to his whereabouts on 24 June 1981 and provided him with an alibi.

The defendant was found not guilty of felonious breaking or entering and guilty of misdemeanor larceny. He appealed from the imposition of a prison sentence of two years.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the court's denial of his motion to suppress the identification testimony of Elizabeth Currin and his motion for a lineup. G.S. 15A-281 provides:

> "A person arrested for or charged with an offense punishable by imprisonment for more than one year may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge to whom the request was directed must order the State to conduct the identification procedures."

We can find no cases interpreting this section of the statute. The superior court found that a nontestimonial procedure would not have constituted a material aid in determining whether the defendant committed the offense in denying his motions to suppress the identification testimony of Elizabeth Currin and for a nontestimonial identification procedure. We do not believe the court committed error in this ruling. There was substantial evidence identifying the defendant which did not depend on Mrs. Currin's ability to recognize him at the trial. Officer Clayton testified the defendant told him he was driving the automobile of Melody Roach at the time the evidence showed it was used in the break-in. Two officers testified that they heard the defendant say that he knew that "white bitch got my license number" after Mrs. Currin had testified she took the license number of the person who was at Mr. Currin's house. There was evidence that the defendant threw from Melody Roach's automobile checks and a card that had been in Mr. Currin's house. We do not believe that with this evidence the results of a lineup could weaken Elizabeth Currin's identification testimony. For that reason we hold the court was not in error in holding that a nontestimonial identification procedure would not have been a material aid in determining whether the defendant committed the offense.

[2] In his second assignment of error the defendant contends it was error for the court not to replace his attorney and not to advise the defendant that he could represent himself. The defendant argues that his counsel's failure to get a lineup for him, his failure to object to Elizabeth Currin's identification testimony at the preliminary hearing, his failure to get his bond reduced and his failure to visit him in jail had made relations so bad between them that the defendant's counsel could not be effective. *See State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). The defendant says this contention is confirmed by the record which shows

there were stormy scenes between Mr. Pike and the defendant at trial. We believe the fault the defendant found with his attorney was in regard to trial tactics. We do not believe they rise to such a level that they should destroy the relationship between attorney and client.

We comment that the defendant was represented at the trial by John Pike. Defendant was tried for two felonies. The evidence was substantial that the defendant was guilty of both charges and he could have been sentenced to 20 years in prison if the jury had so found. While being represented by Mr. Pike, in whom the defendant expressed no confidence, he was found guilty only of a misdemeanor for which he could receive a sentence of two years. Mr. Pike must have done something right.

The defendant also argues it was error for the court not to advise the defendant of his right to represent himself after the court had refused to appoint new counsel for him. We believe that to hold this was reversible error, we would have to overrule *State v. Cole*, 293 N.C. 328, 237 S.E. 2d 814 (1977), which we cannot do. The defendant's second assignment of error is overruled.

[3] The defendant next assigns error to the charge. The State's evidence showed that four items were taken from the house of William Currin. The court instructed the jury that they could find the defendant guilty if they found he had taken any one of the items. The defendant contends this deprived the defendant of a unanimous jury verdict because some of the jurors could have found the defendant guilty of taking one of the items and the other jurors could have found him guilty of taking another item. We believe we are bound by *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982), to overrule this assignment of error.

[4] In his fourth assignment of error the defendant contends that he should have been allowed to put on surrebuttal evidence. Mrs. Currin testified that she had seen the defendant in court on Monday. Defendant testified he had not been in court on Monday. After defendant rested, the State called as a witness Deputy Sheriff Marion Grissom who testified he had brought the defendant into the courtroom on Monday. The defendant's attorney then made a motion that he be allowed to put on evidence to show he was not in the courtroom and to contradict the testimony of Mr. Grissom. G.S. 15A-1226(a) provides:

"Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal."

The defendant, relying on *State v. Thompson*, 19 N.C. App. 693, 200 S.E. 2d 208 (1973), argues that the testimony of Mr. Grissom was new evidence which gave him the right to put on further rebuttal evidence. We do not believe *Thompson* governs this case. In that case after the jury had begun their deliberations, they returned to the courtroom and asked a question as to the interior design of the passenger compartment of a truck. The court allowed the State to reopen its case and put on testimony as to the interior of the truck. There had been no previous evidence on this feature of the case. The defendant was not allowed to put on evidence as to the design of this part of the truck, and this Court found this was error. In the instant case, unlike *Thompson*, the State did not present evidence tending primarily to add to its original case but offered the testimony of Mr. Grissom to impeach the testimony of the defendant and corroborate the testimony of Elizabeth Currin. This would not be new evidence and the defendant would not have the right to further rebuttal under G.S. 15A-1226(a). *See* 1 Stansbury's N.C. Evidence § 22 (Brandis rev. 1973) for a definition of new evidence. The defendant's fourth assignment of error is overruled.

[5] In his last assignment of error the defendant contends the special venire was improperly drawn. G.S. 9-11(a) provides:

"If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the

register of deeds the names of those additional jurors who are so summoned and who report for jury service."

The defendant contends the court should have found the sheriff was not suitable because of his interest in the action to be tried. He says this is so because (1) it was a criminal case in which several deputy sheriffs were testifying; (2) there was evidence in the record that the defendant believed the sheriff was harassing him and seeking to connect him with additional charges; (3) and there was a possibility that the sheriff, Arthur Currin, might have been related to the victim, William Currin. We do not believe any of these factors would support a finding that the sheriff is not suitable because of his direct or indirect interest in the case. Deputy sheriffs testify in many cases. We do not believe the legislature intended to disqualify sheriffs from summoning extra jurors in all of them. If this were so, we believe the legislature would have designated some other official to summon extra jurors. We also believe that if the sheriff were disqualified from summoning jurors in every case in which a defendant feels the sheriff is harassing him, there would be few if any sheriffs qualified to summon a juror. As to the contention that the sheriff has the same last name as the victim so that they might be related and if they are related the sheriff might have such an interest in the case that he is disqualified, we believe this is too speculative to merit consideration. The defendant's last assignment of error is overruled.

No error.

Judges CLARK and WHICHARD concur.

Malloy v. Daniel

SYLVIA ANN MALLOY, GUARDIAN AD LITEM FOR VINCENT N. CANNADY, A MINOR, PLAINTIFF v. DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, INTERVENOR PLAINTIFF v. DONNA MAE DANIEL AND MARTIN EUGENE DANIEL, DEFENDANTS

No. 8114SC938

(Filed 6 July 1982)

Social Security and Public Welfare § 2— subrogation for Medicaid assistance—no right in county department of social services

The Durham County Department of Social Services was not the "county involved" so as to be entitled to assert subrogation rights under G.S. 108-61.2 in a personal injury recovery for Medicaid assistance provided to the minor plaintiff, since the Department of Social Services was a mere subdivision of Durham County and had no capacity to bring a suit to enforce a claim.

APPEAL by intervenor plaintiff Durham County Department of Social Services from *Herring, Judge.* Judgment entered 10 April 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals on 4 May 1982.

This appeal arises out of civil actions brought by Sylvia Malloy (hereinafter referred to as "plaintiff"), acting as guardian ad litem for the minor Vincent Cannady, and by the Durham County Department of Social Services (hereinafter referred to as "intervenor plaintiff") against defendants Donna Daniel and Martin Daniel, for damages incurred by the minor Vincent Cannady as a proximate result of defendants' negligence.

On 20 March 1977, the minor Cannady was struck by an automobile driven by defendant Martin Daniel and owned by defendant Donna Daniel. Cannady incurred injuries, pain and suffering, and a one-half inch shortening of his right leg as a result of being struck by such automobile, and defendants' negligence was the proximate cause of those injuries and damages.

Of the medical expenses incurred by Cannady as a proximate result of defendants' negligence, $12,558.18 was paid for by the North Carolina Department of Human Resources, Division of Medical Assistance, through the Durham County Department of Social Services. This payment consisted of Medicaid benefits as provided pursuant to Part 5 of Article 2 of Chapter 108 of the General Statutes of North Carolina.

Subsequent to the injuries of the minor Cannady, plaintiff, who had been appointed guardian ad litem for the minor child, and was acting in that capacity, entered a written retainer contract with her attorney; under this contract, the attorney was to be paid one-third of any and all recovery resulting from a judgment against or settlement with defendants in favor of plaintiff acting in behalf of the injured child. Pursuant to such contract, plaintiff's attorney, from 29 March 1977 and thereafter, proceeded to investigate and otherwise prepare plaintiff's case for settlement or trial, and expended numerous hours doing legal work, ascertaining the driver and owner of the "hit and run" vehicle which struck Cannady, and negotiating with defendants' insurance carrier.

On or about 15 May 1978, plaintiff's attorney reached a settlement with defendants in the amount of $15,000 in plaintiff's claim against defendants for injuries and damages incurred by the minor child. On about 6 July 1978, plaintiff's attorney was informed for the first time, by the North Carolina Department of Human Resources, that Cannady had received Medicaid assistance for the injuries caused by defendants and that such Department, through the intervenor plaintiff, was asserting a claim in subrogation against defendants, pursuant to G.S. § 108-61.2.

On 2 August 1978, plaintiff filed a complaint against defendants to recover from them jointly and severally $20,000 for the permanent injuries, pain and suffering, and medical expenses incurred by the minor Cannady as a proximate result of defendants' negligence. This action was instituted by plaintiff to secure the $15,000 settlement previously reached with defendants. In reaching such settlement, plaintiff's attorney had received no assistance from the intervenor plaintiff, and has diligently rendered valuable services on behalf of plaintiff and in pursuit of plaintiff's claim.

On 7 December 1978, pursuant to a consent order signed by all parties, intervenor plaintiff filed a complaint of intervention alleging that it had provided Medicaid benefits to the minor Vincent Cannady in the amount of $12,558.18 for the medical expenses incurred by Cannady as a proximate result of defendants' negligence, and that it was therefore subrogated to all rights of

recovery. The intervenor plaintiff's complaint prayed for judgment against defendants jointly and severally as follows:

> [t]hat any amount of money . . . recovered by the plaintiff against the defendants jointly and severally that is equal to the medical assistance paid on the behalf of the minor child in the amount of . . . ($12,588.18) be paid by the defendants jointly or severally into the Office of the Clerk of Superior Court for the use and benefit of the Intervenor Plaintiff.

On 14 December 1978, defendants filed an answer to the intervenor plaintiff's complaint in which it offered

> to pay into the office of the Clerk of the Superior Court the sum of $15,000 in full settlement and compromise of all claims and demands of the Plaintiff . . . [and] Intervenor Plaintiff . . . for all claims past, present and prospective, including medical and hospital expenses heretofore incurred or which may hereafter be incurred, which amount is to be distributed as the court deems just and proper.

On 6 June 1979, the court entered a partial judgment stating that there was a controversy between plaintiff and intervenor plaintiff with regard to the distribution of the recovery of the monies from the defendants in this action, and that the $15,000 settlement offer made by defendants was a fair and reasonable settlement in view of all the circumstances. The judgment further ordered

> that the plaintiff have and recover of the defendants the sum of $15,000.00 in full settlement and compromise of all claims and demands of the plaintiff for all damages past, present and prospective, including medical and hospital expenses heretofore incurred or which may hereafter be incurred and that said sum is to be paid by the defendants into the Office of the Clerk of Superior Court for the use and benefit of the plaintiff, subject to the Court's final determination and distribution of these monies between the Plaintiff and the Intervenor Plaintiff.
>
> [Plaintiff] and . . . [intervenor plaintiff] join [ ] in this Judgment and . . . consent to said settlement and further, in consideration of the payment of the amount herein set forth, do hereby release and discharge . . . [defendants] . . . of and

from any and all actions, causes of action, claims or demands that they might have by reason of injury to the minor plaintiff, loss of services, or medical expenses incurred by or on his behalf.

In its final judgment as to the proper distribution as between plaintiff and intervenor plaintiff of the $15,000 paid by defendants, the court made unchallenged findings of fact and entered the following conclusions of law: that G.S. § 108-61.2 afforded intervenor plaintiff rights of recovery belonging to the beneficiary of Medicaid assistance and that "beneficiary of assistance" meant the person lawfully entitled to recover the medical expenses incurred on behalf of the minor Cannady in a case against the tortfeasor defendants; that the person so lawfully entitled was not the minor child but the child's father, and, hence, the child's father and not the child was the "beneficiary of assistance" through whom the subrogee would be subrogated; that therefore neither the County of Durham nor the intervenor plaintiff "has a subrogated interest against the personal injury recovery of the minor plaintiff, Vincent N. Cannady [sic], arising out of the matters and things complained of in this action;" that the right of subrogation to the rights of the beneficiary of assistance accrues to Durham County and not to the intervenor plaintiff; and that one-third of the total recovery of $15,000 was a reasonable fee to be allowed plaintiff's retained counsel. The court then ordered that the intervenor plaintiff "have and recover no sum whatsoever by reason of subrogation herein," and that

> the Clerk shall disburse the following sums forthwith out of the minor plaintiff's recovery in the sum of . . . ($15,000.00) heretofore paid into the Court as follows:
>
> 1. The sum of . . . ($5,000.00) plus one-third (1/3) of any accrued interest on said . . . ($15,000.00) principal sum as of the date of disbursement[,] to plaintiff's attorney . . . .
>
> 2. That the principal remainder plus any remaining accrued interest shall be retained by the Clerk for the use and benefit of the minor plaintiff, Vincent N. Cannady [sic], as provided by law.

From such judgment, intervenor plaintiff appealed.

Arthur Vann, for plaintiff appellee.

Durham County Attorney Lester W. Owen, by James W. Swindell, for intervenor plaintiff appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Steven Mansfield Shaber, amicus curiae for intervenor plaintiff appellant.

North Carolina Academy of Trial Lawyers, by Thomas F. Loflin, III, and Shirley L. Fulton, amicus curiae for plaintiff appellee.

HEDRICK, Judge.

This lawsuit revolves around a controversy about the respective rights of plaintiff and intervenor plaintiff as against the tortfeasor defendants. The intervenor plaintiff contends that to the extent of its subrogated interest under G.S. § 108-61.2, it must prevail over plaintiff with respect to any amount for which the tortfeasor defendants are liable for having injured Vincent N. Cannady, Jr.

The controlling statute in the present case is G.S. § 108-61.2, which has since been replaced by G.S. § 108A-57. G.S. § 108-61.2 provides:

> To the extent of payments under this Part [i.e., Part 5, entitled "Medical Assistance"], *the county involved* shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of assistance under this Part against any person.

State ex rel. Lanier v. Vines, 274 N.C. 486, 492, 164 S.E. 2d 161, 164 (1968), quoting 67 C.J.S. Parties § 12 with approval, states, " 'Where a cause of action is created by statute and the statute also provides who is to bring the action, the person or persons so designated, and, ordinarily, only such persons, may sue.' " In *Hunt v. State*, 201 N.C. 37, 158 S.E. 703 (1931), a proceeding was brought by "David Elder Hunt, deceased" to determine the State's liability under the Workmen's Compensation Act to decedent's dependents or his estate; the decedent had no dependents and a personal representative had not been appointed for him, and the court adverted to the relevant statute, which

stated that "in case the deceased employee leaves no dependents, the employer shall pay the amount allowed thereunder 'to the personal representative of the deceased.' " *Id.* at 38, 158 S.E. at 704. The court then stated,

> When a statute names a person to receive funds, and authorizes him to sue therefor, no one but the person so designated has the right to litigate the matter. . . .
>
> The proceeding, therefore, brought in the name of the deceased, and no one else, would seem to be nullius juris, . . .

Id. at 38, 158 S.E. at 704, and the proceeding was dismissed. *Id.*

In the present case, the intervenor plaintiff Durham County Department of Social Services is attempting to assert a statutory right of subrogation which, according to G.S. § 108-61.2, inheres "in the county involved." Since the Durham County Department of Social Services is not "the county involved," in that it is not a county at all, the trial court correctly ruled "that the intervenor [plaintiff], Durham County Department of Social Services have and recover no sum whatsoever by reason of subrogation herein."

The propriety of the trial court's ruling is further bolstered by statements in the law which suggest that, except for some specific statutory exceptions, the Durham County Department of Social Services as presently constituted can never be capable of bringing an action to enforce a claim. "In this state, a legal proceeding must be prosecuted by a legal person, whether it be a natural person, *sui juris*, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency." *In re Coleman*, 11 N.C. App. 124, 127, 180 S.E. 2d 439, 442 (1971). Among the corporate powers of a county is the power to "sue and be sued," G.S. § 153A-11; "[e]xcept as otherwise directed by law, each [such] power . . . shall be exercised by the board of commissioners." G.S. § 153A-12. G.S. § 108-61.2 states that "[i]t shall be the responsibility of the county commissioners, with such cooperation as they shall require from the county board of social services and the county director of social services, to enforce" the statutory subrogation rights. Furthermore,

> [t]he mere fact that an agent has negotiated a contract for his principal will not allow him to maintain an action on the con-

> tract in his own name for the benefit of the principal . . . [;] [t]his rule applies even though the principal has specifically authorized the agent to bring suit in his own name.

W. Sell, Agency § 203, 181 (1975); *see also* H. Reuschlein & W. Gregory, Agency & Partnership § 133 (1979); Restatement (Second) of Agency § 363 (1958); *Curry v. Roberson*, 87 Ga. App. 785, 75 S.E. 2d 282 (1953).

Assuming arguendo that a right of subrogation did inhere in the County of Durham in the present case, and granted that such a right is statutory and not contractual, the intervenor plaintiff, as a mere subdivision of the County, could have no more capacity to assert such right than an agent would with respect to a contractual right of his principal. There is no law which indicates that the intervenor plaintiff has been empowered to sue under the circumstances here presented, and just as a principal may not confer such power on its agent with respect to the principal's contractual rights, the county may not confer such power on its subdivision with respect to the county's subrogation rights merely by authorizing or ratifying the suit brought in the name of the subdivision. This rule is one of substantive law, and goes beyond "real party in interest" concerns; hence, any arguments based on G.S. § 1A-1, Rule 17, about authorization or ratification by the county are unavailing. With respect to the County's rights of subrogation, its Department of Social Services is no more capable of suing in its own name than is some lower echelon employee of such Department. The suit must be brought by the County itself. This insistence on the suit being brought by the correct entity regardless of any delegation by that entity is based on the previously discussed precedential guidance, and on the need for a shorthand method of assuring the defendant that he is being sued by the sole party which can conceivably make him liable on the subrogation claim.

In ruling that the intervenor plaintiff Durham County Department of Social Services may not recover on the subrogation claim, the court accomplished its duty of adjudicating the claims of the intervenor plaintiff, and any ruling pertaining to claims inhering in the County of Durham as against the tortfeasor defendants was superfluous to the decision. The decision of the trial court, therefore, may be affirmed on appeal without the ap-

pellate court passing at all on the question of whether the court erred in ruling that the County of Durham, as well as the intervenor plaintiff, did not have a subrogated interest. "If the correct result has been reached by the trial court, its judgment should not be disturbed even though some of the reasons assigned therefor may not be correct." *Reese v. Carson*, 3 N.C. App. 99, 104, 164 S.E. 2d 99, 102 (1968). Assuming arguendo the trial court erred in its ruling on the rights of the County of Durham, which was not a party to the action, the court's ruling respecting the intervenor plaintiff's rights under G.S. § 108-61.2 was entirely proper. The judgment of the trial court is

Affirmed.

Judges HILL and BECTON concur.

SHERRY CHAPMAN POWELL v. DR. L. NEWELL SHULL, JR.; DRS. ROACH, HANCOCK AND SHULL, P.A.

No. 8125SC875

(Filed 6 July 1982)

1. **Physicians, Surgeons, and Allied Professions § 17.3— malpractice—treatment of arm fracture—denial of directed verdict for defendants proper**

In a malpractice action concerning the treatment of an arm fracture, the trial court properly denied defendants' motion for a directed verdict on the negligence issue where the evidence tended to show that the normal healing period for a fracture of the type sustained by plaintiff is approximately 10-12 weeks; that 12 weeks after plaintiff's injury the doctor was fully aware that plaintiff's injury had not healed properly; that by two and one-half months after the accident he was greatly concerned about the increase in angulation and apposition at the fracture site; that plaintiff testified the doctor told her three and one-half months after her accident that her arm had healed, and that she could return to work, chop wood and do construction work; and that another doctor testified that if her doctor had made these statements to plaintiff, her doctor's treatment was not in accordance with the accepted standard of care in the community.

2. **Physicians, Surgeons, and Allied Professions § 20.2— instructions—submission of contributory negligence error**

In a malpractice action in which plaintiff specifically alleged that her doctor negligently treated her between 17 April 1977 and 2 August 1977 for a fracture of her arm, the trial court erred in submitting a contributory

negligence issue to the jury which was based on plaintiff's failure to return to see her doctor as ordered after 1 August 1977 and on plaintiff's failure to consult an orthopedic specialist until 14 October 1977 since plaintiff kept all scheduled appointments with her doctor between 18 April 1977 and 1 August 1977 and since her failure to return to defendants' office after 2 August 1977 and her failure to contact an orthopedic specialist prior to 14 October 1977 did not proximately cause or contribute to the injuries she received prior to 1 August 1977.

APPEAL by plaintiff from *Cornelius, Judge.* Judgment entered 2 March 1981 in Superior Court, BURKE County. Heard in the Court of Appeals on 6 April 1982.

Plaintiff, Sherry Chapman Powell, filed suit on 27 March 1979 to recover damages resulting from the alleged negligence of Dr. L. Newell Shull[1] who treated plaintiff for injuries she sustained in an automobile accident. From a judgment for Dr. Shull in this medical negligence case, plaintiff appeals. Dr. Shull cross-assigned error pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure.

Powell & Settlemyer, P.A., by Douglas F. Powell, for plaintiff appellant.

Mitchell, Teele, Blackwell & Mitchell, by W. Harold Mitchell and Marcus W. H. Mitchell, Jr., for defendant appellees.

BECTON, Judge.

I

Plaintiff fractured her arm in an automobile accident on 16 April 1977, and Dr. Shull treated her for the injury received. Alleging, among other things, (i) that Dr. Shull negligently performed closed reduction surgery of the fracture which resulted in a fibrous nonunion of the fracture; (ii) that Dr. Shull negligently failed to perform open reduction surgery; (iii) that plaintiff ultimately had to consult an orthopedic surgeon, Dr. Larry Anderson, who performed "an open reduction and fixation of fibrous malunion with plate fixation and bone graft and excision of distal

1. When reference is made to the defendants, we will use "defendant" or "Dr. Shull," since plaintiff's action against Drs. Roach, Hancock and Shull, P.A. is based solely upon plaintiff's claim that the negligence of Dr. Shull is imputed to the defendant Professional Association.

ulna . . . ;" and (iv) that plaintiff experienced pain and suffering, a permanent partial disability, and a permanent deformity in that her injured arm is now shorter than her other arm; plaintiff filed suit and prayed for damages in excess of $10,000.

Defendant, in his Answer, admitted that Dr. Shull had treated plaintiff for a broken arm, denied negligence, and alleged that plaintiff was contributorily negligent by not returning to Dr. Shull's office as separately ordered by Dr. Shull and Dr. Hancock, and by failing, for a two and one-half month period, to seek medical treatment.

Although many facts were disputed at trial, the following facts were undisputed. After Dr. Shull advised plaintiff that she had a fracture of the distal third of the radius, he performed a closed reduction of the fracture on 17 April 1977. The x-rays taken following the closed reduction reveal a 50% to 60% apposition fracture fragment. Plaintiff was discharged on 18 April 1977 and told to return in one week. Between 18 April 1977 and 1 August 1977 plaintiff kept all of her appointments with, and was seen by, Dr. Shull on 25 April 1977, 16 May 1977, 2 June 1977, and 1 July 1977. Between 18 April 1977 and 1 July 1977, the degree of apposition present at the fracture site decreased from the 50% to 60% range to 10%. Although defendant Shull concluded on 1 July 1977 that plaintiff "only had 10% apposition" remaining, that the radius had not aligned properly, and that "there was an increase of angulation at the fracture site," Dr. Shull did not inform plaintiff about these matters. Plaintiff was last seen by Dr. Shull on 1 August 1977. Plaintiff contacted Dr. Larry Anderson, a specialist in orthopedic surgery, on 14 October 1977. As a result of this consultation, plaintiff was hospitalized on 8 November 1977, and Dr. Anderson performed an open reduction of the fracture.

Considering these undisputed facts and other facts that were hotly contested and disputed, the jury answered the issues submitted as follows:

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

   Answer: Yes.

2. If so, did the plaintiff by her own negligence contribute to her injuries?

Answer: Yes.

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

Answer: $20,500

Following the verdict, the trial court declared a mistrial, but later vacated that order and entered judgment on the verdict, treating the jury's award of damages as surplusage. Plaintiff then filed notice of appeal.

II

Although some of the trial court's evidentiary rulings and portions of the trial court's instructions to the jury were excepted to, the dispositive issues on this appeal relate to the trial court's decision at the end of all the evidence to deny defendants' motion for a directed verdict and to deny plaintiff's motion for a directed verdict on the issue of contributory negligence.

First, we discuss defendant's cross-assignment of error—"that the plaintiff's evidence was insufficient to establish actionable negligence."

A. Defendant's Motion for Directed Verdict

[1] In this medical negligence action, the burden is upon the plaintiff to prove by the greater weight of the evidence not only that Dr. Shull was negligent but also that such negligence proximately caused her injuries. Generally, in order to recover for personal injury arising out of the furnishing of health care, the plaintiff must demonstrate by the testimony of a qualified expert that the care provided by defendant was not in accordance with the accepted standard of care in the community. *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E. 2d 287, 291 (1978). "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." *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E. 2d 286, 289, *disc. rev. denied*, 303 N.C. 546, 281 S.E. 2d 394 (1981). *See also Jackson v. Sanitarium*, 234 N.C. 222, 226-27, 67 S.E. 2d 57, 61-62 (1951), *rehearing denied*, 235 N.C. 758, 69 S.E. 2d

29 (1952). Moreover, once the standard of care is established, whether by expert or non-expert testimony, a doctor's departure from that standard of care may be shown by non-expert witnesses. *Id.*, 67 S.E. 2d at 62.

Since, on defendant's motion for a directed verdict, we take the evidence in the light most favorable to the plaintiff, we elect not to set out the evidence elicited by defendant in cross examining plaintiff's witnesses and the evidence brought out by defendant in his own case in chief. Plaintiff called two orthopedic surgeons to testify at trial. One, Dr. Larry Anderson, testified in response to a hypothetical question that Dr. Shull had ample opportunity to observe the healing process to the plaintiff's arm. The second doctor, Dr. Charles Lockert, testified similarly, but also was asked, and answered, the following hypothetical question:

> Q. Doctor, if the jury should believe the following to be the facts, and by the greater weight, that Dr. L. Newell Shull, Jr. examined the plaintiff on 17 April 1977 and performed a closed reduction of the displaced fracture to the radius involving the junction of the middle and distal third; that he obtained 50% to 60% apposition of the radius; that he released the plaintiff on 18 April 1977 from the hospital after having applied a long arm cast; that x-rays and examinations taken on 17 April 1977 after casting showed no change in position and alignment; that x-rays taken on 25 April 1977 showed no change in position and alignment; that examination and x-rays taken on, again, 16 May 1977 showed 20% to 30% apposition and that plaintiff was continued in a short arm cast; that examination and x-rays taken on 2 June 1977 after the cast was removed showed slight displacement with 25% to 30% apposition; that plaintiff was examined on 6 June 1977 complaining of pain and the short arm cast was reapplied; that x-rays and examination done 1 July 1977 showed 10% apposition and overall loss of alignment; that plaintiff continued in the cast; that x-rays taken on 1 August 1977 along with examination showed 10% apposition and overall loss of alignment; that only slight callus formation was ever present during any of the examinations; that the treating physician never advised the plaintiff of any difficulty, never referred her to a specialist; that the treating physi-

cian on each examination advised the plaintiff that her arm was healing nicely [;] that she could return to work or chop wood; that on 1 July 1977 there was a displacement of 85% to 100% of the radius at the fracture site. Based on that set of hypotheticals do you have an opinion satisfactory to yourself as to whether the standard of care received by the plaintiff, Sherry Powell could have been in accord with proper medical practice in general use within the community of Caldwell County or similar communities among practitioners engaged in the defendant's field of practice, Dr. Shull's field of practice?

OBJECTION: Overruled.

A. I do.

MOTION TO STRIKE: Denied.

Q. What is that opinion?

OBJECTION: Overruled.

. . . .

A. Based purely on all the facts that you've given me in the hypothetical question as to whether it could have been in accordance, if you take into consideration everything in the hypothetical question, I would say it could not have been in accordance.

MOTION TO STRIKE: Denied.

After specifically stating that his answer to the hypothetical question was based solely on the facts in the hypothetical question, Dr. Lockert also testified, that if defendant told plaintiff that she had no problems, that she was well and healed and capable of any type of work, including chopping wood, then defendant's conduct would constitute a deviation from the standard of care required of physicians engaged in the practice of operative orthopedics in Caldwell County, or in similar communities.

In addition to the testimony of Dr. Anderson and Dr. Lockert, Dr. Shull, himself, testified that plaintiff's fracture did not heal properly within the normal healing period and that he was greatly concerned about the progressive increase in angulation at the fracture site.

Contending that Dr. Shull should have told her about the condition of her arm and should have referred her to a specialist[2] instead of telling her on 1 August 1977 that her arm was healed, that she could return to work, chop wood or do construction work, plaintiff argues that Dr. Shull's testimony, itself, establishes a standard of care which he violated. Dr. Shull testified that he had a duty to inform plaintiff of any risk of proceeding with a closed, as opposed to open, reduction of the fracture, but that he never informed plaintiff of the risk of the treatment; Dr. Shull also testified that he had a duty to advise his patients of the possibility of an adverse result, but failed to so inform plaintiff.

In her brief, plaintiff has excerpted certain portions of Dr. Shull's testimony which we include herein:

> There were some important changes from May 16, to June 2. As I recall, there was an increase in the angulation at that time, I think the apposition was pretty well the same. I did not tell the patient that these changes had progressed. I didn't tell her anything about any changes. . . . With regard to how much deformity she had on June 2, she had some angulation at that point and approximately about 20% apposition at that time. I did not tell her that only 20% of the bones in the radius of her arm were touching and meeting each other.
>
> . . . .
>
> . . . I concluded on July 1, that she only had 10% apposition remaining. . . . No sir, I didn't tell her that she had a deformity whereby 90% of the bones weren't even in alignment or touching each other . . . I did conclude on July 1, after reviewing the films that the alignment of the radius was of grave concern to me. No sir, I didn't tell her that. I didn't want to upset her.
>
> . . . .
>
> . . . The alignment was of great concern on the 1st of July. On August 1, there had been no change, it was still of

2. Dr. Shull testified that, *after* August 2, he and Dr. Hancock "decided that the [plaintiff] should probably be referred to an orthopedist," but that they "made no active efforts . . . to communicate that to her."

concern. It was approximately of the same concern as it was on July 1. I did not tell the patient on August 1 that she had a serious deformity of the arm. She had a deformity of the arm.

. . . .

I did not tell the patient she would have loss of strength in the wrist. I felt that she would, yes sir.

. . . .

. . . I knew that I had the duty to refer her to a specialist more qualified than me if and when I felt that I could no longer adequately treat her for her injuries.

We have detailed the testimony of Dr. Lockert and Dr. Shull because the question of negligence is close, especially considering the testimony of Dr. Anderson and the following testimony of Dr. Lockert:

Yes, a closed reduction of a fracture of the distal third of the radius is an acceptable reduction procedure. Open reductions are also an acceptable procedure. Both procedures sometimes result in complications which in turn result in either a non-union or a malunion of the bones. These occur with or without any fault or negligence on the part of the treating physician.

Dr. Shull's testimony coupled with Dr. Lockert's response (albeit a limited response) to the hypothetical question posed, when weighed on the scales used on motions for directed verdict tip the balance in plaintiff's favor. It is to be remembered that a jury can believe all, part, or none of what an expert says. Dr. Shull testified that the normal healing period for a fracture of the type sustained by plaintiff is approximately ten to twelve weeks; that twelve weeks after plaintiff's injury he was fully aware that plaintiff's injury had not healed properly; and that by 1 July 1977 he was greatly concerned about the increase in angulation and apposition at the fracture site. Plaintiff testified that Dr. Shull told her on 1 August 1977 that her arm had healed, and that she could return to work, chop wood and do construction work. Dr. Lockert testified that if Dr. Shull made these statements to plaintiff, Dr. Shull's treatment was not in accordance with the accepted stand-

ard of care in the community. Taking this evidence in the light most favorable to the plaintiff, and considering the fact that Dr. Shull made no effort to refer plaintiff to a specialist, we are compelled to uphold the trial court's decision to deny defendants' motion for a directed verdict on the negligence issue. On the evidence presented, a jury could find that the negligence of defendant was the proximate cause of injury to the plaintiff. We therefore reject defendant's cross-assignment of error.

B. Contributory Negligence

[2] On the basis of defendant's argument at trial that plaintiff failed to return to see Dr. Shull as ordered after 1 August 1977 and that plaintiff failed to consult an orthopedic specialist until 14 October 1977, the trial court submitted an issue of plaintiff's contributory negligence to the jury. In so doing, the trial court erred. We find no evidence in the record to establish a causal connection between plaintiff's actions and the injuries of which she complains.

Remembering that the burden is on the defendant—the movant on this particular issue—to show that plaintiff's injuries were proximately caused by her own negligence, we look first at plaintiff's allegations and then at the proof offered at trial. In her complaint, plaintiff specifically alleged that Dr. Shull negligently treated her between 17 April 1977 and 2 August 1977. And while plaintiff sought damages for pain, suffering and additional medical expenses incurred as a result of the 17 November 1977 open reduction surgery, the damages sought were based on Dr. Shull's alleged negligence *occurring prior to* 2 August 1977. Medical testimony at trial leads to a singular conclusion: In the course of Dr. Shull's treatment of plaintiff, there was a progressive slippage and an increase in displacement of the fracture; by 1 July 1977, according to the radiologist, the displacement was probably 100%, and the ends of the fracture were not touching at the site of the fracture.[3]

3. The radiologist testified:

> As to the degree of displacement illustrated by plaintiff's Exhibit No. 23, well, it's somewhat more than it was before. I think, probably, it's 100%. I think there's some overriding there. There is no apposition, I don't think there's any apposition between the actual fracture ends. I mean that the ends

Significantly, plaintiff kept all scheduled appointments with Dr. Shull between 18 April 1977 and 1 August 1977. Plaintiff's failure to return to Dr. Shull's office after 2 August 1977 and her failure to contact Dr. Anderson prior to 14 October 1977 did not proximately cause or contribute to the injuries she received prior to 1 August 1977. There is no evidence that the degree of deformity to her arm as established by x-rays on 1 August 1977, would have been decreased or lessened by anything she did prior to or after 2 August 1977.

Based on the foregoing reasons, the trial court erred in submitting the contributory negligence issue to the jury. Consequently, the Judgment is vacated and the case is remanded to the superior court for a new trial.

New trial.

Judge HEDRICK and Judge HILL concur.

EDWARD E. HORNE, ADMINISTRATOR OF THE ESTATE OF DOUGLAS EDWARD HORNE, PLAINTIFF APPELLEE v. MARTHA BAREFOOT TRIVETTE AND DEAN DEWITT TRIVETTE, DEFENDANT APPELLANTS

No. 8121SC1023

(Filed 6 July 1982)

1. **Automobiles and Other Vehicles §§ 56.2, 80— turning at crossover—stopping partially in lane of travel—negligence and contributory negligence**

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence and did not disclose contributory negligence by plaintiff's intestate as a matter of law where it tended to show that defendant slowed down and started to turn left into a median crossover which separated the northbound and southbound lanes of a four-lane highway, that she failed to complete the turn and stopped short, leaving from five to eight feet of the rear of her car in the left-hand lane of travel, and that plaintiff's intestate was killed when his loaded gravel truck struck the rear of defendant's car.

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of the fracture are not touching. Now the bones are touching but in a different position than where the actual fracture site is. It could go ahead and heal in that position.

2. Automobiles and Other Vehicles § 90.7— instructions on sudden emergency

The evidence was sufficient to justify the trial court's instructions on sudden emergency in an action to recover for the death of plaintiff's intestate who was killed when his loaded gravel truck struck the rear of an automobile operated by defendant which had stopped partially in the intestate's lane of travel at a crossover between the northbound and southbound lanes of a four-lane highway.

3. Evidence § 42— shorthand statement of fact

Testimony by a witness that "the truck swerved to the right as much as he possibly could" did not invade the province of the jury but was admissible as a shorthand statement of fact.

4. Rules of Civil Procedure § 59— failure of investigating officer to disclose eyewitness—no denial of fair trial

The trial court did not err in the denial of defendants' G.S. 1A-1, Rule 59(a)(1) motion for a new trial on the ground that they had been prevented from having a fair trial because the investigating officer failed to disclose the name of an eyewitness to the collision in question until the trial had started and because several witnesses who could have corroborated the eyewitness's account of the collision were not discovered until after trial since the eyewitness did testify in defendants' behalf, and it appeared that reasonable investigation efforts after the accident and after disclosure of the existence of the eyewitness would have produced the other individuals who could have substantiated the eyewitness's version of the accident.

APPEAL by defendants from *DeRamus, Judge.* Judgment entered 31 March 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 May 1982.

This is an appeal from the judgment after a jury verdict of $150,000 for plaintiff in a wrongful death action. Plaintiff's intestate, hereafter referred to as Horne, was killed when his loaded gravel truck struck the rear of an automobile operated by defendant Martha Trivette stopped partially in a lane of traffic at a crossover on Interstate 85 near Lexington, North Carolina.

Defendants denied negligence, alleged contributory negligence and counterclaimed for personal injuries and property damage.

PLAINTIFF'S EVIDENCE

The accident occurred at about 11:00 a.m. on 21 September 1978 on I-85 outside Lexington. The weather was clear and the road was dry. The accident took place at a crossover between the two northbound and two southbound lanes. Defendants' car

turned left into the crossover, with the rear of the car remaining several feet in the left-hand southbound lane. Horne was following defendants' car in the inside lane and after it turned, Horne applied the brakes and swerved to the right. There was traffic to his right in the outside southbound lane. The truck went out of control after striking the rear of defendants' car, crashed through a concrete railing on an overpass and landed cab first on the street below. The driver of a car which was between defendants' car and the truck saw the truck rapidly approaching behind him and steered his car into the grassy median to avoid being caught between the two vehicles. The crossover within the median was 23 feet long and defendants' car was 18 to 20 feet long. The witness Jim Russell testified that he was driving a gravel truck in front of Horne; that he swerved suddenly to avoid colliding with the Trivette car; that he observed the collision, stopped, and walked back to the scene, but that when he realized his friend Horne was dead, he left in a state of shock and did not report that he witnessed the collision.

DEFENDANTS' EVIDENCE

The owner of a nearby service station testified that the truck driver blew his horn before hitting the car and that the car in the crossover had its left turn signal on. The defendant operator and her three passengers testified that the car pulled into the crossover as far as possible without being in danger of being hit by cars in the northbound lane. Defendant had been waiting for the northbound traffic to clear when Horne struck her. No one in the car was seriously injured.

Whiting, Horton and Hendrick by T. Paul Hendrick and Hamilton C. Horton, Jr., for plaintiff appellee.

Bell, Davis & Pitt by William Kearns Davis for defendant appellants.

CLARK, Judge.

[1] Defendants argue that the court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on the issues of defendant Martha Trivette's negligence and Horne's contributory negligence. They contend that the evidence did not show any actionable negligence by defendant which prox-

imately caused Horne's death, and that Horne's failure to keep a proper lookout caused the accident. The question presented by a defendant's motion for a directed verdict is whether the evidence, taken in the light most favorable to plaintiff, is sufficient for submission to the jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). Plaintiff's evidence tended to show that defendant slowed down, started to turn left into a median crossover which separated the four-lane highway but failed to complete the turn. She stopped short, leaving between five to eight feet of the rear of her car in the left-hand lane of travel. A person who drives a motor vehicle upon this State's highways must exercise reasonable care to ascertain that he can turn safely from a straight course of travel. G.S. 20-154; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538 (1950). The drivers of vehicles following defendant had the right to expect her to complete her turn and not stop short, blocking the flow of traffic in the left-hand lane. The evidence tends to show negligence on her part. Whether her negligence proximately caused Horne's death is a question for the jury. *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431 (1951). We find the evidence was sufficient to warrant submission of the issue of defendant's negligence to the jury and to overcome the motion for directed verdict.

Likewise, we find the court properly denied defendants' motion for a directed verdict on the contributory negligence issue. A directed verdict on the ground of contributory negligence will not be entered unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion could be reached. *Clary v. Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975). The fact that the collision occurred is some evidence that Horne failed to keep a proper lookout, but it does not compel this conclusion. *Shay v. Nixon*, 45 N.C. App. 108, 262 S.E. 2d 294 (1980). We believe that reasonable men could form differing opinions on this issue based upon the evidence and particularly in light of the sudden emergency doctrine. This issue, as well as the preceding one, was to be resolved by the jury, and defendants' motions were properly denied.

[2] Defendants next argue that the doctrine of sudden emergency was inapplicable to this situation and that an instruction should not have been given on it. The doctrine applies in situa-

tions where defendant's negligence creates a sudden emergency and plaintiff's acts have not brought about or contributed to the emergency. Plaintiff is held to the standard of care of acting as a reasonably prudent man would under similar circumstances, not to a standard of selecting the wisest course of conduct when faced with the sudden emergency. *Barney v. Highway Comm.*, 282 N.C. 278, 192 S.E. 2d 273 (1972); *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785 (1962). There is evidence tending to show that Horne was confronted with a sudden emergency. It was for the jury to determine whether Horne contributed to the creation of the emergency and whether he acted as a reasonably prudent man would have acted when confronted with the obstruction caused by defendants' car. The trial court correctly instructed on the doctrine.

[3] Defendants assign as error the admission of testimony of Isaacs, an eyewitness, that "[t]he truck swerved to the right as much as he possibly could." They argue that this statement invaded the province of the jury and was objectionable because it was an opinion and conclusion of the witness. We believe that the statement was admissible as a "shorthand statement of the fact" since the witness Isaacs was testifying concerning the results of his observation of the events leading up to the accident. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976); 1 Stansbury's N.C. Evidence § 125 (Brandis rev. 1973). His observation concerned an action that Horne took to avoid the collision and was not a conclusion on the ultimate issue of Horne's contributory negligence. Isaacs expanded on this statement by also testifying that there was traffic in the right-hand lane, that defendants' car obstructed the left-hand lane, that he himself swerved to avoid an accident, and that he had a clear view of Horne's truck at the time of the accident. We overrule this assignment of error.

Nor do we find error in the trial court's summary of the evidence. The trial judge used the same format in summarizing both plaintiff and defendants' evidence and taken in context, the court did not err in characterizing the evidence "as tending to show" certain facts. This language does not express the court's opinion of the evidence. *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556 (1944). We overrule this assignment of error.

[4] Defendants' final argument is that the court erred in denying their motion for new trial. They seek a new trial on the basis of G.S. 1A-1, Rule 59(a)(1) which provides that a new trial may be granted for "[a]ny irregularity by which any party was prevented from having a fair trial." They submit that they were denied a fair trial because the investigating officer withheld the name of the service station operator, Hinson, until the trial had started; several witnesses who could have corroborated Hinson's account of the accident were not discovered until after the trial; Russell failed to state in his deposition that he had reported the accident to his employer on that date; and other material conflicts between Russell's deposition and his trial testimony.

Despite the withholding of Hinson's name from defense counsel, Hinson did testify in defendants' behalf, and it would appear that reasonable investigation efforts after the accident and after disclosure of Hinson's existence would have produced the other individuals who could have substantiated Hinson's version of the accident. Every witness except Russell testified that there was only one dump truck traveling along the highway prior to the accident. We are not convinced that the testimony of two men who did not witness the impact but arrived immediately after the accident at the scene could affect the jury verdict. Evidence which is merely corroborative or cumulative of evidence offered at trial or which contradicts evidence of the opposing party is insufficient to warrant granting a new trial. *Branch v. Seitz*, 262 N.C. 727, 138 S.E. 2d 493 (1964).

The changes in Russell's testimony in the deposition and at trial affect his credibility, and it was for the jury to determine whether they believed his inconsistent testimony. Defense counsel conducted extensive impeachment of the witness by using his deposition testimony. A motion to set aside the verdict and order a new trial is addressed to the discretion of the trial judge. His ruling is not reviewable on appeal, absent a showing of abuse of discretion. *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). Judge DeRamus presided over both the trial and at the hearing on the motion for a new trial. Affidavits were presented by both parties at the hearing, and the court heard argument of counsel. Defendants have presented no compelling arguments showing they are entitled to a new trial. Based upon the record,

we find no abuse of discretion by the trial judge in refusing defendants' motion for new trial.

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JERRY ALONZO YOUNG

No. 8118SC1296

(Filed 6 July 1982)

1. **Criminal Law § 66.16— pre-trial photographic identification—independent origin of in-court identification**

The trial court's conclusion that a rape victim's in-court identification of defendant was of independent origin and not tainted by a pre-trial photographic identification was supported by findings that the victim had an opportunity to observe her assailant for several minutes under ample lighting and that she identified defendant at voir dire as that assailant.

2. **Criminal Law § 71— observation of "fresh" paint chips—shorthand statement of fact**

A witness's testimony that paint chips he observed on a car bumper were "fresh" was competent as a shorthand statement of fact.

3. **Criminal Law §§ 50.1, 51— paint chips on fender—qualification of expert—implied ruling**

The trial court by implication ruled that a vehicle body repairman was an expert on inferences to be drawn from fresh paint chips on fenders, and the repairman was properly permitted to state his opinion that he could tell that there had just been an accident because there were fresh paint chips on a dented automobile fender.

4. **Criminal Law § 50.2— admissibility of nonexpert opinion testimony**

In a prosecution for rape and crime against nature which allegedly occurred after automobiles driven by defendant and by the victim collided, an officer was properly permitted to testify that the body side molding on defendant's automobile resembled body side molding found at the crime scene, although the jury had pieces of both before it as exhibits, where the officer also testified that defendant's car was missing a piece of body side molding, and the officer's opinion was based on observations of defendant's entire car to which the jury was not privy.

5. **Criminal Law § 80— statement in business record—hearsay**

An insurance company document containing a statement by defendant that his car had been stolen on the day of the alleged crimes was not admissi-

ble under the business entry exception to the hearsay rule when it was offered to prove that the car was so stolen.

6. Criminal Law § 102.6— prosecutor's jury argument—absence of defense counsel's argument in record

The district attorney's jury argument that the absence of resistance by the prosecutrix to an act of sexual intercourse was not exculpatory of defendant since defendant might have murdered her had she resisted will not be held improper where the argument of defense counsel was not placed in the record on appeal so as to enable the appellate court to determine whether the challenged argument was provoked. Furthermore, such argument was not so clearly calculated to prejudice the defendant as to exceed the bounds of propriety.

APPEAL by defendant from *Wood, Judge.* Judgments entered 2 July 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 25 May 1982.

Defendant was charged in proper bills of indictment with second degree rape and crime against nature. Defendant pleaded not guilty, and was found guilty as charged in both cases. From judgments imposing consecutive prison terms of no more and no less than forty years for second degree rape and no more and no less than ten years for crime against nature, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Boyan and Nix, by Kathleen E. Nix, for defendant appellant.

HEDRICK, Judge.

The first assignment of error argued in defendant's brief is "the trial court's denial of defendant's Motion to Suppress the out-of-court photographic identification of the defendant" by the prosecuting witness. Defendant contends that the out-of-court identification was the product of an impermissibly suggestive photographic identification procedure. Since no evidence was presented at trial that defendant was identified at this pre-trial photographic identification session, then even if the procedure was impermissibly suggestive, its only relevance for defendant's appeal would be whether it tainted the prosecuting witness' in-court identification of defendant. Such a taint is alleged in defendant's next assignment of error, wherein defendant argues that "the trial court committed prejudicial error in denying the motion

to suppress the in-court identification of defendant" by the prosecuting witness.

Even if the prosecuting witness participated in an illegal pretrial identification procedure, that witness' in-court identification of the defendant "is nevertheless admissible if the trial judge determines from the evidence presented that the in-court identification is of independent origin, based on the witness' observations at the time and scene of the crime, and thus not tainted by the pretrial identification procedure." *State v. Thompson*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981).

> [W]hen the admissibility of in-court identification testimony is challenged on the ground it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility; and when the facts so found are supported by competent evidence, they are conclusive on the appellate courts.

State v. Allen, 301 N.C. 489, 496-97, 272 S.E. 2d 116, 121 (1980).

[1] The trial court in the present case, at the conclusion of a *voir dire* hearing, made unchallenged findings of fact which were amply supported by evidence. These conclusive findings were that immediately prior to the perpetration of the second degree rape of and crime against nature against the prosecuting witness, she had an opportunity to observe the perpetrator for several minutes under ample lighting, and that she identified defendant at *voir dire* as that perpetrator. The court then concluded that her in-court identification of defendant was independent of and in no way tainted by a previous out-of-court identification procedure. These conclusive findings of fact support the court's conclusions of law, which in turn support the court's denial of the motion to suppress the in-court identification. Furthermore, there is nothing in the record to indicate that the trial judge, as finder of fact at *voir dire*, applied anything less than a "clear and convincing evidence" test in determining whether the in-court identification was of independent origin, and his factual determination that such evidence was of clear and convincing weight is not subject to review on appeal. This assignment of error is overruled.

Defendant next assigns error to the admission of the "testimony of Gary Wade Brower as to his opinion that he could tell there had just been an accident and that paint chips he found [on the bumper of the prosecutrix's car] were fresh." Defendant contends that this testimony was inadmissible opinion evidence.

[2] With respect to Brower's testimony that the paint chips were "fresh," the following law regarding "shorthand statements of the fact" is controlling: such a shorthand statement, though it represents an inference drawn from constituent basic facts, is admissible in certain situations in which it would be impracticable to describe the basic facts in detail, *e.g.* because of the limitations of customary speech, or the relative unimportance of the subject testified about, or the difficulty in analyzing the thought processes by which the witness reaches his conclusion, or because the inference drawn is such a natural and well understood one that it would be a waste of time for him to elaborate the facts. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). The law does not demand a witness to further analyze his conclusion about the freshness of paint chips on an automobile bumper, and his testimony that they were "fresh" is an admissible shorthand statement of the facts.

[3] With respect to Brower's testimony about the occurrence of an "accident," the full content of such testimony should first be noted; he testified, "that there had just been an [automobile] accident . . . because . . . [t]here was [sic] paint chips, fresh paint chips . . . [o]n the dent on the front fender" of the prosecutrix's automobile. This testimony involves the drawing of an inference by Brower of the occurrence of an accident from the existence of fresh paint chips on a dented automobile fender. Brower, if he were a mere layman, would be no more qualified than the jury to draw such an inference from the circumstances presented; prior to making such an inference, however, Brower testified, "I'm a body man for Hilliard Motor Company—I fix cars, body repair." Given his vocation as a body repair man, the trial court could have found that Brower would be better qualified than the jury to draw inferences from the facts of the fresh paint chips on the dent of the automobile's fender. "[W]here the witness is better qualified than the jury to draw appropriate inferences from the facts," the opinion of that witness is admissible as expert

testimony. *State v. Griffin*, 288 N.C. 437, 442, 219 S.E. 2d 48, 52-53 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976). The determination that a witness possesses the requisite skill to testify as an expert is chiefly a question of fact ordinarily within the exclusive province of the trial judge, and " 'will not be reversed on appeal unless there is no evidence to support it.' " *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548-49 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209, 96 S.Ct. 3208 (1976). It will be assumed that the trial judge in the present case made an implicit finding that Brower was an expert on inferences to be drawn from fresh paint chips on fenders, *see Lawrence v. Reliance Insurance Co.*, 32 N.C. App. 414, 232 S.E. 2d 462 (1977), and such a finding is here sufficiently supported by evidence to avoid reversal on appeal. This assignment of error is overruled.

[4] Defendant also assigns error to the court's admission of testimony by Detective Grady Bryant that the body side molding on defendant's automobile resembled body side molding found at the scene of the alleged crimes. Defendant contends that Bryant was in no better position than the jury to draw inferences about any similarity between the side molding on defendant's car and the side molding found at the scene of the alleged crime, since the jury had pieces of each before it as exhibits and could make its own determination. We disagree. The record indicates that the inference to which Bryant testified was based on observations to which the jury was not privy, to wit, an observation of the body side molding found at the scene of the alleged crime, and an observation of *defendant's entire car*, which he testified was missing a piece of body side molding. The jury, on the other hand, had before it only two pieces of molding, and was not able to observe either of their relationships to an automobile, or to the gap in molding on defendant's automobile. The inference to which Bryant testified was therefore not one which the jury could also draw, since Bryant's inference was based on data which was different from and more complete than what was before the jury. Furthermore, at the time of Bryant's testimony, the exhibit of the body side molding from defendant's car had not even been introduced into evidence, and, hence, the jury was in no position to compare the likenesses of the two moldings to one another, whereas Bryant was. This assignment of error has no merit.

[5] Defendant next assigns as error the court's exclusion of an insurance company document containing a statement by defendant to the effect that his car had been stolen on the day of the alleged crimes. Defendant argues that the excluded evidence were records made in the ordinary course of business and were therefore admissible.

The admissibility of entries made in the regular course of business derives from circumstances which furnish a guaranty of the trustworthiness of such entries, notwithstanding the fact that the person making the entry is unavailable for cross-examination; the guaranty of trustworthiness derives from the desire of the person making the entry to provide accurate information to the business for which the records are intended. Hence, a business entry that defendant's car was stolen on the night of the alleged crime would be admissible to show that the car was so stolen; a business entry, however, that defendant *said* his car was stolen on the night of the alleged crime would contain a guaranty of trustworthiness of only the fact that that was what defendant said; that the person making the entry desires to record truthfully what defendant reports in no way means that what defendant reported was true. The business entry exception to the hearsay rule therefore does not mandate the admission of a business record that defendant said his car was stolen on the night of the alleged crime, when, as here, such record is offered to prove that the car was so stolen. Defendant's statement that his car was stolen, unlike the insurance company employee's record of his statement, is not necessarily imbued with an intent to provide reliable information to the insurance company. Rather, defendant's statement, contained in the proffered records, was an extrajudicial assertion offered to prove the truth of the matter asserted therein, and was therefore properly excluded as hearsay. This assignment of error is overruled.

[6] By his next assignment of error, defendant argues that the prosecutor's closing argument to the jury was improperly inflammatory. When, however, the district attorney's argument to the jury is challenged as improper, the argument of defense counsel should be placed in the record on appeal to enable appellate courts to determine whether the challenged argument has been provoked; if a portion of the argument of either counsel is omitted from the record on appeal, the arguments must be presumed

proper. *State v. Quilliams*, 55 N.C. App. 349, 285 S.E. 2d 617 (1982). "Ordinarily the exercise of the trial judge's discretion in controlling jury arguments will not be reviewed unless the impropriety of counsel's remarks is extreme and clearly calculated to prejudice the defendant in the eyes of the jury." *State v. Quilliams, supra* at 352, 285 S.E. 2d at 620. In the present case, the record on appeal contains no portion of defendant's argument to the jury, and only a brief excerpt of the district attorney's in which he intimated that the absence of resistance by the prosecutrix to the act of sexual intercourse was not exculpatory of defendant, since had the prosecutrix resisted the defendant might have murdered her. Given only an isolated portion of the jury argument, we must presume that counsel's argument was proper since we cannot tell if it was provoked; further, the excerpt which has been presented to us in the record is not so clearly calculated to prejudice the defendant as to exceed the bounds of propriety. This assignment of error has no merit.

Defendant's last two assignments of error relate to the court's instructions to the jury. We have carefully considered the exceptions upon which these assignments of error are based and find that the court's instructions, when considered contextually as a whole, were not improper.

We hold defendant had a fair trial free of prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD CAUDLE, SR.

No. 8118SC1247

(Filed 6 July 1982)

1. Homicide § 21.8 — second degree murder — sufficiency of evidence — defendant's assertion of self-defense

In a prosecution for second degree murder where the state introduced into evidence statements by defendant tending to show that he had gotten a rifle out of the trunk of his car and shot the deceased in self-defense but also introduced evidence which contradicted defendant's statement that he shot the

deceased in self-defense, the trial court did not err in denying his motion to dismiss at the end of all the evidence.

2. Homicide § 19.1— evidence of specific acts of violence by deceased—no error in exclusion where unknown to defendant

Defendant failed to show error in the exclusion of testimony by one of his witnesses that the witness had once had to shoot the deceased to keep from being cut by him where there was no evidence that defendant knew of the incident between the witness and the deceased and where the defendant himself testified that he had heard the deceased had been shot in a previous incident and presented evidence of the reputation of the deceased as being a violent and dangerous man.

3. Criminal Law § 85.2— character evidence about defendant—not necessary to limit question to particular community

In a prosecution for second degree murder where two State's witnesses were asked whether they knew defendant's character and reputation in the community, it was not necessary to limit the question to a particular community since character evidence may be received from one knowledgeable with any community in which defendant has a well-known or established reputation so long as the testifying witness had sufficient contact with the defendant, and both witnesses met the requirements.

4. Criminal Law § 85.2— testimony concerning specific acts and threats by defendant—admission not error

The trial court did not err in admitting the statements of a witness showing specific threats and actions by defendant against her and her family where objections to the testimony concerning defendant's alleged actions against her granddaughter were sustained, and where the remaining testimony concerning other threats by defendant against the witness, her son and her mother were volunteered without prompting and were admissible under the rule that a qualified character witness may, on his own volition, state in what respect the character of the person about whom he is testifying is bad.

5. Homicide § 26— instructions—intoxication—no bearing on guilt or innocence of second degree murder or voluntary manslaughter

In a prosecution for second degree murder the trial court properly instructed the jury, upon inquiry by them as to whether malice is possible in a person "under the strong influence of alcohol," that voluntary intoxication is generally not a legal excuse for crime and that defendant's intoxication, if any, would have no bearing on their determination of his guilt or innocence of second degree murder or voluntary manslaughter.

6. Criminal Law § 126.3— judge taking verdict sheet from jury at door of jury room

G.S. 15A-1237(b), requiring that a verdict be returned by the jury in open court, was not violated when the trial judge took the verdict sheet from the jury at the door of the jury room after being informed that they had reached a verdict and then read the verdict in open court.

State v. Caudle

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 17 June 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 May 1982.

Defendant was indicted for the first degree murder of James Douglas Wilkins. He was placed on trial for murder in the second degree and convicted. From a judgment of 40 years imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for State.

Robert S. Cahoon, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns error to the denial of his motions to dismiss at the close of State's and all the evidence. Defendant presented evidence at trial following denial of his initial motion to dismiss and thereby waived the right to challenge that denial. G.S. 15-173; *State v. Hough,* 299 N.C. 245, 262 S.E. 2d 268 (1980). Defendant's motion to dismiss made at the close of all the evidence is before this Court for review, and we conclude that denial of that motion was proper.

Defendant contends that the motion should have been allowed because State introduced uncontradicted exculpatory evidence by which it was bound. Defendant relies upon *State v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201 (1954), where the State introduced declarations by the defendant which presented a complete defense while its evidence *contra* raised only a possibility of guilt. It was held that under such circumstances, the defendant was entitled to acquittal upon his demurrer to the evidence. It was also noted, however, that the State, upon offering evidence of exculpatory declarations of a defendant, is not precluded from showing that the true facts differ from those related by the defendant and that such conflicting evidence is sufficient to overcome a motion to dismiss.

In the present case State did introduce into evidence statements by defendant made at the time of his arrest and shortly thereafter tending to show that he had gotten a rifle out of the trunk of his car and shot the deceased in self-defense after the deceased had hit him in the mouth and threatened to kill him

with a handgun which defendant had inside his car. In addition to this evidence, however, State presented evidence tending to show that the police were called to the scene of the shooting at approximately midnight on 4 May 1980 by several people who had been awakened by loud noises in the park across the street from their houses, had observed defendant's car sitting in the park with one man standing at the open trunk and another sitting inside the car and had heard the man at the trunk yell "Get out of the goddamn car" several times and then heard a gunshot. When police arrived they found defendant crouched beside the body of the deceased which appeared to have been dragged from the passenger seat of the car approximately 30 feet towards a creek. The deceased died of a gunshot wound to the chest. A spent rifle cartridge was found near the right front fender of the car. A rifle with blood on it was found behind the passenger seat, and a handgun was found on the floorboard of the driver's side of the car. Defendant had threatened to kill someone with the handgun earlier in the evening and had bragged about having a rifle in the trunk of the car. After his arrest, defendant made the statement, "That's what he gets for what he did to my mother." This evidence sufficiently contradicts defendant's statement that he shot the deceased in self-defense to merit denial of the motion to dismiss.

[2] Defendant next assigns error to the exclusion of testimony by one of his witnesses that the witness had once had to shoot the deceased to keep from being cut by him. We agree with defendant that evidence of the character of the deceased as a violent and dangerous fighting man is admissible in a prosecution for homicide where self-defense is claimed. However, evidence of specific acts of violence by the deceased is admissible only when those acts occurred in the presence of the defendant or were known to the defendant prior to the homicide. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978). There is no evidence in the record that defendant knew of the incident between the witness and the deceased. Even assuming that the evidence should not have been excluded, the record reveals no prejudice to defendant since he testified himself that he had heard that the deceased had been shot in a previous incident and presented evidence of the reputation of the deceased as being a violent and dangerous man. *See State v. Cole*, 31 N.C. App. 673, 230 S.E. 2d 588 (1976).

In assignments of error three and four defendant alleges error in the trial court's admission into evidence of the testimony of two witnesses regarding defendant's character and reputation in the community. State called these witnesses to rebut evidence of his good character presented by defendant. Both witnesses testified that defendant's character and reputation in the community was bad, and one of the witnesses elaborated upon her answer by stating that defendant had threatened to kill her son and her mother, had told her that if she testified against him she would never see her granddaughter again and had recently taken her granddaughter away overnight without telling anyone where he was. Defendant argues that admission of the testimony as to his character and reputation in an unspecified community was error, and that the testimony regarding specific threats and violent acts by him was inadmissible hearsay. We disagree with both arguments.

[3] The procedure for offering evidence on a person's character is well established.

> The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is. This he may do categorically, *i.e.*, simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices.

State v. Abernathy, 295 N.C. 147, 166-67, 244 S.E. 2d 373, 385-86 (1978), *quoting State v. Hicks*, 200 N.C. 539, 157 S.E. 851 (1931). In the present case both witnesses were asked the required "preliminary qualifying question," that is, whether they knew defendant's character and reputation in the community. It was not necessary to limit the question to a particular community since character evidence may be received from one knowledge-

able with "any community or society in which the person has a well-known or established reputation" so long as the testifying witness has had "sufficient contact with that community or society to qualify him as knowing the general reputation of the person sought to be attacked or supported." *State v. McEachern*, 283 N.C. 57, 67, 194 S.E. 2d 787, 793-94 (1973). Here, both witnesses, after testifying that they had known defendant for approximately two years and were related to him by marriage, answered the qualifying question in the affirmative. We hold this foundation to be a sufficient, though minimal, compliance with the requirements for admission of character evidence. *Cf., State v. Orr*, 48 N.C. App. 723, 269 S.E. 2d 727 (1980) (character witness had obviously insufficient contact with any community in which the prosecuting witness might have been known to testify with respect to her general reputation and character). Further, defendant did not attempt to elicit any disqualifying facts by cross-examination or voir dire and did not move to strike the witnesses' testimony as to his general reputation and character.

[4] With regard to admission of the statements showing specific threats and actions by defendant against one of the witnesses and her family, we find no reversible error. The trial court sustained defendant's objections to the testimony concerning his alleged actions against the granddaughter, and defendant did not move to strike that testimony. The remaining testimony concerned alleged threats by defendant against the witness, her son and her mother. The statements were volunteered by the witness without prompting by State and were admissible under the rule that a qualified character witness may, on his own volition, state in what respect the character of the person about whom he is testifying is bad. *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980). These assignments of error are overruled.

[5] In the next assignment of error which defendant brings forward on appeal, he contends that the trial court erred in instructing the jury, upon inquiry by them as to whether malice is possible in a person "under the strong influence of alcohol," that voluntary intoxication is generally not a legal excuse for crime and that defendant's intoxication, if any, could have no bearing on their determination of his guilt or innocence of second degree murder or voluntary manslaughter. We find no error. The trial court correctly summarized the law as it exists in this State.

State v. King, 49 N.C. App. 499, 272 S.E. 2d 26 (1980), *discr. rev. denied*, 302 N.C. 220, 276 S.E. 2d 917 (1981). Moreover, in his own testimony defendant denied being drunk at the time of the shooting.

[6] Defendant next contends that G.S. 15A-1237(b), requiring that a verdict be returned by the jury in open court, was violated when the trial judge took the verdict sheet from the jury at the door of the jury room after being informed that they had reached a verdict. The judge then read the verdict in open court. We fail to perceive any violation of the statute or prejudice to defendant in this procedure. This assignment of error is overruled.

Defendant's final assignment of error is a formal one, asserting error in the denial of his motion to set aside the verdict and in entry of judgment against defendant for the reasons set forth in the preceding assignments of error. For the reasons previously stated, we find no error.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. MONROE GORDON PILAND

No. 811SC1117

(Filed 6 July 1982)

1. **Constitutional Law § 66— attorney's ability to waive defendant's right to be present at suppression hearing**

In a prosecution for manufacture of marijuana and felonious possession of marijuana, defendant's counsel had the power to waive the defendant's presence at a suppression hearing where defendant failed to demonstrate any prejudice to him by his absence, and where the evidence elicited was not disputed and there was no showing that it would have been different had the defendant been present.

2. **Searches and Seizures § 33— marijuana seen from neighbor's property—lawful search and seizure**

In a prosecution for manufacture of marijuana and felonious possession of marijuana where officers had been invited by defendant's neighbor to enter the neighbor's property and view defendant's property which they did and saw

marijuana, even assuming the defendant had a reasonable expectation of privacy in the place at which he planted the marijuana, it was in plain view of the officers at a place they had a lawful right to be and a reasonable expectation of privacy did not affect the officers' right to seize the marijuana without a search warrant under the circumstances.

3. **Narcotics § 4.5— instructions—failure to submit defense of necessity—proper**

In a prosecution for the manufacture of marijuana and felonious possession of marijuana where the defendant was a medical doctor who contended he grew the marijuana for the benefit of his patient, the trial court properly failed to submit to the jury the defense of necessity.

4. **Narcotics § 4.5— instructions—preparation and compounding controlled substance—no application**

In a prosecution for the manufacture of marijuana and felonious possession of marijuana, G.S. 90-87(15), concerning the preparation or compounding of a controlled substance, had no application to defendant's case where defendant was doing more than preparing or compounding the marijuana since he was growing it.

5. **Narcotics § 4.5— instructions—lapse linguae—confusion in definition of intent—no prejudice to defendant**

In a prosecution for the manufacture of marijuana and felonious possession of marijuana, the defendant was not prejudiced and the jury was not misled by a *lapse linguae* in the charge on constructive possession and by an initially confusing charge on intent which was subsequently corrected.

6. **Narcotics § 1.2— professional dispensation of drugs—statute not unconstitutionally vague**

G.S. 90-101(g) and (h) which allow a physician to possess a narcotic in pharmaceutical form could not lead a physician of common intelligence to believe he could grow marijuana and possess it in its raw form and are not unconstitutionally vague.

ON writ of certiorari to review judgment entered by *Cornelius, Judge.* Judgment entered 28 February 1981 in Superior Court, DARE County. Heard in the Court of Appeals 11 March 1982.

The defendant, a medical doctor, was tried for the manufacture of marijuana and felonious possession of marijuana. Prior to the trial of the case, a hearing was held to suppress evidence of marijuana which was found on the defendant's premises and the statement of the defendant at the time of his arrest. The defendant was not present while a part of the motion to suppress was heard. The district attorney stated that he would not insist that the counsel for the defendant go forward with the hearing in the absence of his client. The defendant's attorney stated he was anx-

ious to have the case heard that day and the court heard four witnesses before the defendant arrived in court. Mr. Albert L. Austin, a deputy sheriff of Dare County, testified at the suppression hearing that Mr. Herman Gaskins of Hatteras, North Carolina, told him there might be marijuana growing on his property or on the adjoining property. Mr. Austin went to Mr. Gaskins' house and walked into the yard behind the house. He was able to observe through a myrtle hedge along Mr. Gaskins' property line what he recognized as marijuana growing on the adjoining property, which property belonged to the defendant. Mr. Austin notified Deputy Sheriff Carroll Midgett. Mr. Midgett and an agent with the State Bureau of Investigation went to Mr. Gaskins' house. They received permission from Mr. Gaskins to go into his backyard, which they did, and at that time were able to observe the marijuana through the myrtle hedge. They heard a voice and went through the hedge. At that time the defendant approached them. He told them the marijuana was his and he had been growing it to administer to his patients. The defendant said the only way he could be sure that the marijuana he used for medical purposes had not been treated with any insecticides or harmful chemicals was to grow it himself. The defendant also told the officers he had marijuana in his house and gave this to the officers. The court found facts consistent with this evidence and overruled the motion to suppress evidence of the marijuana and the motion to exclude the statement of the defendant.

At the trial, the State offered the evidence it had used at the *voir dire* hearing. The defendant testified he was growing the marijuana to treat Gail Hollis, who was experiencing nausea from chemotherapy treatments. He did not try to get a license to dispense it because he felt such an attempt would be futile. Several doctors and laymen presented evidence that marijuana is helpful in treating the nausea which accompanies chemotherapy. Dr. John Laszlo of Duke University Medical Center testified that he has a permit to dispense marijuana. He also testified as to the drug's usefulness and to the difficulty in getting a license to dispense the drug. Gail Hollis testified she was not Dr. Piland's patient and she had not and would not take marijuana.

The defendant was found guilty of both charges. He appeals from the imposition of an active sentence which was suspended.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers, for the State.

Alexander and McCormick, by David S. Rudolph and Donald H. Beskind, for defendant appellant.

WEBB, Judge.

[1] The defendant brings forward seven assignments of error. He first argues that holding part of the suppression hearing without his presence violated his right of confrontation and effective assistance of counsel. He contends his attorney could not waive his right to be present. The State had offered to continue the suppression hearing, but it was started before the defendant was present at the request of defendant's counsel. There can be no question that his counsel intended to waive the presence of the defendant at the hearing. We hold that he had the power to do this. It has been held that a defendant cannot waive his right to be present at every stage of his trial upon an indictment charging a capital felony. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Our Supreme Court has not extended this rule to non-capital cases. It has held that this rule is not extended in a capital case to require the defendant's presence at a hearing on a pretrial motion for discovery. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). The defendant in this case has not demonstrated any prejudice to him by his absence from a part of the hearing. The evidence elicited was not disputed and there has been no showing that it would have been different had the defendant been present. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends the court should have granted his motion to suppress the marijuana found on his property and his statements made to the officers at the time of his arrest. He contends the marijuana was seized and he was arrested as the result of an unlawful search. We do not believe there was an unlawful search. The officers had been invited by Mr. Gaskins to enter his property. While in a place at which they had a right to be, they were able to observe the growing marijuana in plain view. No search warrant was required to enter the property of the defendant and seize the contraband. *See State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979). The defendant, citing several United States Supreme Court cases and

cases from other jurisdictions, argues that the marijuana was being grown at a place in which he had a reasonable expectation of privacy and for this reason a search warrant was required before the officers could enter the property. We do not believe the case turns on this point. Assuming the defendant had a reasonable expectation of privacy in the place at which he planted the marijuana, it was in plain view of the officers at a place they had a lawful right to be. A reasonable expectation of privacy does not affect the officers' right to seize the marijuana without a search warrant under these circumstances. When the defendant said the marijuana was his, they had a right to arrest him and the statement he volunteered at that time may be received in evidence. The defendant's second assignment of error is overruled.

[3] In his third assignment of error the defendant contends the court should have submitted to the jury the defense of necessity. He cites cases from other states and textbook authority for the proposition that in some cases society may be better served by violation of the law than adherence to its letter. He argues from this that the jury should have been allowed to determine whether the defendant had a right to grow marijuana in violation of the law in order to furnish it to his patients. We do not consider the defense of necessity except to say it has no application in this case. The evidence shows there is at least one doctor in this state who may prescribe marijuana. The defendant could have referred to Dr. Laszlo any patient who he felt needed marijuana. We cannot hold that any doctor in the state who decides he wants to grow marijuana may do so in disregard of the criminal sanctions against it and the laws and rules regulating the prescription of drugs by physicians. The defendant's third assignment of error is overruled.

[4] In his fourth assignment of error the defendant contends the court should have charged the jury on G.S. 90-87(15) which provides in part:

> " 'Manufacture' . . . does not include the preparation or compounding of a controlled substance . . . .
>
> a. By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice."

We do not believe G.S. 90-87(15) has any application to this case. The defendant was doing more than preparing or compounding the marijuana. He was growing it. He should not have been growing it as an incident to administering or dispensing it in the course of his professional practice as he was forbidden by law from doing so. The defendant's fourth assignment of error is overruled.

[5] The defendant's fifth assignment of error is to the charge. The court charged on constructive possession. He charged the jury that if they found the marijuana was on premises owned and controlled by the defendant, this would be a circumstance with other circumstances from which they could conclude the defendant had the power and intent to control the marijuana. He charged further they could not make this inference on this circumstance alone. He then charged as follows: "This inference may be drawn only from this or any other circumstances that you find from the evidence beyond a reasonable doubt." The defendant contends that by using the word "or" the court charged inconsistently. We do not believe this *lapse linguae* was prejudicial to the defendant. He admitted throughout the trial that the marijuana was his. We believe from reading the entire charge that the jury was not misled. The defendant's fifth assignment of error is overruled.

The defendant next assigns error to the definition of intent used in the charge. The court apparently became confused when it started the definition of intent. It said "Intent is defined as—a person acts intentionally for the purposes of this crime when it is his intent to knowingly possess marijuana." The court then correctly defined intent. We do not believe the jury was confused or misled by the above quoted sentence. The court also instructed the jury as follows:

> "And intent to normally possess marijuana may be inferred from the act itself, the nature of the possession, the conduct of the defendant, and other relevant circumstances."

The defendant argues that by using the phrase "the nature of the possession" the court assumed that possession had been proved and thus commented on the evidence. We do not believe the jury would conclude from this phrase that the court had assumed that possession had been proved. If they did it may have been because

the defendant admitted possession. This assignment of error is overruled.

[6] In his last assignment of error the defendant contends the statute was unconstitutionally vague as applied to him. G.S. 90-101 provides in part:

> "(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.
>
> (h) A physician licensed by the Board of Medical Examiners pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to regulations adopted by the North Carolina Drug Commission."

The defendant argues that the term "tetrahydrocannabinols" reasonably includes marijuana. He argues further that no regulations had been adopted by the North Carolina Drug Commission. He concludes these two sections of the statute led him to believe he could grow and possess marijuana for the use of his patients. Assuming that tetrahydrocannabinols include marijuana, we do not believe a statute which allows a physician to possess it in pharmaceutical form could lead a physician of common intelligence to believe he could grow marijuana and possess it in its raw form. The defendant's last assignment of error is overruled.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. LEON KEITH GRAY

No. 8112SC1282

(Filed 6 July 1982)

1. **Larceny § 7.6— removal of tires from car—sufficient evidence of taking and asportation**

Evidence that defendant removed tires and wheels from cars belonging to a car dealer at least a fraction of an inch was sufficient evidence of a taking and asportation to support a conviction of larceny.

2. **Larceny § 8— felonious larceny—failure to submit issue of attempted larceny**

The trial court in a prosecution for felonious larceny of automobile tires did not err in refusing to instruct the jury on attempted larceny where all the evidence tended to show that defendant was guilty of larceny in that he removed tires from automobiles completely and propped them against the hubs.

APPEAL by defendant from *Clark, Judge.* Judgement entered 4 June 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 May 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious larceny.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Judge.

Defendant was indicted for the larceny of four tires. Evidence for the State, in pertinent part, tended to show the following:

Kyle Powers, nephew of C. C. Powers, President of Powers-Swain Chevrolet, Inc., met his uncle at the dealership on 1 March 1981 to discuss a job. When he arrived he saw two men on the lot beside two cars. One of the men drove out the front of the dealership, and the other drove out the back. Kyle identified defendant as the one who drove out the back.

When Kyle's uncle arrived, he told Kyle someone had been tampering with the cars on the lot. Kyle and his uncle then

walked over to two Monte Carlos. These cars "were sitting on bricks, and the two inside tires were gone." They also noticed an M-80 Malibu with "the lug nuts . . . gone and three bricks . . . laying up under the frame of the car."

Kyle and his uncle went to the garage area of the dealership to get a lug wrench to put the nuts back on. From there Kyle observed defendant walk up, get under the Malibu, and pull on the tires. Kyle's uncle called the Sheriff, and Kyle went out to talk with defendant. Defendant told him: "I just happened to notice the lug nuts were off and I was just crawling under there to see what was wrong." Defendant then "drove off in a hurry."

Kyle observed defendant's license plate number. He gave it to his uncle, who in turn relayed it to law enforcement officials.

Four tires and wheels had been removed from two Monte Carlos in the lot, and these cars were sitting on bricks. All the lug nuts were off the Malibu, and bricks were lying around it. The Malibu tires "sat on the side of the hub." The top hole and bolt had been moved "probably a half inch"; the bottom, three or four inches. The tire had actually been moved "about an inch or so."

When C. C. Powers first drove onto the lot, he noticed the two Monte Carlos parked side by side with the inside tires and wheels missing. He subsequently noticed the Malibu "with the lug nuts taken off, scattered over the ground." While he and Kyle were in the showroom he saw someone "sitting up a brick under the left front tire of [an] automobile." The person he saw took hold of two tires, broke them loose, and left the weight of the car "on the brick bat."

Powers then went to call the Sheriff. While he was calling he saw defendant drive out of the lot. He gave the Sheriff's office a description of defendant's car, its license number, and the direction in which it had gone.

Shortly thereafter three deputies returned with defendant. Defendant was wearing coveralls which were wet from the shoulders down. There was dirt and sand under the Malibu on the dealership lot. It had been raining, and the area under the Malibu was wet.

Powers estimated that the tires and wheels had been moved one inch from the axle of the Malibu. There was no weight on the wheels as they leaned against the hub.

Joe Herman, the Sheriff's Department employee who answered the call to stop defendant's car, also observed that the back of defendant's coveralls was wet and sandy. Kyle Powers and C. C. Powers both advised Herman when he brought defendant back to the dealership that defendant "was the one that they had seen . . . trying to remove their tires off of their . . . car there in the lot." Herman searched defendant's car and found some tools and "a half of brick . . . in the trunk." He observed "where the lug nuts had been taken off . . . and spewed around the tires" of the Malibu and that two tires were "completely off of the hub." He estimated the other two tires had been moved from the hub "approximately a quarter of an inch, an inch—." He observed bricks under the four wheels of the Malibu.

Mary Morrow, a crime scene technician with the Cumberland County Identification Bureau, also observed that the tires had been removed from the Malibu and "were leaning against the wheel area." She stated that the tires "were completely off and were leaning against the hub." She observed that defendant's car contained a lot of tools and that "[t]here were brick chips laying on the driver's side of the front seat floorboard." She also observed that bricks had been placed under the wheels of the two Monte Carlos and that the tires had been removed on the insides of both cars.

Morrow forwarded to the S.B.I. laboratory brick chips from defendant's car and bricks she received from Officer Herman. Herman had told her the bricks came from under the Malibu and one of the Monte Carlos on the dealership lot. A forensic chemist for the S.B.I. testified that one of the chips precisely fit into a "chipped away" place on a brick Morrow had received from Officer Herman.

Defendant offered no evidence.

[1] Defendant contends the court erred in denying his motions to dismiss, because the evidence was insufficient to establish the "taking and carrying away" of the property of another required to constitute the crime of larceny. On the authority of *State v.*

Carswell, 296 N.C. 101, 249 S.E. 2d 427 (1978), we find the evidence sufficient to take the larceny charge to the jury.

In *Carswell* some rooms in a motel were broken into. In one of the rooms the window air conditioner was pried away from the base on which it rested, but was not removed. The following night a motel security guard observed defendant Carswell and another man enter that room, take the air conditioner from its stand, and place it on the floor. The unit was moved approximately four to six inches toward the door. The men then left that room and were stopped by the security guard as they appeared to be entering another room.

Our Supreme Court held that evidence sufficient to take a larceny charge to the jury. It stated: "A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away." *Carswell*, 296 N.C. at 103, 249 S.E. 2d at 428, *quoting from* 4 W. Blackstone, *Commentaries* 231. Further, "the accused must not only move the goods, but he must also have them in his possession, or under his control, *even if only for an instant.*" *Carswell*, 296 N.C. at 104, 249 S.E. 2d at 429 (emphasis supplied). The Court held that the act of picking up the air conditioner and placing it on the floor "was sufficient to put the object briefly under the control of the defendant, severed from the owner's possession." *Id.*

In ruling on the motion to dismiss the evidence must be considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Holton*, 284 N.C. 391, 394, 200 S.E. 2d 612, 614 (1973); *State v. Henderson*, 276 N.C. 430, 438, 173 S.E. 2d 291, 296 (1970). So considered, the evidence here permitted a finding that defendant removed tires and wheels from cars belonging to Powers-Swain Chevrolet, Inc. at least a fraction of an inch from their axles. His act in so doing was sufficient to permit a finding that he placed the tires under his control, severed from the owner's possession, "even if only for an instant." *Carswell*, 296 N.C. at 104, 249 S.E. 2d at 429. Judged by the *Carswell* standard, such evidence was sufficient to take the larceny charge to the jury. *See also State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Speller*, 44 N.C. App. 59, 259 S.E. 2d 784 (1979).

[2] Defendant further contends the court erred in refusing his request to instruct the jury on attempted larceny. We find no error.

A defendant may be convicted of the crime charged in the bill of indictment, or, *inter alia*, of an attempt to commit it. G.S. 15-170 (1978). "The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, *but falling short of the completed offense*." *State v. Powell*, 277 N.C. 672, 678, 178 S.E. 2d 417, 421 (1971) (emphasis supplied). *See also State v. Sanders*, 280 N.C. 81, 185 S.E. 2d 158 (1971); *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956); *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949); *State v. Hoover*, 14 N.C. App. 154, 187 S.E. 2d 453, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 899 (1972). "Where there is evidence of defendant's guilt of a lesser degree of the crime set forth in the bill of indictment, defendant is entitled to have the question submitted to the jury even in the absence of a specific prayer for the instruction." *State v. Green*, 298 N.C. 793, 797, 259 S.E. 2d 904, 907 (1979). "However, it is not necessary to submit the lesser included offense if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime." *State v. Brown*, 300 N.C. 41, 50, 265 S.E. 2d 191, 197 (1980).

> The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees. [Citations omitted.] The presence of such evidence is the determinative factor. [Citation omitted.] Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show the commission of a crime of lesser degree, the principle does not apply and it would be erroneous for the court to charge on the unsupported lesser degree.

State v. Simpson, 299 N.C. 377, 381, 261 S.E. 2d 661, 663 (1980).

The record here contains no evidence tending to show that defendant may have been guilty only of attempted larceny. All the evidence showed that defendant had removed the tires completely and propped them against the hubs. He thus had placed them under his control, severed from the owner's possession, for at least an instant. This was sufficient, under the *Carswell* stand-

ard, *supra*, to complete the offense of larceny. Defendant's acts thus did not "fall short of the completed offense," *Powell, supra*; and there was no evidence tending to show the commission of a crime of lesser degree than that charged, *Simpson, supra*. Consequently, the court properly declined to instruct on attempted larceny.

We find in defendant's contentions relating to the court's evidentiary rulings and instructions no error warranting a new trial.

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JOHN BANGLE CORL, DEFENDANT, AND RUTHERFORD LEROY CORL AND ELIZABETH FLYNN CORL, SURETIES

No. 8119SC1393

(Filed 6 July 1982)

Arrest and Bail § 11— sureties' liability on appearance bonds ended at entry of judgment

Where one condition of an appearance bond was that defendant "shall appear . . . whenever required and will at all times render himself amenable to the orders and processes of the Court," and where the bond further provided that "this bond is effective and binding upon the obligors throughout all stages of the proceedings in the trial divisions . . . *until the entry of judgment in the superior court*," the sureties' liability upon the bond terminated upon entry of judgment in the superior court, and the trial court erred in holding the sureties liable on their bond for the defendant's failure to submit himself for commitment upon his release from medical treatment.

APPEAL by sureties from *Washington, Judge*. Judgment entered 16 October 1981 in Superior Court, CABARRUS County. Heard in the Court of Appeals 9 June 1982.

On 10 April 1980 defendant John Bangle Corl was arrested on criminal charges. His appearance bond, executed by Rutherford L. Corl and Elizabeth Flynn Corl as sureties, provided in pertinent part as follows:

Pretrial Release—The conditions of this bond are that the above named defendant shall appear in the above entitled action whenever required and will at all times render himself amenable to the orders and processes of the Court. It is agreed and understood that this bond is effective and binding upon the obligors throughout all stages of the proceedings in the trial divisions of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken *or until the entry of judgment in the superior court.*

. . . .

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, the court will enter an order declaring the bond forfeited. [Emphasis supplied.]

On 23 January 1981 defendant pled guilty to two charges. He received an active sentence on one and a suspended sentence with probation on the other.

Because defendant wished to obtain medical treatment and to secure medical records before commitment, Judge Davis ordered "that the Sheriff commit defendant, effective March 2, 1981." On that date Judge Davis was advised that defendant was hospitalized, and he ordered that "[c]ommitment be held until such time, from day to day, as defendant is released from the hospital."

Defendant did not appear for commitment upon his release. Orders for his arrest were issued, and he was arrested on 25 September 1981.

On 17 August 1981 an order of forfeiture on the appearance bond was served on the sureties. They moved to dismiss, and a hearing was held. On 16 October 1981 Judge Washington entered judgment holding the sureties liable on their bond for the defendant's failure to submit himself for commitment.

From this judgment, the sureties appeal.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Kenneth W. Parsons for surety appellants.

WHICHARD, Judge.

For authority on the duration of a surety's liability on an appearance bond, *see generally* Annot., 20 A.L.R. 594 (1922); 8 Am. Jur. 2d, Bail and Recognizance, §§ 104-110 (1980 & Cum. Supp. 1981). While the authorities set forth do not necessarily control because of the express language of the bond here, we review them briefly for the purpose of placing this case in the context of topical decisions.

In *United States v. Miller*, 539 F. 2d 445 (5th Cir. 1976), and *United States v. Wray*, 389 F. Supp. 1186 (W. D. Mo. 1975), defendants were sentenced to imprisonment but allowed a short stay of commitment. They then failed to appear as ordered. Their bonds required each defendant to "abide any judgment entered . . . by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe." In each case the court held the failure to appear for commitment came within the terms of the bond, and the surety was thus liable.

In *United States v. Gonware*, 415 F. 2d 82 (9th Cir. 1969), the court observed that a bail bond, like any other contract, should be construed to give effect to the reasonable intentions of the parties. It then stated:

> [I]t is a common practice in the federal courts as well as the state courts, for defendants to request and for courts to grant short stays of execution of sentence to allow defendants to put their affairs in order before they start to serve their sentence. . . . Given this widespread practice, it is reasonable that the parties to this bail bond intended that the surety would remain liable during a reasonable stay of execution of the sentence.

Id. at 84.

In *United States v. D'Anna*, 487 F. 2d 899 (6th Cir. 1973), judgment against the surety was reversed. The court ruled that Michigan law controlled; and it found that the Michigan Supreme Court had ruled, in a case involving a similar bond, that the surety's liability terminated when sentence was imposed and could not be extended except upon consent.

It appears the weight of authority that unless the bond includes a condition requiring the defendant to abide the final order or judgment of the court or, if convicted, to render himself in execution thereof, the surety's liability terminates upon pronouncement of judgment. *Annot.*, 20 A.L.R. 594, § XVI. The rationale is that sentencing removes the defendant from the custody of the surety and returns him to the custody of the law. *See* 8 Am. Jur. 2d, Bail and Recognizance, § 110.

On the basis of *State v. Schenck*, 138 N.C. 560, 49 S.E. 917 (1905), North Carolina is cited as holding counter to this general rule. The bond there was conditioned on the defendant's appearance to answer the charges, and it provided that he was "not to depart the same without leave first had and obtained." *Id.* at 560, 49 S.E. at 917. Upon conviction defendant appealed, but failed to give the undertakings required for appeal or to appear at the next term of court. Judgment was entered against the sureties, and they appealed. Our Supreme Court upheld the sureties' liability, stating:

> It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. This was said, too, with reference to a bail bond worded precisely like the one in this case. . . . The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately . . . .
>
> . . . .
>
> We conclude that the recognizance binds the sureties for the continued appearance of their principal, from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for the term or without day. He must answer its call at all times and submit to its judgment.

Id. at 562-65, 49 S.E. at 918-19; *accord, State v. Hutchins*, 185 N.C. 694, 116 S.E. 740 (1923); *State v. Eure*, 172 N.C. 874, 89 S.E. 788 (1916).

Our Supreme Court thus has viewed the surety's undertaking in broad terms. Prior North Carolina cases did not, however, consider bonds with language identical to that of the bond here; and liability "must be determined by the conditions of the bond in question." *State v. Mallory*, 266 N.C. 31, 42, 145 S.E. 2d 335, 343 (1965), *cert. denied*, 384 U.S. 928, 16 L.Ed. 2d 531, 86 S.Ct. 1443 (1966).

An appearance bond is a contract of the defendant and the surety with the State. *See Gonware, supra*, 415 F. 2d at 83. General rules for construction of contracts thus determine liability thereon. A contract must be construed as a whole, considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction. *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E. 2d 438, 440-41 (1960). The heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter, and the situation of the parties at the time of execution. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 196 (1975).

The condition of the bond here that defendant "shall appear . . . whenever required and will at all times render himself amenable to the orders and processes of the Court" makes the bond a continuing obligation. *See* 8 Am. Jur. 2d, Bail and Recognizance, § 104. Further language, however, provides that "this bond is effective and binding upon the obligors throughout all stages of the proceedings in the trial divisions . . . *until the entry of judgment in the superior court.*" (Emphasis supplied.) Construing the bond as a whole, the continuing obligation imposed by the requirement that defendant appear "whenever required" and render himself amenable to court orders "at all times" must be considered in light of the further provision that the bond binds the obligors only "until the entry of judgment in the superior court." To interpret the continuing obligation as terminating upon entry of judgment gives effect to both provisions.

Further, the situation of the parties changes upon entry of judgment. If, as here, the judgment is one of imprisonment, de-

fendant's hope for acquittal or a non-incarcerative sentence terminates at that point. Such termination materially increases the risk of defendant's flight. There is logic in the contention that this increased risk is not within the contemplation of the surety when the bond contract is entered and thus should not be imposed without his specific consent. *See Miller, supra,* at 448.

We conclude that the express terms of the bond, and of G.S. 15A-534(h) from which said terms were derived *in haec verba,* dictate a holding that the sureties' liability terminated upon entry of judgment in the superior court. This occurred on 23 January 1981. The trial judge announced sentence on that date, and the records of the clerk filed with this Court show that she recorded judgment and that the session ended on that date. Because 23 January 1981 preceded defendant's failure to appear for commitment, which occurred sometime after his release from the hospital on 2 March 1981, the sureties may not be held liable on the bond.

A stay of commitment is appropriate and customary under certain circumstances. Provision should be made, however, to assure the defendant's appearance when ordered. G.S. 15A-534 and bonds entered pursuant thereto do not make such provision. The General Assembly may wish to revise the statute. Pending any such revision, consent of the parties to modification of the suretyship contract for the purpose of extending liability through any period during which commitment is stayed may best insure the appearance when ordered of the beneficiaries of such stays.

Reversed.

Judges CLARK and WEBB concur.

Davis v. Raleigh Rental Center

DONNIE R. DAVIS, EMPLOYEE, PLAINTIFF v. RALEIGH RENTAL CENTER, EMPLOYER, NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC960

(Filed 6 July 1982)

1. **Master and Servant § 96— workers' compensation—competent evidence to support findings**

In an action for benefits under the Workers' Compensation Act following a back injury in the course of plaintiff's employment with defendant, there was competent evidence to support the Commission's findings (1) that plaintiff was not placed under added stress because a customer, rather than another employee, helped to load a saw, (2) that on many other occasions plaintiff had assisted customers in loading equipment, and (3) that it was not unusual for plaintiff to assist customers in loading equipment.

2. **Master and Servant § 96.5— workers' compensation—findings of Commission not inconsistent with findings adopted from hearing Commissioner's opinion.**

In a workers' compensation proceeding, the Commission's findings of fact were not inconsistent with the findings it adopted from the hearing commissioner's opinion and award where it found that plaintiff's injury occurred while plaintiff was engaged in his usual work for defendant employer; that plaintiff was not engaged in an unusually strenuous job when his injury occurred; and that plaintiff's injury was not the result of an accident.

3. **Master and Servant § 55.1— workers' compensation—finding that injury not result of accident—supported by evidence**

In a workers' compensation proceeding, the Commission's findings that plaintiff's injury was not the result of an accident was supported by the evidence where the evidence showed that plaintiff, while helping a customer load a concrete saw into the back of a truck, injured his back; helping customers load merchandise was part of plaintiff's job; plaintiff was "doing [his] usual work in the usual way"; the load was "pretty even" between plaintiff and the customer; and the only difference on this occasion was that plaintiff felt a pain.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 20 January 1981. Heard in the Court of Appeals 28 April 1982.

Plaintiff initiated this action for benefits under The North Carolina Workers' Compensation Act, after suffering an injury in the course of his employment with the Raleigh Rental Center. Deputy Commissioner Angela R. Bryant found the injury compensable. On appeal by defendants, the full Commission reversed, finding that the injury did not result from an accident.

The evidence at the hearing tended to show the following: For twelve years plaintiff had been employed as a mechanic by Raleigh Rental Center. One of his duties had been to help customers load rented equipment. Customarily, a fellow employee, Jimmy Strickland, would help plaintiff load such equipment.

On or about 19 December 1978, plaintiff was injured while helping a customer load into a truck a floor model concrete saw weighing approximately 100 to 120 pounds. Plaintiff described the injury in the following manner:

> The customer assisted me in loading the saw. Jimmy Strickland gave no help at all, he was standing on the side.
>
> I reached down and picked up the saw and got to the tailgate. When I got to the tailgate my back popped. I first experienced back pain when I was part of the way up. About the time I got to the tailgate.
>
> The customer was some help in loading the saw. He wasn't as much help as Jimmy would have been, but he was help. I continued to work that day.

Subsequently, plaintiff underwent back surgery. At the time of the hearing, plaintiff was taking pain medication and was wearing a sacro-lumbar corset. On cross-examination, plaintiff acknowledged that, on the day of the accident, he was "doing my usual work in the usual way."

The full Commission found that although plaintiff sustained an injury arising out of and in the course of his employment, the injury was not produced by an accident. Consequently, plaintiff's claim was denied, and he appealed.

Michael R. Birzon for plaintiff appellant.

Young, Moore, Henderson & Alvis, by William F. Lipscomb, for defendant appellees.

MARTIN (Harry C.), Judge.

[1] Plaintiff first argues an absence of competent evidence to support the Commission's findings (1) that plaintiff was not placed under added stress because a customer, rather than Jimmy Strickland, helped to load the saw, (2) that on many other oc-

casions plaintiff had assisted customers in loading equipment, and (3) that it was not unusual for plaintiff to assist customers in loading equipment.

This Court is bound by the general rule that if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal even though there is evidence supporting a contrary finding. *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960). In our opinion, there was competent evidence adduced at the hearing to support the findings about which plaintiff complains. Plaintiff himself testified that the load between him and the customer was "pretty even." Although he testified that the customer wasn't as much help as Jimmy Strickland would have been, he presented no evidence that he was placed under additional stress by the weight of the saw. Plaintiff testified further that it was one of his duties to help customers load and unload equipment. On the day of his injury, plaintiff was doing his "usual work in the usual way."

[2] Plaintiff's second contention is that the Commission made findings of fact inconsistent with the findings it adopted from the hearing commissioner's opinion and award. We find no inconsistencies which would defeat the clear import of the Commission's findings and conclusions or which would cause us to remand the case to it for a revision of its findings. The Commission found that plaintiff's injury occurred while plaintiff was engaged in his usual work for defendant employer; that plaintiff was not engaged in an unusually strenuous job when his injury occurred; and that plaintiff's injury was not the result of an accident.

Under the same argument, plaintiff also contends that the Commission's "mere citation of a case" does not constitute a conclusion of law because the Commission failed to relate the case to the applicable facts and draw the conclusion therefrom. The Commission cited the case of *Artis v. Hospitals, Inc.*, 44 N.C. App. 64, 259 S.E. 2d 789 (1979), to support its conclusion that injury to the body resulting from stress from one's usual work is not compensable. It is implicit from *Artis* that plaintiff was denied benefits because his injury occurred in the normal course of his work.

[3] Next, plaintiff questions whether the Commission properly determined that his injury was not the result of an accident.

Under the workers' compensation act, an injury arising out of and in the course of employment is compensable only if it is caused by an accident. The accident must be a separate event preceding and causing the injury. *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980).

The term "accident," under the Act, has been defined as "an unlooked for and untoward event," and "[a] result produced by a fortuitous cause." *Edwards v. Publishing Co.*, 227 N.C. 184, 186, 41 S.E. 2d 592, 593 (1947). "[U]nusualness and unexpectedness are its essence." *Smith v. Creamery Co.*, 217 N.C. 468, 472, 8 S.E. 2d 231, 233 (1940). To justify an award of compensation, the injury must involve more than the carrying on of usual and customary duties in the usual way. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962).

The Commission concluded that plaintiff's injury was not the result of an accident. As discussed, there was evidence that plaintiff, while helping a customer load a concrete saw into the back of a truck, injured his back; helping customers load merchandise was part of plaintiff's job; plaintiff "was doing [his] usual work in the usual way"; the load was "pretty even" between plaintiff and the customer; and the only difference on this occasion was that plaintiff felt a pain. Bound as we are to the Commission's findings of fact, when supported by competent evidence, we hold that the Commission's conclusion was correct.

This case is not unlike *Harding, supra.* Plaintiff, a truck driver and grocery deliveryman, slipped an intervertebral disc while lifting a case of groceries. The Supreme Court reversed the award of benefits, noting that in order for an injury to form the basis for compensability, it must involve more than merely carrying on the usual and customary duties in the usual way. An accident involves interruption of the work routine and the introduction of unusual conditions likely to result in unexpected consequences. In the present case, as in *Harding,* there was no interruption of the work routine and there were no unusual conditions likely to result in unexpected consequences.

Moore v. Sales Co., 214 N.C. 424, 199 S.E. 605 (1938), cited by plaintiff, is distinguishable. In that case, plaintiff was injured while he and another man were lifting a four-inch, 400-450 pound steel pipe. The Supreme Court affirmed an award for plaintiff,

finding two factors which interrupted the routine of work and introduced unusual conditions. First, all other employees except plaintiff and another worker had been discharged; plaintiff and the other man were left to do the work alone. Secondly, plaintiff had never handled the type of pipe he was lifting at the time of his injury.

Under the workers' compensation act, plaintiff has the burden of proving that his claim is compensable. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). Plaintiff has failed to prove that his injury resulted from an accident. The Commission's findings are supported by competent evidence and we, therefore, affirm its determination that there was no accident and no compensable claim.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. LEBURN HOYT LANG

No. 8128SC1242

(Filed 6 July 1982)

1. **Kidnapping § 1.3— necessity for instruction on false imprisonment**

In a prosecution for kidnapping "for the purpose of facilitating the commission of a felony, assault with the intent to commit rape," the trial court erred in failing to submit to the jury the lesser included offense of false imprisonment where the evidence tended to show that, during the more than an hour that the prosecutrix was in defendant's presence, defendant ordered her to remove her clothes and fondled her but at no time stated that he wanted to have sexual intercourse with her, since the jury could have found that defendant restrained, confined or removed the prosecutrix for the purpose of fondling her and not for the purpose of facilitating the commission of assault with intent to commit rape.

2. **Criminal Law § 73— time of store closing—time-lock device—coded disk—testimony not hearsay**

A witness's testimony as to the time a store closed based upon his reading of a coded disk from an automatic time-lock device attached to the door of the store did not violate the hearsay rule or the rule requiring first-hand knowledge and was properly admitted.

State v. Lang

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 9 April 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 May 1982.

The defendant, Leburn Hoyt Lang, was indicted for kidnapping and assault with intent to commit rape. He was convicted of kidnapping and assault on a female, and was given an active fifteen-year prison sentence.

Attorney General Edmisten, by Associate Attorney K. Michele Allison, and Special Deputy Attorney General Charles J. Murray, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith and Wade M. Smith, for defendant appellant.

BECTON, Judge.

The defendant raises two issues on appeal: (1) whether the trial court, in its instructions on kidnapping, should have submitted to the jury the lesser included offense of false imprisonment; and (2) whether the trial court should have allowed a witness to testify to the time a store closed based upon the witness' reading of a coded disk from an automatic time-lock device. For the reasons that follow, we believe the defendant is entitled to a new trial.

I

[1] The crime of false imprisonment is a lesser included offense of the crime of kidnapping. *State v. Bynum*, 282 N.C. 552, 193 S.E. 2d 725, *cert. denied* 414 U.S. 839, 38 L.Ed. 2d 116, 94 S.Ct. 182 (1973). When there is evidence of guilt of a lesser offense, a defendant is entitled to have the trial court instruct the jury with respect to that lesser included offense even though the defendant makes no request for such an instruction. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). Moreover, when the trial court is required to instruct on a lesser offense, and fails to do so, the error is not cured by a verdict finding the defendant guilty of the offense charged. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972).

So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment, depends

upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute. Our kidnapping statute, G.S. 14-39, provides, in pertinent part, that:

> (a) 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 . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; . . .

In this case, the defendant was charged with, and the State sought to show that the kidnapping was "for the purpose of facilitating the commission of a felony, assault with the intent to commit rape." We must determine if there was evidence from which the jury could have concluded that the defendant, although restraining, confining and removing the victim, kidnapped the victim for some purpose other than assaulting her with the intent to commit rape.

The prosecuting witness testified that the defendant, at gun point, forced her into his car and drove around for thirty minutes before stopping at a dark location and ordering her to remove her clothes. She testified:

> When we stopped, he was beginning to tell me to take my clothes off when I saw a guy riding a bicycle, and so I looked over and saw the guy, and he saw the guy, too, so we started back up the car.

After driving for about twenty minutes and then stopping in an isolated area, the defendant ordered the prosecuting witness to take her clothes off.

> When I got my clothes off, he started feeling around for about five minutes. He put his finger in my vagina. And then he started feeling my breast, where I started crying and told him that I had had open heart surgery. . . . He felt in the area of the scar. At that point I started crying.

> . . . He told me to put my pants back on, but to leave my bra and shirt off. I did that. He started up the car and we started driving around again. . . .

While the defendant was driving this time he was also fondling the prosecuting witness' breasts with his right hand. "After this third drive, he stopped at the K-Mart Tire Store on Tunnel Road . . . " and told her to put her shirt and bra on. The defendant then walked around to the passenger side and let the prosecuting witness out.

The jury may have viewed as significant the prosecuting witness' testimony that during the more than an hour she was in the defendant's presence the defendant gave her instructions to get in the car, "keep [her] head down on [her] knees and don't raise it," take her clothes off and put her clothes on, but never stated that he wanted to have sexual intercourse with her. That statement of intent was deemed significant by our courts in *State v. Allen*, 297 N.C. 429, 255 S.E. 2d 362 (1979) and *State v. Bradshaw*, 27 N.C. App. 485, 219 S.E. 2d 561 (1975), *disc. review denied* 289 N.C. 299, 222 S.E. 2d 699 (1976).

From the evidence in this case, the jury could have concluded that defendant restrained, confined and removed the prosecuting witness for the purpose of fondling her—not for a felonious purpose. Indeed, the jury in the consolidated case, assault with intent to commit rape, found the defendant guilty only of the lesser included offense of assault on a female. Simply put, the law does not point inexorably and unerringly to defendant's guilt or innocence of the offense of kidnapping, since the jury could reasonably conclude that defendant did not intend to gratify his passion on the prosecuting witness notwithstanding any resistance on her part.

Since defendant was charged with kidnapping "for the purpose of facilitating the commission of a felony, assault with the intent to commit rape," we review the relevant case law relating to the felony of assault with intent to commit rape. In *State v. Little*, 51 N.C. App. 64, 275 S.E. 2d 249 (1981), the victim, who had just come out of the shower, found an assailant in her house who was armed with a knife. Although the assailant did not state any specific sexual intention, he threatened to hurt the victim, told her to get back to the bed, and asked her whether she wanted to

pay for it. When the assailant lifted the towel that covered her body, the victim screamed. The assailant dropped the knife and ran. The *Little* Court said:

> This evidence would permit the jury to find that, at the time defendant committed the assault, he did not intend to satisfy his lust, if he encountered any significant resistance, and thus reject the State's argument that he intended to carry out the act at all events and notwithstanding any resistance he might encounter.

52 N.C. App. at 70, 275 S.E. 2d at 253.

Similarly, in *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963), a preacher lured the prosecutrix into his basement on a religious pretext, told her that she could be healed by having sexual relations with him, and put his hands up her dress and tried to pull her underclothes down even though she had responded " 'No, I don't believe in no such mess as that'." 260 N.C. at 755, 133 S.E. 2d at 651. The prosecutrix began to cry when the preacher's body touched hers. She told him she was going to scream if he did not let her go. The preacher finally desisted. Upon these facts, our Supreme Court held that the evidence was insufficient to convict the defendant of assault with intent to commit rape.

The evidence of assault with intent to commit rape was much more overwhelming in *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978), than in the case at bar.

> In *Banks*, defendant burst into the lobby of a women's restroom where the prosecutrix was reading. He pushed her against the wall and started to kiss her. When she attempted to escape, defendant, at knife point, forced her to enter a stall, disrobe, sit on the commode and prop her feet against the walls of the stall. He then rubbed his genitalia against hers and thereafter forced her to perform oral sex. The court held the evidence to be sufficient to take the case to the jury on the charge of assault with intent to commit rape but ordered a new trial because the judge failed to submit the lesser included offense of assault on a female.

State v. Little, 52 N.C. App. at 71, 275 S.E. 2d at 253.

In the case at bar, the evidence was undoubtedly sufficient to convict defendant of kidnapping for the purpose of facilitating the commission of assault with the intent to commit rape. That, however, is not the issue. The issue is whether there was any evidence from which the jury could conclude that the defendant restrained, confined or removed the prosecutrix for the purpose of fondling her and not "to gratify his passion on [her], at all events, and notwithstanding any resistance on her part. . . ." *Id.* at 68, 275 S.E. 2d at 252.

For failure of the court to instruct on a lesser included offense of false imprisonment, defendant is entitled to a new trial. Because the evidence concerning the coded disk may be elicited at the retrial, we discuss defendant's second assignment of error.

II

[2] The prosecuting witness testified that she left the Asheville Mall when Brooks Fashions Store (Brooks) closed around 9:20 p.m. and was accosted in the parking lot between 9:25 and 9:35 p.m. The State also offered the testimony of two other witnesses concerning the time Brooks closed. Bonnie Arndt, one of Brooks' employees, testified that a time-lock device is attached to the store's door which records, in code, the time of day that the door is locked and unlocked. This coded recording is in the form of marks on a removable paper disk which is mailed at the end of each week to Phelps Time Lock Service in Maryland where it is decoded. Patrick Murtaugh, general manager of Phelps Time Lock Service explained the coding procedure and testified that he received and decoded a disk from Brooks for the week of 4 October 1978. Murtaugh also made written computations of the closing times which were later typed and sent to Brooks. Over objection, Murtaugh testified that the disk revealed that Brooks locked its door at 9:39 p.m. on 4 October 1978. Over objection, State's Exhibit No. 2, the original decoding sheet for Brooks, which contained an entry for 4 October 1978, was admitted into evidence.

Although arguing that the admission of Murtaugh's testimony and State's Exhibit No. 2 violates the hearsay rule *and* the rule requiring first-hand knowledge, defendant couches his second assignment of error in language that suggests the evidence should have been excluded for lack of a proper foundation. Defendant styles his argument thusly: "May a witness

testify to the time of a store's closing, based upon his reading of a coded disk from an automatic time-lock device, when there is no evidence that the disk was properly installed and removed and no evidence that the device's lock mechanism was accurate?"

We are cognizant of the distinction between the hearsay rule and the rule requiring first-hand knowledge. *See* McCormick, Evidence 2d Hearsay, § 247 (1972). What the automatic time-lock device revealed is not an "assertion of [a] person, other than that of the witness himself in his present testimony, . . . offered to prove the truth of the matter asserted . . . ;" 1 Stansbury, North Carolina Evidence, § 138 (Brandis rev., 1973); consequently, it was not hearsay. Moreover, just as "[m]echanical and electronic devices for measuring the speed of vehicles are in common use in the State, and the readings of such instruments are admissible when a proper foundation is laid," 1 Stansbury, North Carolina Evidence, § 86 (Brandis rev. 1973), so, too, are the readings of a coded disk from an automatic time-lock device. In the admission of the evidence objected to, we find no error.

Because of the trial court's failure to submit the lesser included offense of false imprisonment on the kidnapping charge, defendant is entitled to a new trial. On the rape charge, we find no error.

New trial on kidnapping charge.

No error on rape charge.

Judge HEDRICK and Judge HILL concur.

LEE C. SHORTT v. KNOB CITY INVESTMENT COMPANY, INC.

No. 8117SC1093

(Filed 6 July 1982)

1. Brokers and Factors § 6— real estate commission—sale of stock as sale of property for purposes of determining entitlement to commission

In an action brought by plaintiff real estate broker to recover a commission for the sale of a motel, sale of 100% of the stock in defendant motel con-

stituted a sale by the defendant corporation of the property in question for the purposes of determining whether plaintiff was entitled to a commission under an exclusive listing agreement, and since there was such a sale, defendant was liable to plaintiff for the contracted-for commission.

2. **Brokers and Factors § 6— real estate commission—apartment house as part of listing agreement for motel**

In an action for a real estate commission, there was evidence to support the judge's finding that a four unit apartment house which was included in the sale of a motel was included within the listing agreement and that plaintiff's commission should not be reduced by a percentage attributable to the price of the apartment house.

3. **Brokers and Factors § 6— real estate broker's commission—right to prejudgment interest**

In an action for a real estate commission where the trial judge found that plaintiff was entitled to recover a commission from defendant, the judge erred in denying plaintiff prejudgment interest in light of G.S. 24-5 and decisions by our Courts.

APPEAL by plaintiff and defendant from *Washington, Judge.* Judgment entered 19 June 1981 in Superior Court, SURRY County. Heard in the Court of Appeals on 27 May 1982.

This appeal arises from a judgment for plaintiff real estate broker in his action against defendant to recover a commission for the sale of a motel. Each party made a motion for summary judgment. The defendant's motion for summary judgment was denied, and plaintiff's motion for summary judgment as to liability was allowed. Thereafter, the case was calendared for trial as to the issue of damages, and the parties waived trial by jury and agreed that "the Court may decide the issue of damages based upon the pleadings, interrogatories and answers thereto, depositions and other papers on file in this action."

As to the issue of damages, Judge Washington made the following findings, conclusions and order:

FINDINGS OF FACT

1. Plaintiff is a real estate agent who has been duly licensed as a real estate agent in the State of North Carolina since 1975.

2. On February 23, 1979, defendant was the owner of a parcel or lot of land, together with the improvements thereon, known as the Holiday Inn of Pilot Mountain, said

property being six acres more or less fronting on Highway 268, situated in the Town of Pilot Mountain, Surry County, North Carolina.

3. On February 23, 1979, the improvements on said property consisted of a 72 unit motel, a restaurant, a 4 unit apartment house and related fixtures; one of the apartments was used in the operation of the motel as the residence of the motel manager as part of his compensation as motel manager.

4. On February 23, 1979, plaintiff and defendant entered a written contract giving plaintiff the exclusive right to offer for sale: "All that certain parcel or lot of land together with improvements thereon known as the Holiday Inn of Pilot Mountain. Said property being 6 acres more or less fronting on Hwy. 268 situated in the Town of Pilot Mountain, County of Surry, State of North Carolina. Property to be offered includes all real estate, fixtures, equipment and supplies used in the operation of the motel and restaurant."

5. The contract provided that the sale price of the property was to be $625,000.00 payable in cash or any other arrangement suitable and acceptable to the owners.

6. The contract provided that plaintiff's listing was to expire May 1, 1979, but further provided that if the property was sold within six months of the termination of the contract to a purchaser to whom it was submitted by plaintiff or another broker or defendant or any other person during the term of the listing, defendant agreed to pay plaintiff a commission of ten (10%) percent of the sale price of the property.

7. The 4 unit apartment house was to be included in any sale of the listed property at a price of $60,000.00 and on the same commission basis to plaintiff as provided in the February 23, 1979 listing contract.

8. On May 31, 1979, the four shareholders of defendant corporation sold 100% of the outstanding shares of the stock of said corporation to Mr. I. G. Patel, a person to whom the listed property had been submitted in April of 1979 during the term of plaintiff's listing, for a sale price of $785,000.00.

9. Mr. I. G. Patel's inquiries during April of 1979 regarding the listed property were never referred to the plaintiff by defendant.

10. On February 23, 1979, May 31, 1979 and all times in between the property which plaintiff had the exclusive right to offer for sale constituted all of the tangible property owned by defendant corporation.

11. Plaintiff was entitled to receive a commission in the amount of $78,500.00 from defendant on May 31, 1979.

12. Plaintiff has not been paid his commission of $78,500.00, or any part thereof, by defendant.

13. Plaintiff moved the Court pursuant to G.S. § 24-5 that he be awarded prejudgment interest on the commission of $78,500.00 at the legal rate of interest from May 31, 1979.

14. The amount of damages plaintiff was entitled to recover from defendant was unliquidated prior to trial.

Based upon the foregoing findings of fact, the Court hereby makes the following conclusions of law:

CONCLUSIONS OF LAW

1. Defendant breached the February 23, 1979 listing contract with plaintiff when, on May 31, 1979, it failed to pay plaintiff the sum of $78,500.00 as a commission.

2. Plaintiff is entitled to have and recover of defendant the sum of $78,500.00 as damages for defendant's breach of the February 23, 1979 listing contract.

3. Plaintiff is not entitled to recover prejudgment interest.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff have and recover the sum of $78,500.00 from defendant plus interest at the legal rate from the date of this Judgment and that the costs of this action, including depositions, be taxed to the defendant.

Defendant and plaintiff appealed.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and James M. Stanley, Jr., for plaintiff appellant/appellee.

Gardner, Gardner, Johnson, Etringer & Donnelly, by Gus L. Donnelly, for defendant appellant/appellee.

HEDRICK, Judge.

[1] In its first assignment of error, defendant argues the court "erred in allowing Plaintiff's Motion for Summary Judgment on the issue of liability as to Plaintiff's original or first cause of action in that no evidence whatsoever was presented by Plaintiff to show that the defendant corporation had ever conveyed any of its assets." Defendant does not contend that the issue of liability was not susceptible to summary judgment, and in fact next assigns error to the court's failure to enter summary judgment that defendant was not liable as a matter of law. The question of law presented by these assignments of error is therefore the following: Was the 31 May 1979 transaction by which defendant's four shareholders simultaneously sold 100 percent of the stock in defendant corporation to Patel a sale of defendant's property within the terms of the exclusive sales agency contract? Defendant would be liable for commission if and only if such stock sale by the shareholders, which was within the stipulated six month period, was a sale of the property by defendant corporation.

A case recently resolving issues similar to the one in the present case is *Kingston Development Co. v. Kenerly*, 132 Ga. App. 346, 208 S.E. 2d 118 (1974). In *Kingston*, the six sole shareholders of defendant Kingston exchanged all of their stock in Kingston with another corporation, Presidential, for stock in Presidential. Kingston, a corporation whose principal asset was real property located in Gwinnett County, thereby became a subsidiary of Presidential. The question before the court was whether this stock exchange transaction, whereby the stock in Kingston came under different ownership, relieved defendant Kingston of a contractual obligation to the plaintiff real estate brokers to pay them a commission upon a sale of the Gwinnett County property owned by Kingston.

The court in *Kingston* noted that after the transaction, (1) Kingston still held legal title to the realty, (2) but its stock was now owned by a different entity, and (3) that there was no

contention that the transaction was designed to avoid paying plaintiffs their brokerage commission. Nevertheless, the Court stated, "Jurisprudential pragmatism prevents the exaltation of legalities to a sacrosanct status in disregard of realities . . . . This practical approach leads us to rule that the contractual commissions commitment continues enforceable against Kingston." *Id.* at 350, 208 S.E. 2d at 122.

In reaching such a result, the court stated that it was employing "reverse piercing of the corporate veil," *Id.* at 351, 208 S.E. 2d at 122, notwithstanding the absence of any allegation of fraud. The court continued,

> In a case factually similar to that at bar the Supreme Judicial Court of Massachusetts ruled for the broker in *Morad v. Haddad*, 329 Mass. 730, 735, 110 N.E. 2d 364, 367 stating: "The sale of all of the stock of the corporation was in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction." Another case of this nature is *Benedict v. Dakin*, 243 Ill. 384, 90 N.E. 712 which ruled that a broker who is employed to procure a purchaser of all the company's property earns his commission when he procures a purchaser for all of the stock of the corporation.
>
> . . .
>
> [Furthermore,] where the corporation contracts with the broker . . . it is the corporation as contracting party—not its stockholders as individuals—that would be responsible for commissions.

Id. at 351-52, 208 S.E. 2d at 122.

We think the principles and holding of *Kingston* may be invoked in the present case to hold that the former shareholder's sale of 100 percent of the stock in defendant constituted a sale by the defendant corporation of the property in question, for the purposes of determining whether plaintiff is entitled to a commission under the exclusive listing agreement. Since there was such a sale, defendant is liable to plaintiff for the contracted-for commission. Summary judgment for plaintiff on the issue of defendant's

liability was therefore proper. Defendant's first two assignments of error are overruled.

[2] Defendant's third assignment of error is set out in the record as follows: "Judge Edward K. Washington erred in concluding as a matter of law that the Plaintiff is entitled to recover damages in the amount of $78,500.00, for Defendant's breach of the February 23, 1979 listing contract in that the Court's findings of fact are not supported by the evidence presented." This assignment of error purports to be based on exceptions 4, 5, 6, and 7, which all relate to the court's finding and conclusions that defendant was indebted to the plaintiff in the amount of $78,500.00. In its brief, the defendant seems to contend that the four unit apartment house which was included in the sale for $60,000.00 was not included within the listing agreement and that the plaintiff's commission, if he was entitled to any sum, should be reduced by $6,000.00. The court found as a fact that the four unit apartment house was included in the listing agreement and that plaintiff was entitled to a 10 percent commission for that property and the remainder of the real estate involved. Defendant did not except to this finding, and indeed, there is plenary evidence in the record to support it. The finding made by Judge Washington with respect to the amount of defendant's indebtedness upon the sale herein described support the conclusion that defendant is indebted to plaintiff in the total sum of $78,500.00. We find this assignment of error to be without merit.

[3] Finally, plaintiff cross-assigns error to the denial of his motion for prejudgment interest. In its brief, defendant states:

> In the light of G.S. 24-5 and decisions by the courts, defendant concedes that if plaintiff were entitled to judgment, he would be entitled to prejudgment interest as a matter of law except as to that portion of the alleged purchase price of the apartment complex which plaintiff stated was not covered in his listing contract.

Since we have affirmed the trial court's conclusion that plaintiff is entitled to recover $78,500.00, we also conclude that he is entitled to recover prejudgment interest from the date of 31 May 1979. Plaintiff's cross-assignment of error has merit.

The result is: Judgment for plaintiff in the sum of $78,500.00 is affirmed and the trial court's order denying plaintiff's prayer for prejudgment interest is reversed, and the cause is remanded to the superior court for the calculation of interest on said sum from 31 May 1979, to be added to the judgment.

Affirmed in part, reversed and remanded in part.

Judges ARNOLD and WELLS concur.

JANE ELLIS RHODES v. THE BOARD OF EDUCATION OF THE PERSON COUNTY SCHOOL ADMINISTRATIVE UNIT, JAMES E. WINSLOW, CHAIRMAN, ALVIN DICKERSON, NANCY GARRETT, VIRGINIA HESTER, LOIS WINSTEAD AND WALTER S. ROGERS, IN HIS CAPACITY AS SUPERINTENDENT OF PERSON COUNTY SCHOOLS, WALTER S. ROGERS, INDIVIDUALLY, JOSIAH P. THOMAS, IN HIS CAPACITY AS PRINCIPAL OF HELENA ELEMENTARY SCHOOL, JOSIAH P. THOMAS, INDIVIDUALLY

No. 819SC1163

(Filed 6 July 1982)

Schools § 13.2— wrongful dismissal of teacher—insufficient complaint

Plaintiff career teacher's complaint was insufficient to state a claim for relief against defendant board of education for wrongful dismissal for insubordination where the complaint disclosed on its face that defendant had not breached its contract with plaintiff and that it had dismissed plaintiff only after strict compliance with the terms of the contract and the applicable statutes, and that plaintiff herself had failed to follow the procedure for obtaining further review pursuant to the contract and the law. G.S. 115-142.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 9 April 1981 in Superior Court, GRANVILLE County. Heard in the Court of Appeals on 10 June 1982.

This appeal arises from plaintiff's action, purportedly grounded on tort and contract, for wrongful discharge from her employment as a public school teacher in the Person County Schools. At trial, the action against the defendants Walter Rogers, who is the superintendent of schools in Person County, and Josiah Thomas, who is principal of the elementary school at which plaintiff taught, was dismissed at the close of all the evidence. The follow-

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

1. Was the plaintiff, Jane Ellis Rhodes, wrongfully discharged from her employment as a school teacher by the defendant, Person County Board of Education?

Answer: Yes.

2. What amount of damages, if any, is the plaintiff, Jane Ellis Rhodes, entitled to recover of the defendant, Person County Board of Education?

Answer: One dollar.

From a judgment entered on the verdict "that plaintiff have and recover of defendant, Person County Board of Education, the sum of one dollar," plaintiff appealed.

Barringer, Allen and Pinnix, by John L. Pinnix and William D. Harazin, for plaintiff appellant.

Mount, White, King, Hutson, Walker & Carden, by R. Michael Carden and Albert W. Oakley, for defendant appellees.

North Carolina School Boards Association, Inc., by George T. Rogister, Jr., Richard A. Schwartz, and Elizabeth F. Kuniholm, amicus curiae.

HEDRICK, Judge.

We note at the outset that plaintiff does not assign error to the dismissal of her claim as against individual defendants Walter Rogers and Josiah Thomas. The three assignments of error brought forward and argued in plaintiff's brief relate only to the issue of damages in her alleged claim against the defendant Person County Board of Education. In these three assignments of error, plaintiff contends that (1) the jury's verdict of one dollar was not supported by the evidence, (2) the court erred in denying plaintiff's motion pursuant to Rule 59 to set aside the jury verdict of one dollar, and (3) in light of uncontradicted evidence of substantial damages, the trial court erred in instructing the jury on nominal damages. Our disposition of the defendant's cross-assignment of error based on the trial court's denial of its Rule 12(b)(6) motion to dismiss for failure to state a claim against the

school board makes it unnecessary for us to discuss plaintiff's assignments of error.

A complaint may be dismissed for failure to state a claim upon which relief can be granted if the complaint is "clearly without any merit; . . . this want of merit may consist in an absence of law to support a claim, or *in the disclosure of some fact that will necessarily defeat the claim.*" *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 232, 252 S.E. 2d 231, 235 (1979) [emphasis added].

In her complaint with respect to defendant Board of Education, plaintiff alleged that she had obtained career status within the meaning of G.S. § 115-142(g). Likewise in her complaint, plaintiff alleged that she had entered into a contract with defendant Person County Board of Education, and a copy of said contract was attached to and incorporated in such complaint by reference. The pertinent provision in the contract entered into between plaintiff and defendant Board of Education is as follows: "This agreement entered into between the Board of Education of the Person County School Administrative Unit and Jane E. Rhodes . . . , in accordance with and subject to the provisions of the school law applicable thereto, which are hereby made a part of this contract, witnesseth . . . ."

The pertinent portions of the "school law applicable thereto" are embodied in the then G.S. § 115-142, entitled "System of employment for public school teachers," and are as follows:

> (d) Career Teachers.—
>
> (1) A career teacher shall not be subjected to the requirement of annual appointment nor shall he or she be dismissed . . . without his or her consent except as provided in subsection (e).
>
> . . .
>
> (e) Grounds for Dismissal . . . of a Career Teacher.—
>
> (1) No career teacher shall be dismissed . . . except for:
>
> . . .

c. Insubordination . . . .

. . .

(h) Procedure for Dismissal . . . of Career Teacher.—

(1) A career teacher may not be dismissed . . . except upon the superintendent's recommendation.

(2) Before recommending to a board the dismissal . . . of the career teacher, the superintendent shall give written notice to the career teacher by certified mail of his intention to make such recommendation and shall set forth as part of his recommendation the grounds upon which he believes such dismissal is justified. The notice shall include a statement to the effect that if the teacher within 15 days after the date of the receipt of the notice requests a review, he shall be entitled to have the proposed recommendations of the superintendent reviewed by a panel of the [Professional Review] Committee. A copy of G.S. 115-142 and a current list of the members of the Professional Review Committee shall also be sent to the career teacher. If the teacher does not request a panel hearing within the 15 days provided, the superintendent may submit his recommendation to the board.

(3) Within the 15-day period after receipt of the notice, the career teacher may file with the superintendent a written request for either (i) a review of the superintendent's proposed recommendation by a panel of the Professional Review Committee or (ii) a hearing before the board within 10 days. If the teacher requests an immediate hearing before the board, he forfeits the right to a hearing by a panel of the Professional Review Committee. If no request is made within that period, the superintendent may file his recommendation with the board. The board, if it sees fit, may by resolution dismiss such teacher.

. . .

The statute also provides for the procedures to be followed by the Board when it conducts a hearing after the Professional Review Committee conducts a review of the superintendent's recommendation, when such review is requested; further, the statute provides for judicial review of dismissals ordered by the Board after such post-Professional Review Committee hearings.

While the plaintiff in her complaint has made many allegations against the individual defendants, Rogers and Thomas, both in tort and breach of contract, the essence of her allegations against the defendant Board of Education is simply that the Board breached its contract with her when it acted on the recommendation of the superintendent and dismissed her "'on the grounds of insubordination.'" Thus, the defendant's cross-assignment of error presents for review the question of whether plaintiff has stated a claim for relief against the defendant school board for breach of contract.

A contract between an employer and an employee which provides the manner in which the employee's job may be terminated is an enforceable agreement. *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 279 S.E. 2d 46 (1981). In the present case, by incorporating into the contract the applicable "school law," G.S. § 115-142, the parties have provided the reasons and means by which the plaintiff's teaching position with the Board can be terminated. Although plaintiff alleged she was "fired" by the superintendent in October, her complaint discloses she was not dismissed by the Board until 21 December. Indeed, plaintiff's complaint when considered along with the applicable "school law" discloses that only the Board had the authority to discharge her, and then only after following the procedure provided in the contract and the applicable school law. Rather than disclosing that the defendant school board breached the contract when it dismissed her on 21 December, the plaintiff's complaint affirmatively discloses that the defendant board followed strictly the provisions of the applicable "school law" and the contract in dismissing plaintiff. On the other hand, plaintiff has not alleged that she followed the provisions of the applicable law and the terms of the contract to obtain a hearing or review of the Board's action after she received the letter of the superintendent, dated 16 November 1977, notifying her that he intended to recommend to the Board that she be discharged for insubordination. If plaintiff had chosen

to follow the terms of the contract, she could have ultimately obtained judicial review of the question of whether the Board had breached its contract in discharging her for insubordination. Since, upon receiving notification from the superintendent of his intention to recommend her dismissal, she sought neither a Professional Review Committee hearing nor a hearing before the Board, the Board, as it saw fit, could by resolution dismiss plaintiff. Since the contract and the school law provide the means of determining whether the Board acted properly and pursuant to law in dismissing the plaintiff, a "career status" teacher, the trial court erred in denying the Rule 12(b)(6) motion of the defendant school board when plaintiff's complaint disclosed on its face that the defendant Board had not breached the contract and that it had dismissed the plaintiff only after strict compliance with the terms of the contract and the applicable "school law," and that the plaintiff herself had failed to follow the procedure for obtaining further review pursuant to the contract and the law.

For the reasons stated, the judgment of the superior court with respect to the defendant Person County Board of Education is vacated, and the cause is remanded to the superior court for an order dismissing plaintiff's claim against the Board for failure to state a claim upon which relief can be granted.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

PIEDMONT PLASTICS, INC., PLAINTIFF v. MIZE COMPANY, INCORPORATED, DEFENDANT AND THIRD-PARTY PLAINTIFF v. SOUTHERN AGRICULTURAL CHEMICALS, INC., AND H-M-T MANUFACTURING, INC., DEFENDANTS

No. 8126SC1142

(Filed 6 July 1982)

1. Evidence § 29.2— tally sheets showing records of service calls—not within business records exception

The trial court did not err in finding that a tally sheet showing records of service calls did not fall within the business records exception to the hearsay rule since the tally sheet was formed from information received from work orders and the work orders were not offered into evidence.

2. Evidence § 29.2— business records—tally sheet not analogous to ledger sheet

Admission of a tally sheet which showed records of service calls was not required by the cases regarding admission of ledger sheets since there was no evidence regarding the business function of a tally sheet, or its method of compilation, which would suggest the likelihood of accuracy and since the conditions of the business records exception were not established to the court's satisfaction.

3. Trial § 32.2— instruction concerning damages—use of "several" proper

The trial court did not err in instructing the jury on damages that "*several* of the . . . machines were worked on and replaced with other rollers" where the only competent evidence before the court showed 15 defective rollers had been repaired by a service and repair supervisor.

4. Damages § 6; Sales § 19— breach of warranty—failure to instruct on incidental and consequential damages proper

In an action concerning a breach of warranty, the trial court properly failed to instruct on incidental and consequential damages where the record contained no competent evidence which sustained the allegations asserted in the third-party defendant's counterclaim.

APPEAL by third party defendants from *Allen, Judge.* Judgment entered 18 June 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 June 1982.

Original plaintiff sued original defendant for payment allegedly due for certain plastic rollers furnished on an open account. Original defendant answered and filed a third party complaint against third party defendants, to which it had sold the rollers it had purchased from original plaintiff.

Third party defendants answered and counterclaimed for general and special damages allegedly incurred as a result of third party plaintiff's (original defendant's) breach of contract and breach of warranty. The jury awarded third party defendants one dollar on their counterclaim for breach of an implied warranty of fitness for a particular purpose.

Third party defendants appeal.

Obenshain, Hinnant, Ellyson, Runkle & Bryant, by Alfred S. Bryant, for original defendant and third party plaintiff.

Walker, Palmer & Miller, P.A., by Douglas M. Martin, for third party defendants.

WHICHARD, Judge.

[1] Third party defendants first contend that a tally sheet showing records of service calls made by third party defendant Southern Agricultural Chemicals for the purpose of replacing defective rollers fell within the business records exception to the hearsay rule, and thus was improperly excluded. We find no error.

Business records are admissible as an exception to the hearsay rule if "(1) the entries are made in the regular course of business; (2) the entries are made contemporaneously with the events recorded; (3) the entries are original entries; and (4) the entries are based upon the personal knowledge of the person making them." *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 650, 217 S.E. 2d 682, 699, *cert. denied*, 288 N.C. 393, 218 S.E. 2d 467 (1975). The purpose of these prerequisites to admission is to ensure the trustworthiness of the records. "[E]ntries should be so complete and in such detail as to indicate that they are reliable and accurate." *Lowder*, 26 N.C. App. at 651, 217 S.E. 2d at 700. To render the tally sheet admissible, the sources of information from which it was drawn, the method of its compilation, and the circumstances surrounding the entire matter, must have been such as to indicate its trustworthiness. *Id.* at 650, 217 S.E. 2d at 700.

Third party defendants offered the tally sheet into evidence through the testimony of a Southern Agricultural Chemicals employee who was in charge of supervising the service and repair of machines which used the rollers. The witness testified in pertinent part as follows:

> In my capacity as the person responsible for the service of this equipment, we kept business records concerning the employee time and expenses involved in these service calls. I can identify what has been marked for identification as Southern Agricultural's Exhibit 8. It is a tally sheet for the roller repairs that we did on the various machines. The Exhibit is in my handwriting. I kept this record in the ordinary course of business at Southern Agricultural. It was maintained by me and in my custody.
>
> The entries made on that record were made by me at or about the time when the particular incident would occur. . . .

> In order to fill out this report, *I would receive the information from work orders that we maintained that would include all of that information.* [Emphasis supplied.]

The work orders referred to by this witness were not offered into evidence. In *Lowder* this Court held a summary of daily reports inadmissible due largely to incompleteness of the reports themselves, which had been admitted into evidence. Because the reports were incomplete, the Court concluded the summary was not produced in the regular course of business. The failure here to offer the work orders, or at least to offer detailed evidence as to their origin and substance, similarly deprived the Court of the information needed to determine the trustworthiness of the tally sheet. The Court thus properly excluded it on the ground that an adequate foundation establishing its trustworthiness had not been laid.

Accepting as true the witness' conclusory statements that the entries were made in the ordinary course of business, were contemporaneous with the events recorded, and were in the witness' handwriting (*i.e.*, were original entries), there is still insufficient evidence that the entries were made with adequate personal knowledge of the witness. The tally sheet, to be proved reliable, must be shown to be based on reliable information. The work orders themselves thus must be shown to satisfy the conditions of the business records exception or otherwise to provide a sufficient basis for introduction of the tally sheet.

[2] Third party defendants argue the tally sheet was admissible by analogy to ledger sheets, which are ordinarily admitted without requiring admission of documentary evidence from which the ledger entries are made. *See State v. Dunn*, 264 N.C. 391, 141 S.E. 2d 630 (1965); *Builders Supply v. Dixon*, 246 N.C. 136, 97 S.E. 2d 767 (1957); *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895 (1950); *Oil Co. v. Horton*, 23 N.C. App. 551, 209 S.E. 2d 418 (1974). The argument is without merit. The mere fact that a record is by definition a ledger sheet does not make it automatically admissible. The conditions of the business records exception must still be established to the court's satisfaction. *See Dunn, Builders Supply, Supply Co.*, and *Oil Co., supra.* Further, a ledger sheet tends by its nature to have features of reliability. "A 'ledger' is the principal book of accounts of a business establish-

ment in which all the transactions of each day are entered under appropriate heads so as to show at a glance the debits and credits of each account." *Black's Law Dictionary* 802 (rev. 5th ed. 1979). It is generally true that a ledger is regularly checked for accuracy and the ledger keeper thereby becomes trained in habits of precision, thus justifying a conclusion that the ledger is sufficiently trustworthy. *See Lowder*, 26 N.C. App. at 650, 217 S.E. 2d at 700. There is no evidence here, however, regarding the business function of the tally sheet, or its method of compilation, which would suggest the likelihood of accuracy. The argued analogy of the tally sheet to ledger sheets is therefore inapposite, and admission of the tally sheet was not required by the cases regarding admission of ledger sheets.

Third party defendants next contend the court improperly sustained objections to several questions propounded to the service and repair supervisor regarding entries on the tally sheet and his calculations based thereon. Again, because the work orders upon which the witness based his calculations were not in evidence, the sufficiency of his data and the extent of his knowledge were indeterminable. Objections to the questions thus were properly sustained. Further, the record does not disclose what the witness' answers would have been. Thus "there is nothing to show that the [third party defendants] were prejudiced." *Hege v. Sellers*, 241 N.C. 240, 245, 84 S.E. 2d 892, 896 (1954). *See also Service Co. v. Sales Co.*, 259 N.C. 400, 411, 131 S.E. 2d 9, 18 (1963).

[3] Third party defendants further contend the following portion of the jury instruction on damages was error: "*Several* of the rollers at this time came apart, and some were returned for repair, and *several* of the . . . machines were worked on and replaced with other rollers." (Emphasis supplied.) They argue that use of the word "several" was "clearly incorrect" and probably "conveyed to the jury the false impression that the . . . roller failure was an infrequent and trivial problem."

While third party defendants contend the excluded tally sheet showed repairs to over 400 rollers, the only competent evidence regarding the number of defective rollers was testimony of the service and repairs supervisor that he "personally worked on about fifteen" roller repairs, either doing the work himself or

supervising others. Although this witness later testified that "[t]here were probably eight individuals other than me who performed work on the . . . machine[s]" there was no evidence as to how much of their work involved roller repairs. In light of the fact that the only competent evidence before the court showed fifteen defective rollers, we fail to see error prejudicial to third party defendants in the court's describing this number by use of the word "several."

[4] Third party defendants finally contend the court erred in failing to give requested instructions on incidental and consequential damages. When there is a breach of warranty in the sale of goods, the buyer may recover incidental and consequential damages in a proper case. *See* G.S. 25-2-714(3), -715 (1965). Incidental and consequential damages are "special damages, those which do not necessarily result from the wrong." *Rodd v. Drug Co.*, 30 N.C. App. 564, 568, 228 S.E. 2d 35, 38 (1976). Special damages "must be pleaded, and the facts giving rise to [them] must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand." *Id.* An instruction on special damages is appropriate, however, only when such damages are particularly alleged in the complaint *and the allegation is sustained by the evidence. See Binder v. Acceptance Corp.*, 222 N.C. 512, 514-15, 23 S.E. 2d 894, 895 (1943).

Third party defendants alleged in their counterclaim that they "incurred great costs and expense in service calls to replace broken rollers and have suffered significant damage to their good name and reputation." Although these allegations may be sufficiently particular to give third party plaintiff notice of special damages, the record contains no competent evidence which sustains them. The service and repairs supervisor testified that he personally was involved in the repair of about fifteen rollers, and that eight other persons were employed to service machinery; but the record contains no competent evidence of expenses attributable specifically to defective rollers and not included within expenses incurred in the routine service and repair of machinery. Neither was there evidence of damage to reputation. The failure to instruct on incidental and consequential damages thus was not error.

No error.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. ROBERT JOSEPH LUCAS, JR.

No. 813SC1307

(Filed 6 July 1982)

1. **Automobiles and Other Vehicles § 131— failure to stop at accident scene—sufficiency of warrant**

A warrant charging that defendant unlawfully failed to stop at the scene of an accident in which the vehicle driven by defendant was involved was sufficient to charge a crime under G.S. 20-166(b) without additional allegations that defendant failed to give his name, address, driver's license number, and the registration number of his vehicle.

2. **Criminal Law § 143.6— violation of probation condition—sufficiency of evidence**

The evidence in a probation revocation hearing was sufficient to support the trial judge's finding that defendant "willfully and without lawful excuse" violated a condition of his probation by refusing to attend and complete a treatment program.

APPEAL by defendant from *Small, Judge* and from *Brown, Judge.* Orders entered 18 May 1981 and 14 July 1981 in Superior Court, PITT County. Heard in the Court of Appeals 25 May 1982.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Jeffrey L. Miller and Tharrington, Smith & Hargrove, by Wade M. Smith, for defendant-appellant.

HILL, Judge.

In Pitt County case No. 80CRS607, defendant was charged with misdemeanor larceny, to which he pleaded guilty in superior court as a part of a plea bargain. He was given a two year suspended sentence and placed on probation for three years. In case No. 80CRS12196, defendant was charged with misdemeanor trespass, and in case No. 80CRS12197, defendant was charged with failure to stop at the scene of an accident. Again as a part of

a plea bargain, defendant pleaded guilty to both charges in superior court. The cases were consolidated for judgment and defendant was given a two year suspended sentence and placed on probation for three years. In Wake County case No. 79CRS72590, transferred for supervision to Pitt County and known there as No. 81CRS7359, defendant was charged with misdemeanor credit card fraud. He was given a twelve month suspended sentence and placed on probation for three years.

On 11 February 1981, defendant's probation in case No. 80CRS607 was modified to include the condition of probation required in No. 80CRS12196 and No. 80CRS12197, that he "[e]nter the program administered by Health Services of the Roanoke Valley, . . . Roanoke, [Virginia], initially at Hegira House and subsequently at Omni House, and that he satisfactorily attend and complete the requirements of said program." A probation violation report was filed on 13 March 1981 stating that "on March 3, 1981 Hegira House terminated the defendant from its program for his being unmotivated, uncommitted and extremely resistant to the treatment offered to him at Hegira House . . . ."

A hearing on the revocation of defendant's probation was convened on 18 May 1981 at which the State's evidence tends to show that defendant did not wish to be at Hegira House. Henry L. Altice, director of Hegira House, testified that the treatment at the house was based upon "insight therapy" and group confrontation. Basically, Altice stated, "If you do something, you get something for it. If you don't, you get dealt with for it. But in terms of actual therapy, there are all types of therapy—energetics, reality, and encounter therapy. One to one counselling and family therapy." Altice further testified that defendant did not perform his assigned tasks at Hegira House and refused to give urine specimens used to monitor drug usage. In sum, Altice stated that defendant "was terminated because of the lack of commitment and involving himself into the process of the program and refusing to take care of himself and in giving urinalysis, and disobeying directions from the staff to work on his crew when he was expected to do that."

Defendant's evidence tends to show that the Hegira House method of treatment was inappropriate for defendant. Dr. James L. Mathis, a psychiatrist, testified that "[a] confrontive-type en-

vironment as described by Mr. Altice would create in [defendant] a tremendous anxiety and create in him a tremendous desire to escape and get away from there." Defendant testified that he did not understand the treatment program at Hegira House and was rebuffed when he made inquiries about "what was going on." Defendant described various "confrontation" methods used at the house that involved yelling obscenities at him to induce crying, and deprivation of sleep, food, and contact with "the family." He stated that he had trouble giving the urine specimens because he had to give them in front of other people. Defendant also admitted that he refused to give urine specimens and that he disobeyed directions from the staff, but he apparently was told by a doctor to refrain from certain activities because of a back ailment caused by a previous automobile injury.

The judge found as a fact that defendant "wilfully and without lawful excuse violated his special condition of probation . . . by refusing to attend and complete the requirements of the program . . . at Hegira House," and ordered that defendant's probation be revoked and the suspended sentences be immediately effectuated.

On 4 June 1981, defendant filed a motion for appropriate relief in superior court stating that the trial court lacked subject matter jurisdiction, that "[t]he acts charged in the criminal pleading did not constitute a violation of criminal law," and that the sentence was illegally imposed or otherwise invalid as a matter of law. The motion was "deemed denied" because defendant already had given notice of appeal from the orders revoking his probation and the superior court thereby had no jurisdiction.

The appeals from the orders revoking defendant's probation and from the order denying his motion for appropriate relief were consolidated for our disposition on 2 September 1981.

[1] Defendant first argues that the judge had no jurisdiction or authority to revoke his probation and effectuate his suspended sentences because the warrant in case No. 80CRS12197 is fatally defective. The warrant states, in part, as follows:

> [D]efendant named above did unlawfully, willfully, . . . fail to stop at the scene of an accident and collision occurring on N.C. 33 . . . Highway . . . in which the vehicle driven by the defendant was involved.

G.S. 20-166(b), under which defendant was charged in this warrant, states, in part, as follows:

> The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person *shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, driver's license number and the registration number of his vehicle* to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision . . ..

(Emphasis added.) Thus, defendant contends that the warrant quoted above is fatally defective because it did not charge the essential elements of the crime; to wit, defendant's failure to give his name, address, driver's license number, and registration number of his vehicle.

"The driver violates the statute if he does not immediately stop at the scene." *State v. Norris*, 26 N.C. App. 259, 262, 215 S.E. 2d 875, 877 (1975), *cert. denied*, 423 U.S. 1073 (1976). In *Norris*, this Court held that the warrant's allegations that Norris " 'did fail to . . . give his name, address, operator's lic. number and registration number of his vehicle . . .' would become relevant only if there was some evidence that he immediately stopped at the scene." *Id.*

We distinguish the present case from *State v. Wiley*, 20 N.C. App. 732, 203 S.E. 2d 95 (1974), which is cited by defendant. In *Wiley*, the warrant read, in part, as follows:

> [D]efendant . . . did unlawfully and willfully operate a motor vehicle on a public street or public highway: *By leaving the scene of a collision* (property damage only) in violation of and contrary to the form of the statute . . ..

Id. at 732, 203 S.E. 2d at 95 (emphasis added). The evidence was uncontroverted that the driver of the truck fled the scene of the accident. This Court arrested judgment because the warrant did not charge Wiley with operating the motor vehicle which was involved in the accident, and it did not charge that Wiley failed to give his name, address, and driver's license number before leaving the scene of the accident. *Id.* Having stopped, Wiley could

have given the information required by G.S. 20-166(b); therefore, that warrant was fatally defective. In the present case, however, defendant was charged with failing to stop at the scene of an accident. Not having stopped, defendant could not have given the information required by the statute.

Under the principles stated in *Norris*, we find that the warrant in case No. 80CRS12197 is sufficient to charge the offense. Defendant's remaining arguments on this point, dependent upon the above disposition, are likewise without merit.

[2] Defendant's final arguments challenge the sufficiency of the evidence to support the judge's findings of fact, conclusions, and orders revoking defendant's probation. As noted above, the judge found as a fact that "defendant has wilfully and without lawful excuse violated his special condition of probation . . . by refusing to attend and complete the requirements of the program . . . at Hegira House . . .."

It is well settled that in a probation revocation hearing, "[a]ll that is required . . . is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewitt*, 270 N.C. 348, 353, 154 S.E. 2d 476, 480 (1967), and cases cited therein. Of course, the judge's findings of fact in such a hearing should be definite and not conclusory. *State v. Robinson*, 248 N.C. 282, 103 S.E. 2d 376 (1958).

We conclude that the evidence recounted above is sufficient to support the judge's finding of fact that defendant "wilfully and without lawful excuse" violated the condition of his probation "by refusing to attend and complete" the Hegira House program. Further, the findings of fact are sufficiently definite to support the order revoking defendant's probation. The judge need not make extensive findings of fact, but they must be sufficient to satisfy the requirements quoted above in light of the evidence presented. This the judge accomplished in the present case.

For these reasons, the orders are

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. KEITH RAY ATKINS

No. 8121SC1322

(Filed 6 July 1982)

Automobiles and Other Vehicles § 112; Homicide § 27; Narcotics § 3.3— involuntary manslaughter—error to instruct concerning driving under influence of drugs—opinion testimony constituting insufficient evidence

In a prosecution for involuntary manslaughter, the trial court erred in instructing that the jury should consider whether defendant violated G.S. 20-139 by driving under the influence of drugs since the only evidence concerning the drug use consisted of a bag of marijuana found on defendant and opinion testimony of an eyewitness to the accident who felt that in his job, "pumping gas," he had some experience in determining whether someone was under the influence of pills, and that in his opinion the defendant "was under the influence of either pills or alcohol." Although the court erred in submitting to the jury the violation of driving under the influence of drugs, the error was not prejudicial since the evidence was overwhelming of defendant's violation of the following statutes: (1) proceeding on the highway in the wrong direction in violation of G.S. 20-165.1, and (2) driving under the influence of alcohol in violation of G.S. 20-138.

APPEAL by defendant from *Walker (Hal H.), Judge*. Judgment entered 27 July 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 26 May 1982.

Defendant was convicted as charged of involuntary manslaughter. He pled guilty to charges of simple possession of marijuana and no operator's license. He appeals from the judgment imposing a sentence of a maximum and minimum of three years in prison. The parties stipulated to the following: Elizabeth Montgomery Warden died on 6 December 1980 as a result of a collision of her car with the defendant's automobile in which she received head and chest injuries which were a direct cause of death; approximately 18 grams of marijuana were found on defendant on 6 December 1980; and a blood test taken of defendant's blood showed .01 percent of alcohol by weight in defendant's bloodstream on 6 December 1980 at approximately 3:00-3:30 a.m.

STATE'S EVIDENCE

At trial the State presented the testimony of Richard Kinzer who was an eyewitness to the accident occurring at 2:45 a.m. on 6 December 1980. Kinzer was turning onto an exit ramp from Highway 52, a four-lane road. The deceased, Elizabeth Warden, passed Kinzer's exiting car and was hit head-on by defendant's car, traveling on the wrong side of the road. After the collision, Kinzer determined that Ms. Warden was dead and went to defendant's car. He smelled alcohol on defendant's breath, and it was his opinion that defendant was under the influence of alcohol or drugs. Defendant was struggling to release his foot from the wreckage and appeared unconcerned when Kinzer informed him that defendant had killed Ms. Warden.

State Trooper Robert Compton investigated the accident. He found 10-12 beer cans around defendant's car and a bag of marijuana in defendant's pocket. He stated that it was his opinion that defendant was under the influence of alcohol or drugs at the time of the collision. A blood alcohol test performed at 4:40 a.m., about two hours after the accident, showed .01 percent alcohol. Compton testified that he saw defendant again in the Clerk's office on 7 March 1980, but defendant was not under arrest at that time. Defendant told Compton then that he had consumed four or five beers on the night of the accident.

DEFENDANT'S EVIDENCE

Defendant presented the testimony of Roger Ayers with whom defendant worked on a construction site. Ayers, his brother and defendant rode together to and from work and the Ayers brothers had left beer cars in defendant's car on the day before the collision. Defendant testified that on the evening in question, he drank two beers with Sue O'Neal, a friend of his, and then went to the hospital to see his girl friend, Sandy Ayers. Ms. Ayers testified that she did not smell alcohol on defendant's breath. After leaving the hospital, defendant was unable to remember what happened in regard to the collision. He stated that he had not smoked any marijuana that evening. As a result of the accident, defendant had a broken bone in his leg, a crushed ankle, severe damage to his kneecap and stitches in his chin.

Attorney General Edmisten by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Pfefferkorn & Cooley by Jim D. Cooley for defendant appellant.

CLARK, Judge.

Involuntary manslaughter is defined as the unintentional killing of another person without malice by some unlawful act not amounting to a felony or naturally dangerous to human life or by an act or omission constituting culpable negligence. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Culpable negligence may arise from the "intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in . . . death . . . ." *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933). The trial court instructed the jury in the case before us that it should consider whether defendant violated any one of the following statutes: proceeding on the highway in the wrong direction in violation of G.S. 20-165.1; driving under the influence of alcohol in violation of G.S. 20-138; or driving under the influence of drugs in violation of G.S. 20-139. A wilful violation of any one of these statutes would constitute culpable negligence if that violation was the proximate cause of Ms. Warden's death.

The judge charged the jury on the three possible statutory violations. There was ample evidence presented on the driving in the wrong direction and the driving under the influence of alcohol violations. Defendant argues, however, that there was insufficient evidence concerning the driving under the influence of drugs violation and that it was error for the judge to charge the jury on this issue. The evidence concerning the drug use consisted of the bag of marijuana found on defendant and the opinion testimony of Kinzer, the eyewitness to the accident. Kinzer testified:

> "In my opinion he [the defendant] was under the influence of either pills or alcohol. I've had some experience in determining whether someone is under the influence of pills because in my job every weekend, pumping gas, I see kids come up and down Stratford Road popping pills and drinking beer one after each other. In response to your question as to whether I observed anybody popping pills this particular evening on

> US-52, it wasn't that. After you see enough of it, you can recognize it. It's like a drink, if you take one, you got to have another."

Our courts have held that a lay witness who has personally observed the individual is competent to testify whether or not in his opinion that person was under the influence of drugs. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974); *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). However, the cases which have allowed opinion testimony regarding drugs have done so on the basis of much stronger indications of drug use. For example, in *State v. Lindley, supra*, the officer observed defendant's erratic driving, his personal demeanor, a white substance on his lips, his pinpoint pupils, the absence of alcohol on his breath, his lack of muscular coordination, his mental stupor, and the way he walked, acted and talked. He also interrogated defendant to ascertain whether there might have been other causes of defendant's condition. In the case before us we do not believe the evidence would have supported an independent finding of driving under the influence of drugs. There was no evidence of any physical manifestations of drug intoxication or of any odor of marijuana smoke in the car.

The trial court erred in submitting to the jury the violation of G.S. 20-139, driving under the influence of drugs. The question is whether the error is prejudicial or harmful so as to result in the granting of a new trial. The error was harmless if it could not have affected the result. *State v. Milby and State v. Boyd*, 302 N.C. 137, 273 S.E. 2d 716 (1981); *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976); G.S. 15A-1443(a). The test of harmless error must be applied on a case-by-case basis.

Applying the test to the case *sub judice*, we find the evidence of defendant's guilt on the involuntary manslaughter charge was overwhelming: he drove on the wrong side of a divided four-lane highway, traveling at 55-60 m.p.h., and hit Mrs. Warden's car head on, killing her; after the accident defendant was "loud and boisterous" at the scene and at the hospital but seemed to be in no pain; he smelled of alcohol, his eyes were red, and there were beer cans in and around the car; defendant admitted drinking two or three beers that evening; when told he had

killed someone, defendant did not seem to care. We conclude that there was no reasonable possibility that error in submitting the G.S. 20-139 violation to the jury might have contributed to the defendant's conviction. We again note that the error in the instructions is not trivial or technical or merely academic but is nonprejudicial because the evidence of defendant's intentional, wilful or wanton violation of the law is so strong that it would be a vain act to reverse and remand for a new trial. We have carefully considered defendant's other assignments of error, and we find no prejudicial error.

No error.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. CARL PAUL BARON, II

No. 8117SC1290

(Filed 6 July 1982)

1. **Rape and Allied Offenses § 4.3— rape victim shield statute—false accusations against others**

In a prosecution for second degree rape and incest, the rape victim shield statute, G.S. 8-58.6, did not preclude evidence that the prosecutrix on previous occasions had falsely accused others of improper sexual advances.

2. **Rape and Allied Offenses § 4— use of tampons by prosecutrix**

In a prosecution for second degree rape of and incest with defendant's thirteen-year-old daughter, evidence concerning the complainant's prior use of tampons was admissible to provide an alternative explanation for the opening in her hymen.

APPEAL by defendant from *Washington, Judge*. Judgment entered 19 May 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 24 May 1982.

The defendant, Carl Paul Baron, II, was convicted of two counts of second degree rape and two counts of incest and was given a fifteen to twenty-year active sentence for the rape and incest that allegedly occurred on 7 January 1981, to be followed by another fifteen to twenty-year prison sentence for the rape and incest which allegedly occurred on 17 December 1980.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Franklin Smith for defendant appellant.

BECTON, Judge.

I

The State's evidence tended to show that the defendant engaged in sexual relations with his thirteen-year-old daughter on 17 December 1980 and again on 7 January 1981. On 12 January 1981, the complainant went to the home of her grandmother and telephoned Jean Kidd, a protective service worker for the Surry County Department of Social Services. Ms. Kidd contacted the Surry County Sheriff's Department, and statutory rape and felonious incest charges were filed.

The physical examination of the complainant conducted on 12 January 1981 revealed no bruising or tearing of the genital or rectal area and no sperms within the vagina. The examination did reveal an opening in the hymen, however. Further, a pubic hair was removed from the complainant's genital area. A State Bureau of Investigation (SBI) laboratory analysis revealed that the hair did not belong to the complainant and did not belong to the defendant.

The defendant, testifying in his own behalf, denied the allegations of rape and incest. The three other children of the defendant testified that they were present on the night of 17 December 1980 and that the incident alleged by the complainant did not occur. They also testified that nothing extraordinary happened on 7 January 1981.

Evidence heard in the absence of the jury revealed that the complainant had accused a foster-parent of coming into her bedroom in the nude, and a neighbor of improper sexual advances. Evidence heard in the absence of the jury suggested further that the complainant had accused her older brother of improper sexual advances and had once painted pubic hairs on a three-year-old child.

II

[1] The dispositive issue on appeal is whether the North Carolina Rape Victim Shield Statute precludes evidence that the complainant, on previous occasions, falsely accused others of improper sexual advances.

Prior to trial, an in-camera hearing was held to determine the admissibility of certain statements made by the complainant. Defense attorneys sought, first, to cross examine the complainant about similar accusations she made against a foster-parent, her brother, and a neighbor; and second, to introduce the testimony of one or more of those persons who would deny the accusations. The trial court ruled this evidence inadmissible under the Rape Victim Shield Statute, G.S. 8-58.6.

G.S. 8-58.6 in pertinent part reads:

Restrictions on evidence in rape or sex offenses cases. — (a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complaint [sic] and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

The trial court interpreted "sexual behavior" to include prior accusations made by the complainant and determined that the evidence sought to be elicited should have been excluded in the absence of "expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged." G.S. 8-58.6(b)(4). We disagree.

The Rape Victim Shield Statute is "nothing more . . . than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *State v. Fortney*, 301 N.C. 31, 37, 269 S.E. 2d 110, 113 (1980). The exceptions, G.S. 8-58.6(b) (1)-(4), merely "define those times when the prior sexual behavior of the complainant *is* relevant to issues raised in a rape trial. . . ." *Id.* at 42, 269 S.E. 2d at 116. The statute clearly was not designed to preclude the admission of all evidence relating to sex. The statute specifically defines sexual behavior as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." G.S. 8-58.6(a). The statute further provides for an in-camera hearing at which time "opposing counsel may present evidence, cross examine witnesses, and generally attempt to discern the relevance of proffered testimony in the crucible of an adversarial proceeding away from the jury." 301 N.C. at 42, 269 S.E. 2d at 116. Again, except when the exceptions are applicable, the statute declares as irrelevant the sexual history of rape victims. It does not exclude otherwise admissible evidence.

In this case, defense counsel made no representation that the complainant had engaged in previous sexual activities. Defense counsel sought only to introduce evidence of the prior allegedly false statements for impeachment purposes and advised the court of their intent. We believe that the Legislature intended to exclude the actual sexual history of the complainant, not prior accusations of the complainant. We reached a similar result in *State v. Smith*, 45 N.C. App. 501, 263 S.E. 2d 371, *disc. rev. denied*, 301 N.C. 104, --- S.E. 2d --- (1980), in which we concluded that language or conversation does not constitute sexual behavior. Specifically, we said: "While the topic of conversation may have been sexual in nature, there is no evidence presented in this case to indicate that the speech arose to the level of sexual behavior or activity. . . ." *Id.* at 503, 263 S.E. 2d at 372. In *Smith*, as in

this case, defense counsel should have been allowed to introduce the evidence in order to attack the credibility of the witness.

Since there is no contention that the complainant ever engaged in sexual activity, there was no need to invoke the statute to prevent the disclosure of complainant's prior statements accusing others of improper sexual advances. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to [her] testimony in arriving at the ultimate facts in the case." *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930). The Rape Victim Shield Statute was applied in this case to prevent defendant from attacking the complainant's veracity. Thus, one of the main functions of cross examination was defeated.

Because we grant defendant a new trial based on the trial court's erroneous application of the Rape Victim Shield Statute to the facts of this case, it is not necessary to address two of defendant's three remaining assignments of error. We do address one issue, however, since it is likely to arise at the retrial.

III

[2] The defendant sought to introduce evidence concerning the complainant's prior use of tampons in order to provide an alternative explanation for the opening in her hymen. Because defendant denied having sexual intercourse with the complainant and because the physical examination revealed no bruising or lacerations of the skin of the genital or rectal area, defendant contends that the "tampon evidence" was especially critical. The defendant's wife (the stepmother of the complainant) testified that the complainant tried to insert a tampon prior to the alleged rape and experienced much pain. Because a jury may view this evidence as consistent with the puncturing of the hymen and consistent with the physical examination which revealed "no recent tears or recent change in her hymen," this evidence should not have been excluded. "Relevancy describes the relationship between a proffered item of evidence and a proposition which is provable or material in a given case." *United States v. Craft*, 407 F. 2d 1065, 1069 (6th Cir. 1969). *See generally* 1 Stansbury, North Carolina Evidence §§ 77-79 (Brandis rev. 1973); McCormick on Evidence § 185 (2d ed. 1972). We believe the jurors, considering

the guilt or innocence of the defendant, should have had access to this evidence in considering whether the alleged offense occurred.

For the foregoing reasons, defendant should be granted a

New trial.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

A. E. P. INDUSTRIES, INC. v. R. BRUCE McCLURE

No. 8226SC144

(Filed 6 July 1982)

Injunctions § 13.1— denial of preliminary injunction—failure to show irreparable harm

The trial court did not abuse its discretion in the denial of a preliminary injunction to restrain defendant, pending trial, from continued breach of covenants not to compete and not to use or disclose confidential information on the ground that plaintiff failed to show that it was threatened with irreparable harm if the injunction were not issued pending trial.

Judge WEBB dissenting.

APPEAL by plaintiff from *Snepp, Judge.* Opinion and order filed 2 December 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 May 1982.

Plaintiff brought suit alleging, *inter alia,* that defendant breached covenants not to compete and not to use or disclose confidential information. Plaintiff moved for a preliminary injunction to restrain defendant, pending trial of the action, from continued breach of the covenants.

From a denial of this motion, plaintiff appeals.

Bell, Seltzer, Park & Gibson, by James D. Myers and Ronald T. Lindsay, for plaintiff appellant.

Elam, Seaford, McGinnis & Stroud, by Keith M. Stroud, for defendant appellee.

WHICHARD, Judge.

Plaintiff contends it is entitled to a preliminary injunction as a matter of law. We disagree.

A preliminary injunction may be issued by order . . .:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff. . . .

G.S. 1-485 (Cum. Supp. 1981). The injury threatened to plaintiff must be irreparable, real and immediate. *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E. 2d 49, 51 (1975). An injunction ordinarily will not be granted where there is an adequate legal remedy "which is as practical and efficient as is the equitable remedy." *Durham v. Public Service Co.*, 257 N.C. 546, 557, 126 S.E. 2d 315, 323 (1962).

> Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain [its] primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between [it] and defendant can be determined.

Conference v. Creech and Teasley v. Creech and Miles, 256 N.C. 128, 139, 123 S.E. 2d 619, 626 (1962).

It lies within the discretion of the court to determine whether a preliminary injunction will be granted upon pleadings and affidavits. *Conference*, 256 N.C. at 139-40, 123 S.E. 2d at 626. In exercising its discretion "the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff." *Id.* at 140, 123 S.E. 2d at 626; *see also Board of Elders v. Jones*, 273 N.C. 174, 182, 159 S.E. 2d 545, 551-52 (1968).

The party moving for a preliminary injunction must offer particular facts supporting its claim of irreparable injury. *Pharr*

v. Garibaldi, 252 N.C. 803, 815, 115 S.E. 2d 18, 27 (1960). In reviewing the denial of a preliminary injunction, the appellate court is not bound by the findings of the lower court, *Plastics, Inc.*, 287 N.C. at 235, 214 S.E. 2d at 51; but there is a presumption that the lower court decision was correct, *Conference*, 256 N.C. at 140, 123 S.E. 2d at 627.

Assuming, *arguendo*, that the employment and termination of employment agreements in question are valid and enforceable, and that plaintiff is likely to succeed on the merits at trial, we nevertheless cannot say the trial court abused its discretion in failing to find that plaintiff was threatened with irreparable harm or that its rights needed protection pending trial. The pleadings and affidavits reveal the following:

The complaint alleges that defendant has breached covenants not to compete and not to use confidential information, but suggests no specific ways in which plaintiff has been harmed. Plaintiff offered one affidavit in which the only allegations of harm are the following: "[T]hat defendant has contacted at least nine substantial customers of plaintiff," who together account for ten to fifteen percent of plaintiff's annual sales in the geographical area subject to the covenant not to compete; that "defendant has been soliciting sales and orders of products of others which are directly competitive with products which are manufactured by the plaintiff to meet the particular needs of each such customer"; that these activities are "highly damaging to the plaintiff's sales program . . . and are also leading to damaging confusion by these customers . . . [who] no doubt consider [defendant] to still represent the plaintiff" and that if defendant continues plaintiff will "suffer irreparable damage."

Defendant offered affidavits from employees of five different companies which either purchase or manufacture the type of products plaintiff manufactures. These affidavits allege that the identity of customers who use such products, and their individual product requirements, are readily available to all salesmen in the trade; and that standard industry practice is for customers to deal with several manufacturers and to place orders in response to competitive bids. Further, defendant himself stated by affidavit that he had incurred several thousand dollars in expenses in setting up his own business (admittedly in competition with

plaintiff), including assuming a lease on office space and hiring two employees; and that he would be without a source of income if enjoined from sales activities.

The trial court denied the injunction, reasoning that if defendant

> is restrained from engaging in this business . . . the injury to him will be real and immediate, and he could not be made whole even though he ultimately prevails upon a determination of the merits.
>
> On the other hand, the plaintiff has failed to establish through its evidence the reasonable likelihood of any substantial monetary damage. If the injunction is granted the plaintiff would in effect have prevailed in the action no matter what the final determination might be.

We find no basis in the record for holding that the trial court abused its discretion in so concluding.

Plaintiff argues that *Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E. 2d 190 (1975), is controlling precedent and requires the granting of an injunction here. The court there, however, upheld the granting of a preliminary injunction to restrain the disclosure of confidential information only after finding evidence in the record of detriment to plaintiff. Although factually similar, that case does not dictate the granting of an injunction here. The issue on review is whether there has been an abuse of discretion. A decision by the trial court to issue or deny an injunction will generally be upheld on appeal if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. *Banner v. Button Corporation*, 209 N.C. 697, 700, 184 S.E. 508, 510 (1936); *see also Studios v. Goldston*, 249 N.C. 117, 119, 105 S.E. 2d 277, 279 (1958). We find the decision here amply supported by the record.

In view of our holding that the trial court did not abuse its discretion in denying the injunction based on inadequate showing of irreparable harm to plaintiff, we deem it unnecessary to discuss plaintiff's further arguments that (1) certain statements offered by defendant to challenge the validity of the termination of employment agreement violate the parol evidence rule,

(2) other statements were either irrelevant or self-serving, and (3) the court erred in finding that plaintiff's customer lists and business methods were not confidential.

Affirmed.

Judge CLARK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. The record shows that the defendant voluntarily entered into a contract with the plaintiff under the terms of which he would not compete with the plaintiff within a certain geographic area and for a prescribed time. The majority does not question the reasonableness of the time and area. He later changed his employment with the plaintiff and for a substantial consideration, he signed a new contract in which he again agreed not to compete within the same area and for the same time. The defendant was not required to sign this contract and I believe it is error for us to say he does not have to abide by it. That will be the effect if the plaintiff is limited to money damages which it may or may not be able to prove, and which it might not be able to collect if it gets a money judgment.

The majority relies on the failure of the plaintiff to show damages. That is one reason I think the injunction should issue. It is difficult to prove damages in this type of case and yet we know the plaintiff could suffer substantial damages. I believe the effect of the majority opinion is to allow the defendant to flaunt the terms of a contract to which he freely assented. This I would not do. I vote to reverse.

STATE OF NORTH CAROLINA v. BOBBY CRAWFORD

No. 8126SC1228

(Filed 6 July 1982)

1. **Criminal Law § 75.7— statement made by defendant before Miranda warnings—statement voluntary—properly admitted**

Where an officer told defendant that he needed him to sign a waiver of rights form in order to question him about a break-in, and the officer further informed defendant of the presence of his fingerprints on stolen merchandise, the officer simply gave defendant the minimal information necessary for him to make an intelligent waiver. Therefore, when the defendant subsequently stated "I'm not signing anything. I don't know anything about the Firestone Store, and if any fingerprints were on the tv's, somebody else had to put them there" before the officer could read defendant his Miranda warnings, the trial court properly found defendant's statements were voluntarily made and properly admitted them.

2. **Criminal Law § 113.9— instructions—error in summarizing evidence—objection and cure**

Although the trial court erred in stating in his summary of the evidence to the jury that the vehicle containing stolen merchandise was owned by an occupant of the same residence of defendant, the error was cured after defendant made a timely objection and the court immediately corrected its instruction and told the jury to disregard the court's recollection.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 19 May 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 April 1982.

Defendant was convicted of felonious breaking and entering and felonious larceny. Judgment imposing concurrent prison sentences was entered.

The State's evidence tends to show the following. On the night of 28 September 1980, Officer Smith responded to a burglary alarm at a Firestone Tire and Rubber Company store on East Independence Boulevard in Charlotte. He observed a Buick vehicle parked at the rear of the store and two men approaching the car. When the men got into the car, the officer shown his spotlight on the driver's side. Defendant turned and looked directly at him for approximately five to ten seconds. The Buick then pulled away from the store. Officer Smith observed a broken window to the left of the store door.

The Buick proceeded toward downtown Charlotte at a high rate of speed. At the corner of Fifth and Seventh Streets, the vehicle went off the road into a field. The men disembarked and began running. After pursuing them unsuccessfully, Officer Smith returned to their car. It contained eight television sets which were later determined to be the property of Firestone. The police matched two prints off the television sets with the finger and palm prints of defendant. Defendant was arrested on 21 October 1980, and placed in custody.

Later that day, he was brought to the office of Officer Layton for questioning in reference to the break-in. Officer Layton testified at trial as follows:

> "I told Mr. Crawford I needed to get a waiver from him and a statement in reference to the break-in at the Firestone Store on Independence Boulevard, and I also advised him that his fingerprints had been found on the televisions that were taken in the break-in which were recovered in the back . . . of his sister's car."

Defendant objected to the admission of any statements he made in response to Officer Layton's remarks. The court conducted a *voir dire*. Officer Layton testified that before he could read defendant his Miranda warnings, defendant said, "I'm not signing anything. I don't know anything about the Firestone Store, and if any fingerprints were on the TVs, somebody else had to put them on there." After hearing testimony, the court made the following finding:

> "This [defendant's] utterance was not made in response to any questions propounded to him by the officer and was voluntarily made, and were [sic] not a violation, or were [sic] not made under circumstances which violated the constitutional rights of the defendant, either under the Constitution of the United States or under the Constitution of the State of North Carolina."

The court admitted defendant's statements into evidence.

Upon conclusion of the evidence and submission of the charges, a jury found defendant guilty of felonious breaking or entering and felonious larceny.

Attorney General Edmisten, by Associate Attorney John W. Lassiter, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Malcolm R. Hunter, for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues that the court committed reversible error in admitting a statement which he alleges was the product of a custodial interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). We disagree.

In *Miranda v. Arizona, supra*, the Supreme Court ruled that the Fifth Amendment requires certain warnings to be given a defendant before any evidence obtained as a result of a custodial interrogation can be admitted against him. The defendant must be advised of his right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to questioning if he so desires. The Court pointed out, however, that its decision did not bar the admission of *volunteered* statements. 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d at 726.

After *Miranda*, courts were confronted with the issue of what constitutes custodial interrogation. The phrase was defined in *Miranda* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706. Some courts concluded the Supreme Court was referring only to *express* questioning of a defendant. *See, e.g., Howell v. State*, 5 Md. App. 337, 247 A. 2d 291 (1968).

In *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980), however, the Court declared that it did not construe the Miranda opinion so narrowly. 446 U.S. at 299, 100 S.Ct. at 1688, 64 L.Ed. 2d at 306. It emphasized that the concern in *Miranda* was protection of the privilege against compulsory self-incrimination, a privilege which could be violated by techniques of persuasion other than express questioning. The Supreme Court declared the following:

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

446 U.S. at 300-02, 100 S.Ct. at 1689-90, 64 L.Ed. 2d at 307-08.

In *Innis*, defendant's incriminating statements occurred after he had been arrested for murder and while he was en route to the central police station. Two officers in the front seat were discussing their concern that handicapped children in the area might find the murder weapon and hurt themselves. Defendant interrupted the conversation and said he could show them where the gun was located.

Applying its definition to the facts at hand, the Supreme Court concluded that defendant had not been interrogated within the meaning of Miranda. The Court pointed out that the officers had not directed their statements to defendant. There had also been no showing that the officers were aware defendant was peculiarly susceptible to an appeal to his conscience concerning the safety of children. In short, it could not be said that the officers should have known their words were reasonably likely to elicit an incriminating response.

Applying the Court's definition to the facts in the present case, we conclude the trial court properly found that defendant's statements were voluntarily made. Officer Layton told defendant that he needed him to sign a waiver of rights form in order to question him about the break-in. When the officer further informed defendant of the presence of his fingerprints on the stolen

merchandise, the officer simply gave defendant the minimal information necessary for him to make an intelligent waiver. There was no reason for Officer Layton to have known that his preliminary remarks were likely to elicit an incriminating response.

We distinguish the situation from that of an officer confronting defendant with incriminating evidence after defendant has invoked his Miranda rights. The present defendant replied before Officer Layton ever had the opportunity to read him his Miranda warnings. Where the evidence supports the trial court's findings and conclusions that the statements were freely and voluntarily made, the ruling will not be disturbed on appeal. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

Moreover, even if we could conclude the court erred in admitting defendant's statement, it would be harmless beyond a reasonable doubt. In the present cause, an expert in fingerprint identification testified that prints lifted from the stolen television sets were identical to defendant's. The officer at the scene of the crime positively identified defendant as the perpetrator. The statement did not incriminate defendant. In fact, it was consistent with defendant's theory raised on cross-examination that any prints found on the television sets resulted from legitimate customer contact. Defendant's assignment of error is overruled.

[2] Defendant's Assignment of Error No. 3 concerns the jury instructions. In summarizing the evidence, the court stated that the Buick vehicle containing the stolen sets had a tag number "registered to and owned by an occupant of the same residence that the defendant, Bobby Crawford, lived in, and that the owner of the vehicle was related to Bobby Crawford." Defendant argues that the State offered no evidence to prove ownership or residency and that the judge's remarks constituted an improper expression of opinion.

Any error in a court's summation of the evidence should be called to the attention of the court before the jury begins its deliberations. *State v. Hammonds*, 301 N.C. 713, 272 S.E. 2d 856 (1981). The present defendant did make timely objection. The court, thereafter, immediately corrected its instruction concerning defendant's residence and told the jury to disregard the court's recollection. We must assume the jurors were capable of

following the court's instruction. Since the State presented evidence that the Buick was registered to defendant's sister, the jury was properly allowed to consider ownership. Defendant's assignment of error is overruled.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

DEEP RIVER FARMS, LTD., A LIMITED PARTNERSHIP v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 8118SC1087

(Filed 6 July 1982)

Taxation § 31.3— hygroponic growing system—not machine for use tax purposes

An assembled hygroponic growing system for tomatoes, which resembles a greenhouse, is not a "machine" eligible for a reduced use tax under G.S. 105-164.4(1)(g) where substantial human activity is required within the system in order for tomatoes to be cultivated and harvested.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 12 August 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 May 1982.

Plaintiff, a grower of tomatoes by use of hygroponic growing systems purchased from an out-of-state vendor, appeals a judgment determining that he was not entitled to a partial refund of a use tax assessed and paid on 35 of his hygroponic growing systems.

Haworth, Riggs, Kuhn, Haworth & Miller, by John Haworth, for plaintiff appellant.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for defendant appellee.

BECTON, Judge.

The plaintiff is a tomato grower who purchased 35 units of articles from an out-of-state vendor for the purpose of cultivating,

growing, and harvesting tomatoes. The sytems were purchased by plaintiff as total packages for a unit price not broken down for the various component systems. As purchased from the out-of-state vendor, the system was incapable of providing a life system for the tomato. In order for it to operate properly, the system had to be supplemented with a concrete floor, tables, and furnaces. Once fully assembled, the system appeared to be a greenhouse and was called a hygroponic growing system.

The plaintiff paid no sales tax on the units at the time they were purchased. Taxes were paid on the supplies purchased locally. The plaintiff was thereafter taxed for the units at a rate of 3% state use tax and 1% county use tax. The plaintiff filed this action requesting a partial refund of state taxes paid. He maintained that the systems should have been taxed as machines or machinery at 1% of the cost, subject to an $80.00 limit, instead of at the 3% rate. From a decision by defendant denying the refund and a decision by the trial court finding that the package purchased from the out-of-state vendor was not a machine, the plaintiff appeals.

The issue before this Court is whether the hygroponic growing system purchased by plaintiff was a machine or machinery for purposes of G.S. 105-164.4(1)(g).

In construing statutes, it is well established that the ordinary and common meaning is to be given words unless a technical or different meaning is apparent by the context. *In re Duckett*, 271 N.C. 430, 436, 156 S.E. 2d 838, 844 (1967). It is also well established that when a taxing statute provides a lower tax rate than is generally applied, a partial exemption is created. *Yacht Co. v. High, Commissioner of Revenue*, 265 N.C. 653, 656, 144 S.E. 2d 821, 823-24 (1965). Further, the taxpayer claiming an exemption has the burden of showing that he comes within that exception. *Id.*, 144 S.E. 2d at 824.

G.S. 105-164.4 provides:

> Imposition of tax; retailer.—There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, . . .

(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State. . . .

. . . .

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn, or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all *nonvehicular implements* and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached

> to handfired furnaces or used in connection with mechanical burners. [Emphasis added.]

We note initially that the statute defines machines to include nonvehicular implements which have moving parts, or which require the use of any motor or animal power in their operation. Giving these terms their ordinary meanings, we hold that the system assembled did not constitute a machine as defined by the statute. In fact, it resembled a greenhouse. Plaintiff and the trial court referred to it as a greenhouse, building, or structure.

The trial court made the following relevant findings of fact to which no exceptions were taken.

> 11. When the articles acquired from out-of-State vendors and the articles acquired from vendors within the State were properly assembled, constructed and connected, the resultant assembly of property constituted what the plaintiff has characterized as thirty-five "hygroponic growing systems."
>
> 12. When the articles . . . were completely assembled, constructed and connected, the structure had the physical appearance of a greenhouse, the walls and roof of which were made of . . . plastic covering . . . supported by the ribs and standards, . . . the floor of which was one of the concrete slabs, . . . which structure contained doors, fans, an evaporative cooler, furnaces, grow tubes, grow tables constructed of fiber board, lumber and angle iron, . . . pumps, pipes and other equipment and supplies, all of which contributed to the maintenance of an artificial environment which provided controlled amounts of nutrients, water, humidity, light and temperature conducive to the successful growth, cultivation and harvesting of tomatoes.
>
> 13. Within each greenhouse structure, employees of the plaintiff would insert cubes of peat moss containing tomato seeds into openings in the long plastic grow tubes which rested on the grow tables constructed by the plaintiff.
>
> . . . .
>
> 16. Employees inside the structure would periodically measure the nutrient level of the water and as necessary, restore nutrients to it.

17. On more infrequent schedules, employees inside the structure would flush the entire system with water, and then reintroduce water and nutrients into the system.

18. Harvesting of ripe tomatoes was also accomplished inside the structure by employees of the plaintiff.

We do not believe that the definition of machines in G.S. 105-164.4(1)(g) can be construed to include this greenhouse-like structure. We find support in our decision in the language of the court in *Endres Floral Co. v. United States*, 450 F. Supp. 16 (N.D. Ohio, 1977), where the court was asked to determine if a greenhouse was a building, structure or machine, and therefore, eligible for certain exemptions for federal income tax purposes. There, the Court stated:

> With respect to this exception, the court looks to whether or not these greenhouses simply function as essentially items of machinery or equipment. In other words, do the greenhouses constitute mere processing chambers. *See Sunnyside Nurseries v. Commissioner*, 59 T.C. 113, 121 (1972). Examples of building-like structures which fall within the first exception are brick kilns and lumber kilns, and freezer structures used in the final processing of milk and ice cream products. The significant distinction between those structures and the greenhouses here at issue is that considerably more human activity is performed within the greenhouse structures. In cases in which structures have been held to be essentially machinery or equipment, the minimal amount of human activity has been emphasized. By contrast, there is more than a minimal amount of human activity performed within the Endres' greenhouses and this activity is essential to the care of the plants and the production of Endres' ultimate product—cut roses.
>
> The employees' work of pinching, pruning, fertilizing, spraying, and cutting the roses took place on a regular basis in the greenhouses. The growing of the rose plants required a considerable degree of skill and knowledge on the part of the employees. While the greenhouses provide a controlled environment for plant growth, they did not simply operate as processing chambers. *See Sunnyside Nurseries v. Commissioner*, 59 T.C. 113, 121 (1972). *Because of the amount of*

human activity in the greenhouses, the structures fail to qualify as essentially items of machinery or equipment within the meaning of the first regulatory exception.

Id. at 24 (emphasis added).

As did the greenhouses discussed in *Endres*, the hygroponic growing systems which are the subject of this dispute required substantial human activity within the system in order for the tomatoes to be cultivated and harvested. We believe that this amount of human activity within the system is too much for it to be classified as a machine.

Further, giving the term machine its ordinary meaning, we find it difficult to discern how this greenhouse could be called a machine. To hold such would allow any building or structure within which there are moving parts, systems or devices powered by machines to be classified as a machine. Such an interpretation would lead to absurd results not intended by the Legislature.

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

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

KAREN STUTTS COOPER v. TOWN OF SOUTHERN PINES AND SEABOARD COAST LINE RAILROAD COMPANY

No. 8120SC887

(Filed 6 July 1982)

1. Municipal Corporations § 14.1; Railroads § 5.2— installation of automatic signal at railroad crossings—no duty of city

G.S. 160A-298(c) allows a city to exercise its discretion in requiring improvements at railroad crossings but it is not under an obligation to do so, and there was neither evidence of abuse of discretion nor negligence in defendant's failing to require the installation of automatic signals at a railroad crossing where an automobile and train accident occurred.

2. Municipal Corporations § 14.1; Railroads § 5.2— town's shrubbery obstructing motorist's view of train tracks—possible negligence—directed verdict for town improper

In an action arising from an accident between an automobile and a train, the trial court erred in directing a verdict for the town where the evidence was sufficient for the jury to reasonably infer that the town failed to exercise ordinary care in maintaining shrubbery along a public street and could foresee that its omission would cause an obstruction interfering with public safety. G.S. 160A-296(2).

3. Railroads § 5.3— train and automobile accident—contributory negligence—jury question

In an action which evolved from an accident between a train and an automobile, the issue of plaintiff's contributory negligence should have been submitted to the jury since plaintiff's evidence supported the following conflicting conclusions: (1) a jury could conclude that if plaintiff had looked back to the right after crossing the first track, she should have seen the train in time to avoid the collision, or (2) a jury could find that with her view obstructed, plaintiff used her faculties the best she could to see if there was a danger and that negligence should not be imputed to her.

APPEAL by plaintiff from *Smith, Judge.* Order entered June 1981 in Superior Court, MOORE County. Heard in the Court of Appeals 6 April 1982.

Plaintiff appeals from a directed verdict in favor of Town of Southern Pines.

On 4 March 1978, plaintiff, then 17 years old, was crossing railroad tracks at New York Avenue in Southern Pines when her car was hit by a southbound train owned by Seaboard Coast Line Railroad Company. Plaintiff received injuries. Her sister, a passenger in the car, was killed.

Plaintiff filed a complaint alleging that the Town of Southern Pines (Town) was negligent in failing to require adequate safeguards at a known hazardous railroad crossing and in permitting shrubbery adjacent to the tracks to obstruct motorists' view. She alleged that defendant Railroad was negligent in failing to take reasonable measures to warn motorists of oncoming trains at a known hazardous crossing and in failing to keep a proper lookout for approaching motorists. Plaintiff sought compensatory and punitive damages from defendants.

At trial, plaintiff presented evidence that New York Avenue is a city-maintained street crossed by approximately 1,000 vehi-

cles per day. It is intersected by two parallel sets of railroad tracks. The tracks are lined on both sides with trees and shrubbery, planted and maintained by the Town.

A white bar indicating a stop extends across the westbound lane of New York Avenue, approximately sixteen feet from the center line of the easternmost railroad track. At this bar is a railroad crossbuck sign. There are nineteen feet from the center of the first track of the crossing to the center of the westernmost track. According to an expert in traffic engineering, it takes 6.7 seconds to travel from the position of the stop bar to the westernmost track.

Plaintiff testified that on 4 March 1978, she did not stop at the white bar on New York Avenue. She pulled directly up to the railroad tracks. She looked left, then right, then left again. To her left, she could see almost down to the next crossing. To her right, her view was obstructed by shrubbery and the angle of the tracks. She could see about halfway to the next crossing. After the second look to the left, plaintiff proceeded across the tracks. She did not look back to the right while crossing.

Plaintiff was struck by a train on the westernmost track. The train engineer testified that he saw plaintiff when he was approximately 75 feet from the crossing. He saw her stop at the east track and then proceed across.

According to plaintiff's witnesses, there have been five prior accidents at the crossing during 1966-1978. The crossing has a hazard index of 217.9.

At the close of plaintiff's evidence, both defendants moved for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure. The court denied the motion as to defendant Railroad and granted the motion as to defendant Town.

Pollock, Fullenwider, Cunningham and Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Young, Moore, Henderson and Alvis, by John E. Aldridge, Jr., and Brown, Holshouser and Pate, by W. Lamont Brown, for defendant appellee.

VAUGHN, Judge.

There are two issues on appeal. (1) Did plaintiff present sufficient evidence to submit the question of the Town's negligence to the jury? (2) If so, did plaintiff's evidence establish contributory negligence as a matter of law? For the following reasons, we conclude that the court improperly entered a directed verdict in favor of the Town.

To establish a *prima facie* case of negligence, plaintiff must establish that defendant owed her a duty of care, that defendant breached that duty, and that defendant's breach was the actual and proximate cause of her injury. *Burr v. Everhart*, 246 N.C. 327, 98 S.E. 2d 327 (1957). A directed verdict on the issue of negligence is improper unless the evidence, when viewed in the light most favorable to plaintiff, fails to show one of these elements.

[1] In the present action, plaintiff alleges that G.S. 160A-298(c) creates a duty of care which the Town breached. We disagree.

G.S. 160A-298(c) authorizes a city to require "the installation, construction, erection, reconstruction, and improvement of warning signs, gates, lights, and other safety devices at grade crossings. . . ." The exercise of control over railroad crossings has also been held to be within a municipality's inherent police power. *See R.R. Co. v. City of Winston-Salem*, 275 N.C. 465, 168 S.E. 2d 396 (1969); *Winston-Salem v. R.R.*, 248 N.C. 637, 105 S.E. 2d 37 (1958).

The fact that a city has the *authority* to make certain decisions, however, does not mean that the city is under an *obligation* to do so. The words "authority" and "power" are not synonymous with the word "duty." When the legislature intended to create a duty in Chapter 160A, it did so expressly. *See* G.S. 160A-296.

G.S. 160A-298 allows a city to exercise its discretion in requiring improvements at railroad crossings. There is no mandate of action. Courts will not interfere with discretionary powers conferred on a municipality for the public welfare unless the exercise (or nonexercise) of those powers is so clearly unreasonable as to constitute an abuse of discretion. *Riddle v. Ledbetter*, 216 N.C. 491, 493-94, 5 S.E. 2d 542, 544 (1939).

In the instant case, we find no evidence of an abuse of discretion. We, therefore, hold, as a matter of law, that the Town was not negligent in failing to require the installation of automatic signals at the New York Avenue crossing. In so holding, we necessarily overrule plaintiff's Assignments of Error Nos. 2 and 3. Those exceptions pertain to the admissibility of exhibits relevant solely to plaintiff's claims under G.S. 160A-298.

[2] Plaintiff claims that the Town was also negligent in allowing shrubbery to obstruct a motorist's view of the tracks in violation of G.S. 160A-296(2). Unlike G.S. 160A-298, G.S. 160A-296(2) does create an affirmative duty of care: A city shall have "[t]he duty to keep the public streets, sidewalks, alleys, and bridges . . . free from unnecessary obstructions." An obstruction can be anything, including vegetation, which renders the public passageway less convenient or safe for use.

In the present case, plaintiff presented evidence that the Town had improved the area bordering both sides of the tracks. There were evergreen trees, large magnolia trees, many azaleas, dogwood trees, and oak trees. The Town was responsible for the pruning of those plants. Plaintiff testified that when she stopped at the crossing, her view to the right was not clear: "Bushes and shrubs and stuff—most of those were in the way. The bushes appeared to be full and green and about medium height."

From such evidence, a jury could reasonably infer that the Town failed to exercise ordinary care in maintaining shrubbery along a public street and could foresee that its omission would cause an obstruction interfering with public safety. We conclude that the court erred in entering a directed verdict in defendant's favor on the issue of negligence.

[3] Defendant argues that the court nevertheless properly directed a verdict in its favor because plaintiff's evidence established contributory negligence as a matter of law. We disagree.

Contributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible. *R.R. v. Trucking Co.*, 238 N.C. 422, 78 S.E. 2d 159 (1953); *Ridge v. Grimes*, 53 N.C. App. 619, 281 S.E. 2d 448 (1981). Here, plaintiff stopped before the tracks. She looked in both directions but did not see a

train. Her view to the right was obstructed by shrubbery and the angle of the tracks. Once she proceeded across the first set of tracks, she never looked back to the right. The train engineer saw plaintiff's car at the easternmost track when he was 75 feet from the crossing.

Plaintiff's evidence supports conflicting conclusions. There were nineteen feet between the two sets of tracks. A jury could conclude that had plaintiff looked back to the right after crossing the first track, she should have seen the train in time to avoid the collision. A jury could also find, however, that with her view obstructed, plaintiff used her faculties the best she could to see if there was danger and that negligence should not be imputed to her. Where conflicting inferences can be drawn from the evidence, there is no contributory negligence as a matter of law. *See Coltrain v. R.R.*, 216 N.C. 263, 4 S.E. 2d 853 (1939); *Loflin v. R.R.*, 210 N.C. 404, 186 S.E. 493 (1936).

We conclude that plaintiff presented evidence that would support a finding that Town's negligence was a proximate cause of her injuries. The court erred in directing a verdict in defendant's favor. The order is reversed.

Reversed.

Judges MARTIN (Robert M.) and ARNOLD concur.

ARLENE R. HARRIS v. HAROLD R. HARRIS

No. 8112DC1158

(Filed 6 July 1982)

1. Appeal and Error § 16— delay of ruling on motion—attempted appeal—jurisdiction to decide motion

Plaintiff's attempted appeal from a non-appealable interlocutory order in which the trial court delayed ruling on plaintiff's motion for an assignment of wages was a nullity and did not deprive the trial court of jurisdiction to hear plaintiff's motion. G.S. 1A-1, Rule 54(b); G.S. 1-277(a).

2. **Divorce and Alimony § 19.5— separation agreement—amount of support—prior appellate decision—binding effect on trial court**

A prior Court of Appeals decision affirming judgment for plaintiff wife in her action to enforce provisions of a separation agreement requiring defendant husband to pay plaintiff, as support, a sum equal to 50% of his Army retirement pay was binding on such issue, and the trial court had no authority to modify the terms of the separation agreement by reducing the percentage of defendant's military retirement pay to which plaintiff was entitled.

3. **Divorce and Alimony § 21— assignment of military retirement pay prohibited**

An assignment to plaintiff wife of defendant husband's military retirement pay pursuant to a court-ordered specific performance of a separation agreement would conflict with federal law and threaten grave harm to substantial federal interests. G.S. 1A-1, Rule 70; G.S. 50-16.7(b).

APPEAL by plaintiff from *Hair, Judge.* Judgment entered 20 July 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 June 1982.

Plaintiff brought an action to enforce a separation agreement wherein defendant agreed to pay plaintiff, as support for herself, a sum equal to fifty percent of his United States Army retirement pay each month for defendant's lifetime. At trial, plaintiff prevailed and defendant appealed to this Court. In an opinion published at 50 N.C. App. 305, 274 S.E. 2d 489 (1981), *disc. rev. denied* and *ap. dismissed,* 302 N.C. 397, 279 S.E. 2d 351 (1981), we affirmed judgment for plaintiff. A more detailed factual summary appears in that opinion. Following certification of that opinion to the trial court, plaintiff moved for an order of contempt for defendant's wilful failure to comply with the trial court's order to pay plaintiff the support due her, and for an order of specific performance by an assignment to plaintiff of fifty percent of defendant's military retired pay. Following a hearing on that motion, on 9 June 1981, Judge Hair found defendant in wilful contempt and ordered him confined to jail until defendant paid plaintiff the sum of $15,390.00, but delayed ruling on plaintiff's motion for assignment of wages. Plaintiff gave notice of appeal from that order on 17 June. In separate motions filed 19 June, defendant moved to dismiss plaintiff's appeal as being interlocutory, to set aside the contempt order and for a new trial on that issue. Pursuant to Rule 60 of the Rules of Civil Procedure, defendant also moved for an order setting aside, or in the alternative, amending the original judgment in plaintiff's favor, which was the subject of the previous appeal in this case. Plaintiff responded to that motion by

asserting *res judicata.* After a hearing, Judge Hair entered an order on 20 July modifying the separation agreement by reducing defendant's monthly support obligation to plaintiff to twenty percent of his military retirement pay, after taxes, and ordering defendant to execute an assignment of his wages to ensure payment to plaintiff of twenty percent of defendant's retirement pay after taxes. Plaintiff appeals from this ruling.

William J. Townsend, for plaintiff-appellant.

Barringer, Allen & Pinnix, by Thomas L. Barringer and Frank M. Parker, Jr., for defendant-appellee.

WELLS, Judge.

[1] The first issue to be addressed in this appeal is whether, after plaintiff gave notice of appeal, Judge Hair had jurisdiction to dismiss plaintiff's appeal by order entered 20 July 1981. In support of her contention, plaintiff cites *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971), *reh. denied,* 281 N.C. 317 (1972) and *Sink v. Easter,* 288 N.C. 183, 217 S.E. 2d 532 (1975), for the general proposition that an appeal takes the case out of the jurisdiction of the tribunal from which the appeal is taken. However, we find those cases to be inapposite.

One of the exceptions to the general rule cited in *Wiggins* is that "[a]n attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction." *Utilities Comm. v. Edmisten, Attorney General,* 291 N.C. 361, 230 S.E. 2d 671 (1976); *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668 (1957), *cert. denied,* 358 U.S. 888 (1958), *reh. denied,* 358 U.S. 938 (1959); *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957). This case is factually similar to *Bizzell,* in that the portion of the Judge's order to which plaintiff's appeal relates is merely a retention for later ruling of one of plaintiff's motions. Thus, plaintiff's appeal was not from a final judgment, and was interlocutory. G.S. 1A-1, Rule 54(b); G.S. 1-277(a); *Leasing Corp. v. Myers,* 46 N.C. App. 162, 265 S.E. 2d 240 (1980); *ap. dismissed,* 301 N.C. 92 (1981); *see* Shuford, N.C. Civil Practice and Procedure, § 54-3 (2nd ed. 1981). We find that the trial court retained jurisdiction to hear plaintiff's motion to have defendant's military retirement pay assigned to her, and we overruled this assignment of error.

[2] Plaintiff's next assignment of error is that the trial judge lacked authority to modify the terms of the parties' separation agreement by reducing the percentage of defendant's military retirement pay to which plaintiff was entitled. We agree. The prior decision of this Court affirming judgment for plaintiff is binding on this issue. *See 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); *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980); *see also Heidler v. Heidler*, 53 N.C. App. 363, 280 S.E. 2d 785 (1981). Judge Hair had no authority to modify defendant's obligations under the separation agreement, and his order so doing is vacated.

[3] The final issue before us is whether plaintiff is entitled to the remedy of specific performance by assignment of fifty percent of defendant's Army retirement pay. The legal and factual history of this case makes it plain that plaintiff's remedies at law are time-consuming, expensive, and inadequate. Plaintiff cites G.S. 1A-1, Rule 70 and G.S. 50-16.7(b), in support of her argument that defendant's military pay is "other income due or to become due" which defendant may be ordered to assign to plaintiff to secure payment according to the terms of the separation agreement.

The question, then, is whether defendant's Army retirement pay is "income" which can be assigned by order of a court of this state. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 59 L.Ed. 2d 1, 99 S.Ct. 802 (1979), the Supreme Court ruled that the Supremacy Clause precluded the application of California community property law to award a divorced wife an interest in her former husband's federal Railroad Retirement Act benefits. The Court's decision was based partly on a specific prohibition against assignment, garnishment, or attachment in the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*, as follows:

> 45 U.S.C. § 231m Assignability; exemption from levy
>
> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . .

In the more recent case of *McCarty v. McCarty*, --- U.S. ---, 69 L.Ed. 2d 589, 101 S.Ct. --- (1981), the United States Supreme Court reversed a ruling of the California Supreme Court which had had the effect of upholding a dissolution decree entitling a divorced wife to 45 percent of her husband's Army retirement pay, which was included as part of the community property of the marriage. In reversing, the Court stated that "[m]ilitary retired pay differs in some significant respects from a typical pension or retirement plan . . . . [M]ilitary retired pay is reduced compensation for reduced current services." Citing legislative history, the court characterized military retirement pay as a "*personal entitlement* payable to the retired member himself as long as he lives," over which the service member may designate as beneficiary one other than a spouse or ex-spouse. The Court went on to state in *McCarty* that:

> [I]t is clear that Congress intended that military retired pay "actually reach the beneficiary." See Hisquierdo . . . [supra] *Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage.* . . . Congress rejected a provision . . . that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child. . . . (Emphasis added.)
>
> . . .
>
> Subsequently, comprehensive legislation was enacted. In 1975, Congress amended the Social Security Act to provide that all federal benefits, including those payable to members of the armed services, may be subject to legal process to enforce child support or alimony obligations. Pub L 93-647, § 101(a), 88 Stat 2357, 42 USC § 659 [42 USCS § 659]. In 1977, however, Congress added a new definitional section (§ 462(c)) providing that the term "alimony" in § 659(a) "does not include any payment or transfer of property . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

We are persuaded that under *McCarty*, supra, and *Hisquierdo*, supra, an assignment of defendant's military retirement pay pursuant to a court-ordered specific performance of a separation

agreement conflicts with the federal law and would threaten "grave harm to 'clear and substantial' federal interests." *McCarty*, supra. As unfortunate as such a result is, given that the equities of this case clearly lie with plaintiff, that portion of Judge Hair's order must also be and is vacated.

The effect of our opinion is that the original judgment in plaintiff's favor, as affirmed by us in our earlier opinion, remains in full force and effect.

Vacated.

Judges HEDRICK and ARNOLD concur.

LEWIS W. FRYE AND WIFE, VIRGINIA FRYE v. WILLIAM W. ARRINGTON AND WIFE, LILLIAN P. ARRINGTON; EDWARD T. ARRINGTON AND WIFE, LOUISE ARRINGTON; LESSIE ARRINGTON, SINGLE; MARY A. DAVIS AND HUSBAND, DONALD DAVIS; WILLIAM A. TAYLOR AND WIFE, CAROL TAYLOR; EDGAR H. TAYLOR AND WIFE, CHARLENE N. TAYLOR; AND LILLIAN T. PINER AND HUSBAND, JOHN PINER

No. 813SC1076

(Filed 6 July 1982)

Deeds § 14.1 — reservation of mineral rights — pre-1968 deed — habendum clause explaining granting clause

In an action to remove a cloud on plaintiffs' title to land conveyed in 1946, the trial court properly entered summary judgment for defendants where the habendum limited the granting clause by containing a reservation which could be read as limiting the fee conveyed to a fee in the surface of the lands described.

APPEAL by plaintiffs from *Reid, Judge*. Judgment entered 14 September 1981 in Superior Court, CARTERET County. Heard in the Court of Appeals 25 May 1982.

Plaintiffs appeal from an order granting summary judgment in favor of defendants.

This is a civil action to remove a cloud on plaintiffs' title to lands in Carteret County. The material facts are not in dispute.

On 26 July 1946, Mary Arrington conveyed to North Carolina Pulp Company by deed in fee simple with warranty, a tract of land located in Carteret County, North Carolina. Immediately following the metes and bounds description of the land appears the following language:

> "The said Mary G. Arrington also reserves unto herself and her heirs and assigns, all the oil, gas and mineral in and under the surface of said lands and all rights of ownership therein, with full right and license to explore, mine, develop and operate for any and all of said products and to erect necessary buildings, pipe lines, machinery and equipment necessary in and about the business of mining, developing or operating for any of said products, according to the privileges and customs of the field that may be developed upon said tract of land, but it is expressly covenanted and agreed that no damage will be done to the timber or trees in said operations."

The *habendum* incorporates the foregoing reservation of oil and mineral rights.

Plaintiffs have succeeded to the title of North Carolina Pulp Company in 128 acres of the original conveyance. They are the owners of all rights and interests in that parcel which were conveyed by the deed of Mary Arrington in 1946. Defendants are the heirs of Mary Arrington and the owners of any rights reserved.

Upon plaintiffs' motion for summary judgment, the court considered the parties' exhibits, stipulations and evidence. It found that there was no genuine issue as to any material fact. It found that in the premises and the *habendum* of the 1946 deed, Mary Arrington reserved all oil, gas and mineral rights in the land. It further found that it was the intent of Mary Arrington to reserve those rights. Based on its findings and conclusions of law, the court ordered that the deed reserved all rights of ownership in oil, gas and minerals in and under the surface of the described lands unto Mary Arrington and her heirs. It denied plaintiffs' motion and entered summary judgment in favor of defendants.

Nelson W. Taylor III, for plaintiff appellants.

Wheatly, Wheatly and Nobles, by John E. Nobles, Jr., for defendant appellees.

VAUGHN, Judge.

Summary judgment is proper only when there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981). In the present action, both parties are in agreement as to the facts. The controversy centers on the construction to be given the reservation found in the description and the *habendum*. Plaintiffs argue that the reservation is void for repugnancy with the grant in fee simple. We disagree.

At the outset, we note that G.S. 39-1.1 is inapplicable to the present action. In construing deeds executed prior to 1 January 1968, courts must look to common law rules. *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976). At common law, the granting clause was the essence of the contract. *Artis v. Artis*, 228 N.C. 754, 760, 47 S.E. 2d 228, 232 (1948). Therefore, when there was an inconsistency between the granting clause and the *habendum*, and the intent of the grantor was unclear, the granting clause controlled. *Seawell v. Hall*, 185 N.C. 80, 116 S.E. 189 (1923); *Triplett v. Williams*, 149 N.C. 394, 63 S.E. 79 (1908).

Courts further held, however, that technical rules of construction were not to be strictly applied if to do so would defeat the obvious intent of the grantor. *E.g., Bryant v. Shields*, 220 N.C. 628, 631, 18 S.E. 2d 157, 159 (1942); *Elliott v. Jefferson*, 133 N.C. 207, 214-16, 45 S.E. 558, 561 (1903). Common law recognized that in some situations the *habendum* would prevail:

> "[I]t is suggested as an elementary maxim that when there are repugnant clauses in a deed the first will control and the last will be rejected, but in . . . other cases, it is held that this principle must be subordinated to the doctrine heretofore stated, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that a subsequent clause may be rejected as repugnant or irreconcilable only after subjecting the instrument to this controlling principle of construction. [Citations omitted.] Having regard to this principle, we must likewise give effect to another of equal importance, which is this: the office of the *habendum* being to lessen, enlarge, explain, or qualify the estate granted in the premises, the granting clause and the *habendum* must be construed together, and any apparent in-

> consistency reconciled, if possible, because the *habendum* may control where it clearly manifests the grantor's intention. 'It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the *habendum* to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum*, the latter must control.' 1 Devlin on Deeds, sec. 215 [Citations omitted]."

Seawell v. Hall, 185 N.C. at 83, 116 S.E. at 191; *Triplett v. Williams, supra.*

In the 1946 deed, it is obvious that Mary Arrington's intent was *not* to convey oil, gas and mineral rights. A reservation of those rights is found in language following the description as well as in the *habendum.* We must determine whether the *habendum* and granting clause can be construed together to effectuate the grantor's intent.

Plaintiffs argue that the two clauses are irreconcilable. If the deed had expressly granted mineral rights to North Carolina Pulp Company, we would agree. A recognized canon of construction is that the *habendum* cannot divest an estate already vested by the granting clause. *E.g., Triplett v. Williams*, 149 N.C. at 395, 63 S.E. at 79.

Here, however, the reservation follows a grant by general description. The Supreme Court has held that similar reservations of timber rights are valid. *See Hardison v. Lilley*, 238 N.C. 309, 78 S.E. 2d 111 (1953); *Mining Co. v. Cotton Mills*, 143 N.C. 307, 55 S.E. 700 (1906). In *Hardison v. Lilley, supra*, the Court explained: "[T]he reservation and exception relate only to the *quantum* of the property described, and not to the quality of the estate conveyed, and are therefore not repugnant to the fee simple estate in that which was conveyed. . . ." 238 N.C. at 311, 78 S.E. 2d at 112. *See also Singleton v. School Dist. No. 34*, 10 S.W. 793 (Ky. 1889).

The reservation of mineral rights in the 1946 deed can likewise be explained without destroying the grant. Ordinarily, a general grant is sufficient to convey minerals in and under the surface of the described land. Mineral rights, however, may be

severed from surface rights. *Vance v. Pritchard*, 213 N.C. 552, 197 S.E. 182 (1938). When Mary Arrington reserved unto herself an estate in fee in the minerals, she necessarily reduced the quantity of the estate conveyed to the land's surface. The reservation, however, had no effect on the fee she conveyed to North Carolina Pulp Company in that surface. *Accord Associated Oil Co. v. Hart*, 277 S.W. 1043 (Tex. 1925).

In summary, where it is clearly the intention of the grantor to limit or explain the granting clause by the *habendum*, the latter, according to common law, will control. Here, the *habendum* contains a reservation which can be read as limiting the fee conveyed to a fee in the surface of the lands described. This construction reconciles any apparent inconsistency between the granting clause and *habendum*, and is in line with the grantor's clear intent. We, therefore, conclude that the court properly held, as a matter of law, that the Mary Arrington deed reserves all oil, gas and mineral rights in and under the surface of the conveyed lands unto Mary Arrington and her heirs.

The court's order entering summary judgment in favor of defendants is affirmed.

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

JAMES H. HUNDLEY, EMPLOYEE, PLAINTIFF v. FIELDCREST MILLS, EMPLOYER, SELF-INSURED DEFENDANT

No. 8110IC1106

(Filed 6 July 1982)

1. Master and Servant § 68— workers' compensation—occupational disease—proof of wage-earning impairment

The plaintiff in a workers' compensation case may prove his wage-earning impairment from an occupational disease by evidence of preexisting conditions such as his age, education and work experience which are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person.

2. Master and Servant § 68— workers' compensation—occupational disease —wage-earning impairment—sufficiency of evidence

Plaintiff presented sufficient evidence of an impairment of his wage-earning capacity because of an occupational lung disease to support an award of compensation for disability from such disease where plaintiff presented the medical report of a pulmonary specialist stating that plaintiff had approximately 20% permanent disability from a lung disease and recommending that plaintiff continue to refrain from areas of high air pollution, and where plaintiff testified that he quit work because he suffered from such shortness of breath that it became necessary for other people to help him with his tasks, he has not worked since he quit his job at defendant's textile mill, he is unable to perform even simple tasks at home because of his shortness of breath, at the time he retired he was 62 years old, had a second grade education and could only read and write his name, and his sole work experience was that of performing unskilled labor in the spinning room of defendant's textile mill. Therefore, where the Industrial Commission found that plaintiff suffered from an occupational disease but failed to make findings as to whether his wage-earning capacity had been impaired by such disease, the cause must be remanded to the Commission for such findings.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 17 July 1981. Heard in the Court of Appeals 27 May 1982.

Plaintiff was employed by Fieldcrest Mills in its spinning room for approximately forty-three years. During his employment, he was exposed to respirable cotton trash dust. In 1976, plaintiff suffered such shortness of breath that he became unable to perform his work as a yarn hauler. He quit his job.

On 9 May 1979, plaintiff filed a claim with the North Carolina Industrial Commission seeking benefits for disability resulting from an occupational lung disease. Based upon plaintiff's testimony and submitted medical reports, the Deputy Commissioner found that the shortness of breath experienced by plaintiff was caused by sinus bradycardia. He concluded that plaintiff did not suffer from an occupational disease and denied plaintiff's claim.

Plaintiff appealed to the Full Commission. Its opinion and award contained the following preliminary remark: "[I]t is the opinion of the Full Commission that while plaintiff has shown no compensable disability as a result of an occupational disease, that plaintiff has shown that he has received damage to his lungs as a result of his exposure to respirable cotton trash dust while work-

ing for defendant-employer." The Commission then set aside the opinion and award of the Deputy Commissioner and substituted its own in lieu thereof.

In Finding of Fact No. 10, the Commission found that plaintiff suffered from an occupational disease. It concluded the following:

> "As a result thereof, plaintiff has sustained permanent injury to important organs or parts of the body for which no compensation is payable under the provisions of G.S. 97-31(1)(23). The fair and equitable amount of compensation for such permanent injury under the Workers' Compensation Act is $4,000.00. G.S. 97-31(24); G.S. 97-52; G.S. 97-53."

It awarded plaintiff $4,000.00 and unpaid medical expenses.

Michael E. Mauney, for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., for defendant appellee.

VAUGHN, Judge.

Plaintiff argues that the Industrial Commission erred in failing to award him compensation for disability caused by an occupational lung disease. Although we conclude that the evidence does not show compensable disability, as a matter of law, we agree that the opinion and award must be vacated and remanded.

A review of an award of the Commission is limited to two questions of law. We must determine whether the Commission's findings are supported by any competent evidence and whether those findings justify the legal conclusions and award. *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980); *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981). If the findings are insufficient upon which to determine the rights of the parties, the Court may remand the proceeding to the Industrial Commission for further findings. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969).

The present plaintiff sought compensation for disability caused by an occupational disease. In Finding of Fact No. 10, the Commission found that plaintiff had sustained his burden of proof as to whether he suffered from an occupational disease. There is competent evidence to support that finding. The Commission

made no findings, however, concerning plaintiff's evidence of present disability. The only mention of disability is found in preliminary remarks of the opinion and award: "[I]t is the opinion of the Full Commission that while plaintiff has shown no compensable disability as a result of an occupational disease, that plaintiff has shown that he has received damage to his lungs as a result of his exposure to respirable cotton trash dust. . . ."

"Disability" is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." G.S. 97-2(9). In the recent decision of *Hilliard v. Apex Cabinet Co.*, 305 N.C. ---, 290 S.E. 2d 682 (1982), the Supreme Court held that the determination of whether a disability exists is a conclusion of law which must be based upon findings of fact supported by competent evidence.

> "We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury."

305 N.C. at ---, 290 S.E. 2d at 683.

Despite the lack of specific findings of fact as to any of these crucial questions, defendant argues that the present record should not be remanded. It contends that plaintiff offered no evidence of disability at the hearing upon which findings could be made. We disagree.

[1] In worker compensation cases, the claimant normally has the burden of proving the existence of his disability and its degree. *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965). It is insufficient for him to show that he has obtained no other employment since his retirement. He must prove that he is *unable* to earn wages in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. at ---, 290 S.E. 2d at 684. Plaintiff may prove his wage-earning impairment by evidence of preexisting conditions such as his age, education and work experience which

are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person. *Little v. Food Service*, 295 N.C. 527, 532, 246 S.E. 2d 743, 746 (1978).

[2] In the present case, the only evidence presented were medical reports and plaintiff's testimony. Dr. Kilpatrick, a pulmonary specialist, reported that plaintiff had approximately 20% permanent disability from his lung disease. He recommended that plaintiff continue to refrain from areas of high air pollution. He did not comment on other places of employment. Plaintiff's testimony was that he quit work because he suffered from such shortness of breath that it became necessary for other people to help him with his tasks. He has not worked since he quit his job at the textile mill. He thinks he could be hired as a security guard at the mill but does not believe his lung power is sufficient to walk the rounds. At home, he is unable to perform even simple tasks because of his shortness of breath. At the time plaintiff retired, he was 62 years old, had a second grade education and could only read and write his name. His sole work experience was that of performing unskilled labor in the spinning room of defendant's textile mill.

We hold that plaintiff presented evidence of an impairment of his wage-earning capacity because of an occupational disease. The Industrial Commission was free to accept or reject all or any part of that evidence. *Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E. 2d 265, 268 (1951). To enable a review of its conclusion concerning disability, however, the Commission was required to make specific findings of fact as to plaintiff's earning capacity. *Hilliard v. Apex Cabinet Co., supra.* The Commission failed to do so. We, therefore, remand the present record to the Industrial Commission for proceedings consistent with the opinion herein.

Vacated in part and remanded.

Judges MARTIN (Harry C.) and HILL concur.

MORRIS STEED AND RUTH STEED v. FIRST UNION NATIONAL BANK

No. 8126SC1100

(Filed 6 July 1982)

1. **Consumer Credit § 1— Retail Installment Sales Act—unauthorized default charges**

Plaintiffs' claim to recover allegedly unauthorized default charges assessed by defendant bank against plaintiffs' installment note account in violation of the Retail Installment Sales Act was properly dismissed where the record showed that defendant charged plaintiffs with the contested default charges but that plaintiffs never paid those charges to defendant, since G.S. 25A-44 requires both the charging and receiving of unauthorized default charges as a basis for recovery.

2. **Parties § 5; Rules of Civil Procedure § 23— class action—absence of injury to plaintiffs**

Plaintiffs who had suffered no injury could not, *ipso facto*, assert injury on behalf of others similarly situated, and a class action which plaintiffs attempted to assert was properly dismissed.

APPEAL by defendant from *Bennett, Judge.* Judgment entered 26 May 1981 in District Court, MECKLENBURG County. Appeal by plaintiff from *Ervin, Judge.* Judgment entered 20 December 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 May 1982.

This action was brought by plaintiffs to recover from defendant bank allegedly unauthorized default charges assessed by defendant against plaintiffs' installment note account, in violation of the Retail Installment Sales Act (RISA).

Plaintiffs' complaint alleged that they entered into a retail installment sales contract for the purchase of a mobile home with Conner Homes Corporation on 27 August 1976. The contract was assigned to defendant. The terms of the contract called for payments to be made by the 15th of each month with default charges to be imposed for any default in excess of ten days. All payments were timely made until August of 1977. Plaintiffs defaulted on the August payment, and defendant imposed a late charge of $4.68 on 25 August. Although plaintiffs did not pay the missed August payment, plaintiffs made timely payments for September through March of 1978. Plaintiffs defaulted on the April payment but made the subsequent payments on time.

Defendant's policy was to apply the next payment received to the month in default. The result was that plaintiffs were assessed a default charge each month after August of 1977 even though all but one of those payments were made on time. Plaintiffs alleged that the North Carolina Retail Installment Sales Act prohibits more than one charge for each default and prohibits imposing subsequent charges for the same default. Plaintiffs prayed for the return of the excess late charges, trebled under the Act for a total of $201.24. Plaintiff also alleged that they represented the class of persons who had been assessed subsequent default charges by defendant in the last four years, that the class numbered in excess of 100 persons, that defendant had been notified on behalf of the class, and that there were common issues of law and fact among the class.

Defendant's answer denied the material allegations of the complaint, raised the statute of limitations, alleged that the demand letter from plaintiff did not meet the requirements of G.S. 25A-44(3), alleged the failure to join a necessary party in that Ruth Steed had not been joined, and alleged that plaintiff did not have standing because defendant had paid to the Steeds' account $56.16, the amount of all late charges assessed against them.

The parties submitted affidavits and interrogatories. Defendant's motion to dismiss the class action was granted by Judge Ervin, from which judgment plaintiffs have appealed. The cause was transferred to the District Court for determination of plaintiffs' remaining claims. Plaintiffs' motion for summary judgment for sums due for unauthorized charges under RISA was granted, from which judgment defendant has appealed. Further facts will be discussed as necessary in the body of the opinion.

North Central Legal Assistance Program, by Michael B. Sosna and Gillespie & Lesesne, by Donald S. Gillespie, Jr., for plaintiff-appellee/appellants.

Smith, Moore, Smith, Schell & Hunter, by David M . Moore, II, Benjamin F. Davis, Jr., and Timothy Peck, for defendant-appellant/appellee.

Edmund D. Aycock, for the North Carolina Bankers Association, Amicus Curiae.

WELLS, Judge.

The portions of the Retail Installment Sales Act pertinent to this appeal are as follows:

§ 25A-29. Default charges.

If any installment is past due for 10 days or more according to the original terms of the consumer credit installment sale contract, a default charge may be made in an amount not to exceed five percent (5%) of the installment past due or six dollars ($6.00), whichever is the lesser. A default charge may be imposed only one time for each default.

If a default charge is deducted from a payment made on the contract and such deduction results in a subsequent default on a subsequent payment, no default charge may be imposed for such default.

If a default charge has been once imposed with respect to a particular default in payment, no default charge shall be imposed with respect to any future payments which would not have been in default except for the previous default.

A default charge for any particular default shall be deemed to have been waived by the seller unless, within 45 days following the default, (i) the charge is collected or (ii) written notice of the charge is sent to the buyer.

§ 25A-44. Remedies and penalties.

In addition to remedies hereinbefore provided, the following remedies shall apply to consumer credit sales:

. . .

(3) In the event the seller or an assignee of the seller (i) shall fail to make any rebate required by G.S. 25A-32 or G.S. 25A-36, (ii) shall charge and receive fees or charges in excess of those specifically authorized by this Chapter, or (iii) shall charge and receive sums not authorized by this Chapter, the buyer shall be entitled to demand and receive the rebate due and excessive or unauthorized charges. Ten days after receiving written request therefor, the seller shall be liable to the buyer for an amount

equal to three times the sum of any rebate due and all improper charges which have not been rebated or refunded within the 10-day period.

(4) The knowing and willful violation of any provision of this Chapter shall constitute an unfair trade practice under G.S. 75-1.1.

I. Defendant's Appeal

[1] The essence of defendant's argument is that G.S. 25A-29 allows the imposition of a default charge for each period a single installment payment remains in default. The essence of plaintiffs' argument is that the statute allows the imposition of but one default charge for any one installment payment in default, no matter how long that payment may remain in default. The record before us indicates, however, that it is not necessary for us to reach the merits of these arguments.

While the record shows that defendant *charged* plaintiffs with the contested default charges, plaintiffs never *paid* those charges to defendant. The statute requires both the charging and receiving of unauthorized default charges as a basis for recovery. While we have found no cases on point interpreting this aspect of G.S. 25A-29, our Supreme Court has held or stated in a number of cases under the usury statutes, *see* Chapter 24 of our General Statutes, that usurious interest must first be *paid* before any recovery may be had by the borrower. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Clark v. Bank*, 200 N.C. 635, 158 S.E. 96 (1931); *Ripple v. Mortgage Corp.*, 193 N.C. 422, 137 S.E. 156 (1927). *Accord, Equilease Corp. v. Hotel Corp.*, 42 N.C. App. 436, 256 S.E. 2d 836 (1979); *disc. rev. denied*, 298 N.C. 568, 261 S.E. 2d 121 (1979). The materials before the trial court show that plaintiffs were not entitled to summary judgment, and that judgment dismissing plaintiffs' claim was required.

II. Plaintiffs' Appeal

[2] The trial court properly dismissed the class action which plaintiffs attempted to assert. Plaintiffs having suffered no injury, they cannot, *ipso facto*, assert injury on behalf of others similarly situated. *See Hall v. Beals*, 396 U.S. 45, 24 L.Ed. 2d 214, 90 S.Ct. 200 (1969); Shuford, N.C. Civil Practice and Procedure, § 23-4 (2d ed. 1981).

The results are that summary judgment for plaintiffs must be reversed; judgment dismissing plaintiffs' class action is affirmed; and the case must be remanded for judgment dismissing plaintiffs' action.

Reversed in part;

Affirmed in part;

Remanded.

Judges HEDRICK and ARNOLD concur.

HAZEL M. JONES v. CITY OF BURLINGTON

No. 8115SC1064

(Filed 6 July 1982)

1. **Municipal Corporations § 12— possible governmental immunity against tort claim—summary judgment improper**

The trial court properly overruled defendant's motion for summary judgment on grounds that defendant had governmental immunity against a tort claim which evolved from plaintiff stepping in a hole on a sidewalk since there was a genuine issue of fact as to the use of the property upon which the hole was located.

2. **Municipal Corporations § 14.3— failure to repair sidewalk—notice—judgment for plaintiff supported by findings**

In an action in which plaintiff sought damages for injuries sustained when she slipped into a narrow, deep hole which existed on defendant's grass sidewalk, the findings of fact made by the trial court clearly supported its conclusion that defendant was negligent and that plaintiff was injured as a result of that negligence. Whether or not the evidence was sufficient to support the findings of fact was not raised on appeal since defendant did not except to any of the findings of fact.

Judge WELLS concurs in the result.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 14 April 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals on 25 May 1982.

Hemric, Hemric & Elder, by H. Clay Hemric, Jr., for plaintiff appellee.

City Attorney Robert M. Ward, for defendant appellant.

HEDRICK, Judge.

Plaintiff instituted this negligence action to recover damages for injuries sustained when plaintiff slipped into a narrow, deep hole which existed on defendant's grass sidewalk. The case was tried without a jury, and the trial court entered judgment for plaintiff for $13,000. Defendant has appealed, raising issues of trial court error in ruling on questions of governmental immunity, defendant's negligence, and plaintiff's contributory negligence. For the reasons set forth below, we affirm.

At trial, plaintiff's evidence tended to establish the following: On 6 April 1978, while plaintiff was picking up trash on the grass sidewalk between her house and Gilmer Street, she slipped into a narrow but deep hole which was concealed by grass, sticks and leaves. She fell backwards, was momentarily knocked out, and was taken by rescue squad to a hospital emergency room. Her injuries necessitated hospitalization, therapy and medication.

Plaintiff acknowledged that her husband had told her that there was a hole near the street, but she testified that she was not aware of its exact location. Plaintiff's husband testified that he had discovered the hole in September 1977, and that he had notified his son, an employee of the Burlington Housing Authority. The son testified that he had advised William C. Baker of the city of the location of the hole and that he was told that someone would check it.

Testifying for the defendant, Baker, the Director of Public Works, denied receiving earlier information about the hole in the sidewalk along Gilmer Street. He stated that the first time he recalled hearing of the hole was sometime after plaintiff's accident. The defendant, through its employees, then had the area barricaded and filled the hole.

The trial court entered its judgment awarding plaintiff monetary damages.

[1] Defendant first assigns as error the denial of its motion for summary judgment. The record discloses that, prior to the trial of

his case, defendant filed a G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's action on grounds that defendant had governmental immunity against this tort claim. Plaintiff responded to the motion and submitted the affidavit of plaintiff's son. After considering the pleadings as well as memoranda of law from both parties, the court denied the motion.

The purpose of summary judgment under G.S. § 1A-1, Rule 56 is to bring litigation to an early decision on the merits without the delay and expense of trial in cases in which it can be readily ascertained that no material facts are in issue. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Upon a motion for summary judgment, the trial court does not attempt to resolve issues of fact; rather it decides whether there is a genuine issue of material fact necessitating a trial. *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *disc. rev. denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977).

The burden of proving governmental immunity rests with the party asserting such defense. In the instant case, defendant sought to show that the hole into which plaintiff fell was part of its public storm drainage system; that the operation of such system was a governmental function for which there is governmental immunity; and that it had not, through the purchase of liability insurance or otherwise, waived that immunity. To counter this contention, plaintiff denied that the operation of a public storm drainage system is a governmental function and argued that the defendant is absolutely liable for injuries caused by its failure to maintain its system of streets, paved and unpaved sidewalks, drains and culverts near streets, and all grassy areas between sidewalks and streets.

Defendant correctly argues that there is governmental immunity against claims arising out of a city's performance of a governmental function. *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E. 2d 239 (1971). If defendant had been able to show that there was no genuine issue as to the use of property for a governmental function, summary judgment would have been proper. The documents submitted in this case, however, raise a genuine issue of fact as to the use of the property upon which the hole was located. This fact was material to the question of governmental immunity. Summary judgment, therefore, was improper under

these circumstances, and the trial court correctly overruled defendant's motion.

Defendant also assigns as error the trial court's denial of his motions to dismiss and the trial court's rendering of judgment for the plaintiff. Its argument is twofold. First, defendant asserts that the court erred in finding that it was negligent in failing to discover and repair the hole into which plaintiff fell. By this assertion, defendant attacks plaintiff's evidence and its sufficiency. The exceptions upon which this assignment of error is based raise only the question of whether the facts found support the conclusions of law drawn therefrom, and whether the judgment is in proper form. Defendant did not except to any of the findings of fact. Thus the question of the sufficiency of the evidence to support the findings of fact is not raised.

[2] We have reviewed the findings of fact made by the trial court and find that they clearly support its conclusion that defendant was negligent and that plaintiff was injured as a result of that negligence:

> The court finds from the evidence that the plaintiff was injured April 6, 1978, from a fall which occurred when she stepped in a hole beside the storm sewer catch basin on the sidewalk between Gilmer Street and her property; that the hole was obscured by grass, sticks, and leaves; that the plaintiff was picking up sticks and trash preparatory to mowing in compliance with Section 32-14 of the Burlington City Code; that the plaintiff was told by her husband seven or eight months before her fall . . . that there was a hole near Gilmer Street; that it was small and could easily be overlooked; that her husband had asked their son, Joe Jones, . . . to ask the City to fix it; that plaintiff was not then nor thereafter informed more specifically of the location of the hole, never saw it and never inquired or ascertained whether the City fixed it; that Joe Jones, plaintiff's son, . . . in August or September, 1977, telephoned William C. Baker, Director of Public Works for the City of Burlington, asked who [sic] to call concerning the hole in the sidewalk, was given a telephone number, called that number, told the unidentified individual who answered exactly where the hole was, and was told that someone would be sent to check on it; . . . that

the hole was not filled until after plaintiff's fall; that plaintiff sustained as a proximate consequence of her fall severe and disabling pain secondary to muscle spasm in the lumbosacral area of her back necessitating medical treatment, hospitalization, therapy, extended bed rest, use of back support device, and prolonged ingestion of medication to relieve pain and relax muscle spasms . . . .

Defendant also asserts that the trial court erred in rendering judgment for the plaintiff since evidence at the trial demonstrated contributory negligence as a matter of law. For the reasons stated above, our review of this question is limited to whether the findings of fact support the conclusions of law and the judgment and whether error appears on the face of the record. After reviewing the findings, we are unable to say that plaintiff failed to exercise reasonable care for her own safety. Plaintiff's knowledge of the existence of a hole somewhere near Gilmer Street and her work in the area some eight or nine months later did not establish contributory negligence as a matter of law. *Walls v. Winston-Salem*, 264 N.C. 232, 141 S.E. 2d 277 (1965), is distinguishable on its facts. This assignment of error is overruled.

The judgment from which defendant appealed is

Affirmed.

Judge ARNOLD concurs.

Judge WELLS concurs in the result.

GEORGE PATRICK HELVY v. BEATRICE L. SWEAT

No. 8119SC958

(Filed 6 July 1982)

Automobiles and Other Vehicles §§ 47.3, 53— physical facts as basis for nonsuit

In an action by plaintiff truck driver to recover for injuries received when he was struck by defendant's automobile as he swung down from behind his tractor cab beside the cab door, the physical evidence of skid marks showing

that defendant's automobile remained entirely in the northbound lane, supported by testimony of disinterested witnesses that plaintiff's tractor-trailer was entirely in the southbound lane, controlled over plaintiff's conflicting testimony that he parked his tractor-trailer about 2 to 2-1/2 feet on the shoulder of the highway and that in swinging beside the cab door no part of his body went beyond the center line of the highway and established that defendant was not negligent and that plaintiff was contributorily negligent as a matter of law.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 13 April 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 28 April 1982.

In his complaint plaintiff alleged that he had suffered severe injuries after being struck by defendant's car. Defendant's answer denied negligence and alleged contributory negligence.

At trial plaintiff's evidence was that he had been driving his tractor-trailer from New York City to Charleston along Interstate 95 and had to stop for repairs near Lumberton, N.C. At 8:00 p.m. on 12 February 1976, as he pulled onto a service road from the garage which had repaired his truck, the connections to the trailer for lights and brakes parted. Plaintiff pulled the right wheels of his truck off the road because there were only two feet between the edge of the road and a ditch. Plaintiff turned on the truck's flashing lights and his headlights were on bright. He swung around to the back of the cab to fix the connections by using the step at the bottom of the cab door and handholds on the cab. After making the connections, he swung back around to the cab door without checking traffic and was struck by defendant's car. He was knocked unconscious and was hospitalized for four days with a concussion, broken leg and abrasions. He missed several weeks of work.

Defendant testified that she had come around a curve and had seen plaintiff's truck in the opposite lane of the road. She saw plaintiff's headlights but no flashing lights. She was blinded by the bright headlights and could see nothing else in front of her. She slowed to about 30 m.p.h. as she approached the truck. Plaintiff suddenly appeared at the left front of her car and struck the hood and windshield. A highway patrolman measured 30 feet of skid marks. Defendant, the garage owner, and the patrolman testified that plaintiff's truck was entirely on the pavement.

Plaintiff appeals from the granting of defendant's motion for a directed verdict.

Ottway Burton for plaintiff appellant.

Butler, High, Baer & Jarvis by Keith L. Jarvis for defendant appellee.

CLARK, Judge.

The single question presented by this appeal is whether the trial judge erred by granting defendant's motion for a directed verdict. A motion for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to plaintiff, was sufficient for submission to the jury. *Hunt v. Montgomery Ward*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). Although the record does not include defendant's motion for directed verdict nor does the judgment indicate on what grounds the motion was granted, we assume that the trial judge based his decision upon a finding that plaintiff was contributorily negligent as a matter of law.

> "[T]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge. [Citations omitted]"

Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976). *Accord, Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

The answers to both the negligence and contributory negligence issues depend primarily upon plaintiff's location at the time he was struck by defendant's automobile. Since plaintiff admitted that he swung down from behind the cab beside the cab door, the point of impact depends primarily upon the location of plaintiff's truck in the southbound lane and the location of defendant's automobile at the time of impact. Plaintiff testified that he

parked his truck about 2 to 2-1/2 feet on the shoulder of the highway, that he did not look for approaching traffic, and that in swinging down beside the cab door no part of his body went beyond the center line of the highway. This testimony, when considered in the light most favorable to the plaintiff, would ordinarily be sufficient both to require submission to the jury of the issue relating to plaintiff's negligence and sufficient to negate contributory negligence as a matter of law. However, we find the evidence refuting plaintiff's testimony—both the testimony of disinterested witnesses and the physical evidence—to be overwhelming.

In some cases the North Carolina courts have held that undisputed physical evidence controls conflicting oral testimony to the extent that such testimony is not sufficient to take the case to the jury. *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105 (1960); *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544 (1959); *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246 (1945); *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337 (1945); *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209 (1944); *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88 (1938); *Hardy v. Tesh,* 5 N.C. App. 107, 167 S.E. 2d 848 (1969); 2 Strong's N.C. Index 3d, *Automobiles,* § 47 (1976).

The defendant and two apparently disinterested witnesses, the investigating officer and the garageman, testified that no part of plaintiff's truck was on the shoulder but that the truck was entirely in the paved southbound lane. The paved highway was 19 feet wide. Trooper Potter, corroborated by his accident report, testified that there was physical evidence of skid (brake) marks entirely in the northbound lane leading to defendant's automobile, which came to a stop beside the front drive axle of the tractor.

In *Powers v. Sternberg, supra,* at 43, 195 S.E. at 89, Stacy, C. J., wrote: "There are a few physical facts which speak louder than some of the witnesses." In the case *sub judice,* we find that the physical facts, supported by the testimony of disinterested witnesses, speak louder than the conflicting testimony of the plaintiff, and that this conflicting testimony is not sufficient to take the case to the jury. The physical facts establish that plaintiff, who admitted that he did not look for an approaching vehicle, swung down from behind his tractor cab into the path of defend-

ant's approaching automobile in the northbound traffic lane. Under these circumstances, we conclude, first, that there was not sufficient evidence to take the case to the jury on the issue of defendant's negligence, and, second, that plaintiff was negligent as a matter of law.

The judgment directing a verdict for defendant is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

IN THE MATTER OF THE FORECLOSURE OF DEED OF TRUST EXECUTED AND GIVEN BY PAUL W. HILL AND WIFE, PATRICIA B. HILL, GRANTORS, DATED THE 30TH DAY OF JANUARY, 1979, AS APPEARS OF RECORD IN BOOK 303 AT PAGE 470, ORANGE COUNTY REGISTRY, R. HAYES HOFLER, III, TRUSTEE v. PAUL W. HILL AND WIFE, PATRICIA B. HILL; RAYMOND SUTTLES AND WIFE, JOYCE SUTTLES; AND R & H CONCRETE PUMPING, INC.

No. 8115SC1080

(Filed 6 July 1982)

1. **Mortgages and Deeds of Trust § 38— foreclosure proceeding—evidence of repurchase agreement—properly admitted**

In an action to foreclose on a deed of trust assigned to a company from a bank once the company paid the bank the balance due on the note, the trial court did not err in introducing evidence of a repurchase agreement signed by the company which had been required by the bank as a condition for the original loan since the agreement was evidence of a valid debt of which the company was the holder and was evidence that the petitioner had the right to foreclose under the deed of trust.

2. **Mortgages and Deeds of Trust § 28— foreclosure proceeding—assignment of bank's rights to foreclose to surety for payment of note**

In a foreclosure proceeding where the parties had previously agreed that the bank would make a loan to R & H Company and take as security (1) a secured interest in the personal property, (2) deeds of trust on the respondents' real estate, (3) guaranty agreements signed by the respondents and (4) a repurchase agreement from Allentown Co., and where the repurchase agreement provided that if Allentown purchased from the bank equipment for the amount then due on the note, the bank would assign its rights to Allentown, the trial court erred in failing to enforce the agreement and in concluding that the bank could not assign to Allentown, a co-surety with the respondents, any rights under the deed of trust against the other sureties. In

none of the prior cases holding that sureties are not entitled to subrogation against co-sureties was there an agreement at the time the parties entered into the obligations that the party who paid a debt of the principal would have recourse against the other sureties, and G.S. 26-5 does not say that parties may not by contract agree to different rights than are provided by the statute.

APPEAL by petitioner from *Brewer, Judge.* Order entered 6 February 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 26 May 1982.

This matter began when the substitute trustee under a deed of trust petitioned to sell certain property in Orange County. A hearing was held before the clerk of superior court who entered an order allowing the substitute trustee to proceed with the sale. The respondents appealed and a hearing was held in superior court. The evidence at this hearing showed that in January 1979, R & H Concrete Pumping, Inc. was a corporation which was principally owned by Paul W. Hill and Raymond Suttles. R & H purchased from Allentown Pneumatic Gun Company certain equipment. In order to purchase the equipment, R & H borrowed $195,000.00 from First Union National Bank. The bank took a security interest in the purchased equipment, personal guaranties from Mr. and Mrs. Hill and Mr. and Mrs. Suttles, and deeds of trust on the residences of the Hills and the Suttles. Mr. and Mrs. Hill reside in Orange County and Mr. and Mrs. Suttles reside in Chatham County. The bank also required Allentown to sign a repurchase agreement which included the following provision:

> "Allentown Pneumatic Gun Company agrees that in the event that R & H Concrete defaults on their loan, Allentown will purchase the equipment from First Union National Bank for the balance of the unpaid principal on the loan. It is further agreed that Allentown will make the necessary arrangements to take physical possession of the equipment in the event of default. At that time, the Bank will assign all of its security interest and rights of recovery in the equipment to Allentown."

In June 1979 R & H defaulted on the loan and voluntarily delivered the equipment to the bank. The bank sold part of the equipment and delivered the rest to Allentown. After Allentown had sold the equipment delivered to it, Allentown paid the bank the balance due on the note. The bank assigned to Allentown all

its interest in the note, deeds of trust, and guaranties. The respondents refused to pay Allentown and Allentown called on the substitute trustee to foreclose.

The court made findings of fact in accordance with the evidence and concluded that immediately following the closing of the loan, Mr. and Mrs. Hill, Mr. and Mrs. Suttles, and Allentown were all jointly and severally liable for the payment of the note to the bank and were therefore co-sureties as to each other concerning their liability thereon. The court concluded further that the bank could not assign to Allentown, a co-surety with the respondents, any rights under the deed of trust against the other sureties. The court held that the substitute trustee is not authorized to proceed under the power of sale contained in the deed of trust.

The petitioner appealed.

Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Robert O. Belo, for petitioner appellant.

Dalton H. Loftin for respondent appellees Paul W. Hill and Patricia B. Hill.

Barber, Holmes and McLaurin, by Edward S. Holmes, for respondent appellees Raymond Suttles, Joyce Suttles, and R & H Concrete Pumping, Inc.

WEBB, Judge.

[1] The petitioner's first assignment of error is to the court's receiving evidence of the repurchase agreement and considering it in reaching its decision. The petitioner, relying on *In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978), argues that the only matters that can be heard on a motion pursuant to G.S. 45-21.16(d) are whether there is (1) a valid debt of which the party seeking foreclosure is the holder, (2) default, (3) the right to foreclose under the instrument, and (4) whether notice has been given to those entitled to receive it. We believe the court properly considered evidence of the repurchase agreement. It was evidence as to two of the matters which are properly considered under *Watts*, that is whether there was a valid debt of which Allentown was the holder and whether the petitioner had the right to foreclose

under the deed of trust. The petitioner's first assignment of error is overruled.

[2] We believe the petitioner's second assignment of error has merit. The agreement between the parties as evidenced by several documents was that the bank would make a loan to R & H and take as security a secured interest in the personal property, deeds of trust or the respondents' real estate, guaranty agreements signed by the respondents and a repurchase agreement from Allentown. The repurchase agreement provided that if Allentown purchased from the bank the equipment for the amount then due on the note, the bank would assign its rights to Allentown. We know of no reason why this agreement should not be enforced. The respondents argue that the record shows and the court found that Allentown and the respondents were co-sureties and for this reason Allentown has no right of subrogation but is limited to contribution. We do not believe the fact that Allentown and the respondents may have been sureties for the payment of the note is determinative. In the cases cited by the respondents, *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E. 2d 669 (1963); *Bunker v. Llewellyn*, 221 N.C. 1, 18 S.E. 2d 717 (1942); and *Liles v. Rogers*, 113 N.C. 197, 18 S.E. 104 (1893), the court applied the principle that sureties are not entitled to subrogation against co-sureties. In none of these cases was there an agreement at the time the parties entered into the obligations that the party who paid a debt of the principal would have recourse against the other sureties. G.S. 26-5, upon which the respondents also rely, provides a surety who performs under a contract may maintain an action for contribution against other sureties. It does not say that parties may not by contract agree to different rights than are provided by the statute. *See Commissioners v. Nichols*, 131 N.C. 501, 42 S.E. 938 (1902), for a case which holds that a surety may contract for a different indemnity than he would be given by law in the absence of such an agreement. *See also Bank v. Burch*, 145 N.C. 317, 59 S.E. 71 (1907), for language to this effect.

We hold that the parties are bound by the contract they entered and this contract gives Allentown the right to foreclose under the deed of trust. We reverse and remand for further proceedings pursuant to this opinion.

Reversed and remanded.

Judges CLARK and WHICHARD concur.

H. CLIFTON STEWART, SR. v. JOE W. MARANVILLE AND WIFE, BETTY H. MARANVILLE, JOE MARANVILLE CAMPERLAND, INC.

No. 8121SC983

(Filed 6 July 1982)

Contracts §§ 16, 27.1 — agreement to repay loan — no condition precedent

In an action to recover funds loaned by plaintiff to defendants for the purpose of preventing foreclosure of defendants' property, summary judgment was properly entered for plaintiff where the materials before the court were insufficient to establish a condition precedent to defendants' obligation to repay the loan but showed an agreement between the parties that plaintiff was to be repaid from the proceeds of a sale of the property and that defendants had sold the property.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 21 May 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 April 1982.

This is an action to recover funds allegedly loaned by plaintiff to defendants for the purpose of preventing foreclosure of defendants' property. From summary judgment for plaintiff in the amount of $59,885.57, defendants appeal.

On 17 November 1978, plaintiff gave defendants a check for $50,000 for the purpose of helping the defendants prevent an impending foreclosure against real estate owned by Joe Maranville Camperland, Inc. In addition, plaintiff made three mortgage payments of $3,295.19 each on defendants' behalf.

On 2 August 1979, defendants sold the Camperland property to a third party, Mr. Satterfield. According to defendants, Satterfield agreed to pay the indebtedness on the property, and the mortgage on the Maranvilles' home, as well as other indebtedness of the defendants. In addition, the plaintiff was to be paid $60,000, and the Maranvilles were to receive $25,000 in cash. Satterfield made all of the payments allegedly agreed upon except that to plaintiff.

Following the sale of the Camperland property, plaintiff brought this action to recover the $59,885.57 he had advanced to defendants. Plaintiff alleged that this amount had been paid pursuant to a loan agreement by which plaintiff was to be the first of defendants' creditors repaid from the proceeds of sale of the Camperland property. Defendants admitted receipt of the amount set forth by plaintiff, but denied liability for repayment of the funds.

Defendants' depositions and affidavit tended to show that plaintiff had made the payments as an act of friendship because Mr. Maranville was ill and in financial difficulty. Defendants denied existence of an agreement that plaintiff was to be a priority creditor, but admitted having a financial obligation to plaintiff "from a humanitarian standpoint."

The trial court granted plaintiff's motion for summary judgment. Defendants appeal.

Wyatt, Early, Harris, Wheeler & Hauser, by A. Doyle Early, Jr., for plaintiff appellee.

House, Blanco, Randolph & Osborn, by Clyde D. Randolph, Jr., and Mary Ward Root, for defendant appellants.

ARNOLD, Judge.

The issue brought before this Court on appeal is whether the trial court properly granted summary judgment against defendants. Defendants bring forth several arguments in support of their contention that summary judgment should have been denied.

Defendants first argue that plaintiff's complaint alleges only the existence of a conditional obligation to pay, and that the record contains no evidence of the happening of the condition precedent. We find no merit in this argument.

It is well established that conditions precedent are disfavored by the law. Only where the clear and plain language of the agreement dictates such construction will a term be viewed as a condition precedent to performance of a contractual obligation. *Parrish Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978). Absent clear language to the contrary, no contract

term will be construed as a condition precedent to an obligation to pay for services rendered. *Electrical Co. v. Construction Co.*, 12 N.C. App. 63, 182 S.E. 2d 601 (1971). Similarly, we refuse to find a condition precedent to the obligation to repay a loan unless the conclusion that the parties so intended is inescapable. The intent of the parties here is not so clear as to dictate such a result.

We determine that the pleadings, depositions and affidavits before the trial court established as a matter of law the existence of an enforceable agreement between the parties. Therefore we do not reach the parties' arguments with regard to equitable grounds for recovery.

We also reject defendants' contention that plaintiff is not the real party in interest. Although the check was drawn on his corporate account, it is undisputed that plaintiff personally absorbed the liability for the loan.

Our review of the record reveals no triable issue of material fact. Accordingly, the summary judgment appealed from is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

PLYMOUTH FERTILIZER COMPANY v. PITT-GREENE PRODUCTION CREDIT ASSOCIATION; M. E. CAVENDISH, TRUSTEE; FRED T. MATTOX, TRUSTEE; MOORE-KING-SULLIVAN, INC.; WARREN LASSITER T/A CHASE INVESTMENT COMPANY; GRIFTON FERTILIZER AND SUPPLY COMPANY, INC.; RUSSELL HOUSTON, III, TRUSTEE; TRAWICK H. STUBBS, JR., TRUSTEE; JIMMY R. WHITFORD; RONALD LASSITER AND WIFE, DELLA LASSITER; ANNIE V. LASSITER AND ESTHER H. VENTERS

No. 813SC1004

(Filed 6 July 1982)

Mortgages and Deeds of Trust §§ 11.1, 14— priority of liens—assignment of first lien to third creditor

Where the owner of property encumbered by a senior deed of trust and a junior judgment lien borrowed funds from a third creditor to pay off the first deed of trust, he could not defeat the priority of the judgment lien over a deed

of trust executed to the third creditor by assignment of the first deed of trust to the third creditor, since the original debt was discharged and the lien of the first deed of trust was extinguished.

APPEAL by respondents from *Reid, Judge.* Judgment entered 22 May 1981 in Superior Court, PITT County. Heard in the Court of Appeals 4 May 1982.

This case concerns the validity of an attempted assignment of a deed of trust secured by a lien on real property. Petitioner, the holder of a lien against the same property, sought a determination by the court that the purported assignment of a senior lien had been invalid and that petitioner's lien was therefore entitled to priority.

The essential facts of the case can be stated rather succinctly:

Petitioner is the holder of a judgment lien against Ronald Lassiter which was duly recorded in the office of the Clerk of Superior Court, Pitt County. This lien precedes in time the lien of Pitt-Greene Production Credit Association's deed of trust. However, another deed of trust was executed prior to either of the above, conveying a security interest in the Lassiters' property to Planters National Bank.

The deed of trust executed in favor of Pitt-Greene represents security for a loan in which part of the proceeds were paid directly by Pitt-Greene to Planters National Bank to satisfy the Lassiters' outstanding debt of $15,947.63 under the bank's deed of trust. Payment to Planters was in the form of two checks made payable jointly to the bank, to Ronald Lassiter and to Ronald Lassiter, Jr. The Lassiters endorsed the checks which were then delivered by Pitt-Greene to the bank. In exchange, the bank purported to assign its lien to Pitt-Greene by recording assignment of the note and deed of trust.

The Lassiters were discharged in bankruptcy, and the property securing the parties' liens was sold for less than the indebtedness secured thereby. Petitioners brought this action seeking adjudication of the priority to which each lien is entitled.

The trial court held that evidence contained in the pleadings and affidavits of the parties entitled petitioner's lien to priority

over that of respondents as a matter of law and granted summary judgment. Respondents appeal.

Everett and Cheatham, by Edward J. Harper, II, for petitioner appellee.

James, Hite, Cavendish & Blount, by E. Cordell Avery, for respondent appellants.

ARNOLD, Judge.

Since the parties are in substantial agreement regarding the facts of the case, the only question for our consideration is whether the trial court correctly concluded from those facts that petitioner was entitled to summary judgment as a matter of law.

Appellants rely heavily on the opinion of our Supreme Court in *Waff Brothers v. Bank of North Carolina*, 289 N.C. 198, 221 S.E. 2d 273 (1976), a case similar in some respects to that before us. The *Waff Brothers* holding gave effect to the intent of the parties to the transfer of indebtedness. If *Waff Brothers* were controlling, therefore, the petitioner here would prevail since assumption of the bank's lien by Pitt-Greene clearly was intended by the Lassiters, the bank and Pitt-Greene. However, we find that the case at bar is distinguishable from *Waff Brothers* in one critical respect. In *Waff Brothers*, the owner of the encumbered property was not personally liable for the payment of the deed of trust. He paid it as a stranger to the indebtedness and was therefore entitled to preservation of the lien in his favor. Where, as here, a property owner is personally liable to creditor #1 and borrows funds from creditor #3 to pay off #1, he cannot defeat the priority of creditor #2, who is senior to #3, by substituting #3 for #1. Regardless of whether the landowner personally handed the borrowed money to #1 in payment of his obligation, the net result is the same: The original debt is discharged and creditor #1's lien is extinguished.

We hold that the trial court correctly granted summary judgment in favor of petitioner, Plymouth Fertilizer Company.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. MARY COX COLTRANE

No. 8119SC1281

(Filed 6 July 1982)

1. **Criminal Law § 143.2— probation revocation—adequacy of notice and hearing**

There was no merit to defendant's contention that she received inadequate notice and hearing concerning revocation of her probation where it was clear from the record that defendant received notice and appeared, represented by counsel, at a hearing conducted pursuant to the violation report filed by her probation officer.

2. **Criminal Law § 143.2— probation revocation—validity of order revoking probation—second hearing continuation of first—proper procedural steps followed**

In a prosecution for a probation violation where defendant was alleged to have willfully violated the terms of her probation by failing to secure employment although employment was available, there was no merit to defendant's contentions that a 28 September 1981 order was invalid because defendant did not have the opportunity to present evidence and qualify and examine witnesses among other errors since the court fulfilled the proper procedural steps in a hearing held on 11 September 1981 in which the trial court found defendant in violation of probation but gave her two weeks in which to comply with the requirement, and since the two weeks between the hearing and entry of the revocation order merely constituted a grace period granted by the judge in his discretion to allow defendant one last chance to avoid activation of her sentence.

APPEAL by defendant from *Hairston, Judge.* Orders entered 11 September 1981, 28 September 1981 and 1 October 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 6 May 1982.

Defendant was convicted on 8 October 1980 of breaking, entering and larceny and sentenced to five years in prison. She was placed on probation subject to the condition that she "[w]ork faithfully at suitable employment or faithfully pursue a course of study or vocational training."

On 20 May 1981, defendant's probation officer filed a violation report with the clerk of superior court stating that she had been unable to confirm any employment by defendant although employment was available. Defendant was arraigned for probation violation and called for hearing on 10 September 1981.

State's evidence tended to show that defendant had delayed finding a job or going to school for several months following her

conviction. Following the violation report filed by her probation officer, however, defendant had completed her G.E.D. requirements. Although defendant was neither employed nor enrolled in school at the time of the hearing, the probation officer recommended continuation of her probation.

In its order dated 11 September 1981, the court found that defendant had willfully violated the terms of her probation by failing to secure employment although employment was available. The court ordered, however, that defendant be continued on probation with the modification that defendant be required to gain full-time employment. Defendant was given two weeks in which to comply with this requirement.

Defendant again appeared before Judge Hairston on 28 September 1981. She admitted she had not secured a job and was not permitted to present evidence of her good faith efforts to obtain employment. The court issued an order revoking defendant's probation and activating her sentence on a finding that she had willfully violated probation.

On 1 October 1981, defendant's motion to strike revocation of her probation was denied. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General John C. Daniel, Jr., for the State.

Stephen E. Lawing for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error is that the court modified the terms of her probation without a showing of good cause and without notice and hearing in violation of G.S. 15A-1344(d).

It is clear from the record that defendant received notice and appeared, represented by counsel, at the hearing conducted on 10 September 1981 pursuant to the violation report filed by her probation officer. We find no merit, therefore, in her contention that she received inadequate notice and hearing. Moreover, we find abundant evidence in the record to indicate that defendant failed to make a good faith effort to comply with the terms of her probation. She enrolled in school only after repeated prodding by her

probation officer and was not in school or working at the time of her hearing.

We wish to emphasize that a grant of probation is a privilege afforded by the court and not a right to which a felon is entitled. In view of this fact, the court is given considerable discretion in determining whether good cause exists for modifying the terms of probation. The court had before it here evidence that defendant had obtained a high school equivalency certificate, that she was not enrolled in school and had no apparent commitment to a course of study at the time of the hearing, and that she had two young children to support. The judge reasonably concluded defendant should no longer be entitled to put off working to support her children. We find no abuse of discretion.

[2] Defendant next challenges the validity of the 28 September 1981 order revoking her probation. Several assignments of error are made relative to the order and the conduct of the hearing including lack of notice, lack of opportunity to present evidence and cross-examine witnesses, and lack of written notice of modification of probation. We find no merit in these contentions, however, because the second hearing was, in reality, a continuation of the first. The court had fulfilled the proper procedural steps in the first hearing and made findings of fact sufficient to support revocation of defendant's probation. The two weeks between that hearing and entry of the revocation order merely constituted a grace period granted by the judge in his discretion to allow defendant one last chance to avoid activation of her sentence. Defendant was notified in court that she had two weeks in which to obtain employment or the case would return to court. The import of such an ultimatum was clear and the result of defendant's failure to comply was predictable. We find no prejudicial error.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

COBLE DAIRY PRODUCTS COOPERATIVE, INC. v. STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA MILK COMMISSION, HERBERT C. HAWTHORNE, DR. VILA M. ROSENFIELD, DR. ISABELLA W. CANNON, RUSSELL E. DAVENPORT, OREN J. HEFFNER, INEZ M. MYLES, B. F. NESBITT, NORMA T. PRICE, DAVID A. SMITH, WILLIAM E. YOUNTS, JR., MEMBERS OF THE NORTH CAROLINA MILK COMMISSION, AND GRADY COOPER, JR., EXECUTIVE SECRETARY OF THE NORTH CAROLINA MILK COMMISSION

No. 8110SC1125

(Filed 6 July 1982)

Injunctions § 13.2— dissolving temporary injunction—failure to show irreparable harm

An order temporarily restraining the N.C. Milk Commission from holding a public hearing concerning plaintiff's milk prices was properly dissolved where unsupported statements in the affidavits by two of plaintiff's officers were insufficient to establish that the court's failure to issue injunctive relief would result in irreparable harm to plaintiff's business.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 22 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 8 June 1982.

This action stems from an order issued by the State Milk Commission on 3 February 1981, directing Coble to appear at a public hearing concerning Coble's milk prices. The purpose of the hearing was to be to determine whether the prices charged by Coble to three of its customers violated a provision of G.S. 106-266.19 which prohibits below-cost sales designed to injure, harass or destroy competition in the dairy industry.

Prior to the date for hearing, Coble brought this action seeking to restrain the Milk Commission from holding the public hearing. A temporary restraining order was entered enjoining the public hearing until after a show cause hearing on plaintiff's claim. Following the show cause hearing, the court entered an order dissolving the temporary restraining order. Plaintiff appealed and was granted a stay of the order pending this appeal.

Broughton, Wilkins & Crampton, by J. Melville Broughton, Jr., and H. Julian Philpott, Jr., and Joe H. Leonard, for plaintiff appellant.

Harris, Cheshire, Leager & Southern, by Samuel R. Leager and W. C. Harris, Jr., for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the evidence before the court entitled it to a preliminary injunction and that the order dissolving the temporary restraining order was entered in error. In support of this contention, Coble argues that it will ultimately prevail in the controversy and that the court's failure to issue injunctive relief will result in irreparable harm to Coble's business. Coble contends that the Commission's procedures for cost determination are arbitrary and inefficient and that the Commission, in recognition of this fact, is in the process of restructuring its procedures. Coble seeks a stay of the below-cost hearing until this restructuring is complete, claiming this would spare Coble irreparable loss while causing no corresponding loss to the Commission.

Coble claims a hearing at which its prices and costs are made public will result in the loss of numerous customers and spoilage of milk, causing irreparable harm to Coble. Its only support for this claim, however, is in the form of unsupported statements in the affidavits of two Coble officers. Such unsupported allegations do not fulfill the requirement that the applicant for injunctive relief "set out with particularity facts supporting [its allegations] so the court can decide for itself if irreparable injury will occur." *Goodman Toyota v. City of Raleigh*, 47 N.C. App. 628, 632, 267 S.E. 2d 714, 716 (1980), quoting *United Telephone Co. of Carolinas, Inc. v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E. 2d 49, 52 (1975). Indeed, it would appear that plaintiff could not succeed in this appeal without revealing much of the very information it seeks to keep secret, since a forecast of specific evidence is required of the applicant for a preliminary injunction.

Having concluded that Coble failed to fulfill one of the requirements for a grant of injunctive relief, we hold that the court properly dissolved its temporary restraining order.

We find it unnecessary to reach the question of the likelihood that plaintiff ultimately will prevail in the underlying controversy. Nor do we find it necessary to discuss the merits of the Milk Commission's challenged procedures. With regard to the latter, however, we do question the Commission's wisdom in refusing to postpone its hearing in this case pending its planned review and possible revision of those procedures. While we have concluded

that it was not legally required to do so, the Commission's intransigence would appear to serve little purpose.

The order of the trial court dissolving its temporary restraining order against defendant is

Affirmed.

Judges HEDRICK and WELLS concur.

IND-COM ELECTRIC COMPANY, A CORPORATION, PLAINTIFF v. FIRST UNION NATIONAL BANK, A BANKING CORPORATION, DEFENDANT v. GAYLE R. POOLE, JERRY L. SNEED, WILLIAM G. POOLE, JAMES A. SNEED AND DON W. DANIELS, THIRD-PARTY DEFENDANTS

No. 8126SC1042

(Filed 6 July 1982)

Banks and Banking § 11.2; Uniform Commercial Code § 36— forged checks—payment by bank—summary judgment properly granted in favor of bank

In an action arising from the payment by bank of thirty-seven forged checks, totalling $159,646.38, drawn against the account of plaintiff over a fourteen-month period, the trial court did not err in entering summary judgment in favor of the bank where plaintiff failed to fulfill the requirements of G.S. 25-4-406(3) by failing to produce a forecast of specific evidence to rebut the bank's evidence of its exercise of ordinary care in paying the forged checks. G.S. 25-3-406.

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 6 August 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 May 1982.

This is a civil action arising from payment by First Union National Bank (FUNB) of thirty-seven forged checks, totalling $159,646.38, drawn against the account of Ind-Com Electric Company (Ind-Com) over a fourteen-month period. Ind-Com's complaint alleged FUNB's liability for its failure to exercise ordinary care in the payment of the checks. FUNB answered, denying liability and raising several defenses including Ind-Com's contributory negligence in failing to prevent or discover the forgeries by its employee.

FUNB moved for summary judgment in reliance upon the pleadings, depositions, answers to interrogatories, admissions and affidavits filed with the court. Following the motion for summary judgment, the parties agreed to extensive stipulations of fact for the express purpose of limiting the court's consideration to a single issue, that being:

> Is there any genuine issue of material fact as to a lack of ordinary care on the part of FUNB in paying the forged checks?

Included among the stipulations of fact was Ind-Com's concession that its own negligence contributed to the forgeries. It was also stipulated that FUNB had acted in good faith and in accordance with reasonable commercial standards in paying the forged checks. However, Ind-Com specifically refused to stipulate to FUNB's exercise of ordinary care pursuant to G.S. 25-4-406(2).

Summary judgment was granted in favor of FUNB. Ind-Com appeals.

Henderson and Shuford, by David H. Henderson and Robert E. Henderson, for plaintiff appellant.

James, McElroy & Diehl, by Gary S. Hemric, for defendant appellee.

ARNOLD, Judge.

Plaintiff's appeal rests on its contention that defendant failed to meet the standard of care required of it by G.S. 25-4-406 and should therefore be held liable in spite of its fulfillment of the requirements of G.S. 25-3-406. These two statutes specify the circumstances under which a drawee bank will be held liable for payment of unauthorized checks in spite of the contributory negligence of the customer.

G.S. 25-3-406 releases the bank from liability in this situation if it "pays the instrument in good faith and in accordance with . . . reasonable commercial standards." Applying this standard, the parties' stipulations would clearly preclude FUNB's liability. However, Ind-Com relies instead on G.S. 25-4-406. This statute sets forth the general rule that a bank is not liable where the customer's negligence in failing to examine his bank statements is

the cause of the loss. As an exception to this rule, however, the statute provides that the bank is not excused from liability where "the customer establishes lack of ordinary care on the part of the bank in paying the item(s)." G.S. 25-4-406(3). Ind-Com contends that compliance with industry standards does not necessarily fulfill the requirement of "ordinary care" and argues that the evidence raises a material issue of fact as to FUNB's compliance with the latter standard.

While we find interesting Ind-Com's argument that the two statutes are inconsistent, we have determined that Ind-Com has failed to fulfill the requirements of G.S. 25-4-406(3), on which it relies. We do not, therefore, find it necessary to reach the issue of the interrelationship of the two statutes.

The statutory requirement that the customer must establish the bank's lack of ordinary care in order to recover notwithstanding the customer's own negligence places the burden of proof squarely upon the shoulders of the customer. Although the initial burden in a summary judgment hearing is on the moving party to establish the absence of any material issue of fact and to show its entitlement to judgment in its favor as a matter of law, we find that this burden was met by FUNB's undisputed evidence that its practices comported with generally accepted standards in the banking industry as required by G.S. 25-3-406.

It is well settled that once the movant has met its burden, the party opposing summary judgment may not rely "upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), North Carolina Rules of Civil Procedure. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Moore v. Fieldcrest Mills, Inc.*, 36 N.C. App. 350, 244 S.E. 2d 208 (1978), *aff'd* 296 N.C. 467, 251 S.E. 2d 419 (1979). Our review of the record here reveals no such specific facts in support of plaintiff's position. Ind-Com apparently relies on its allegation that the protective measures employed by FUNB were inadequate and on the opinion of an Ind-Com officer that the bank should have been placed on notice of the forgeries by the amounts and payees of the checks. We hold that Ind-Com's failure to produce a forecast of specific evidence to rebut FUNB's evidence of its exercise of ordinary care in paying the forged checks entitled FUNB to judgment as a matter of law.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND COMMERCIAL COURIERS, INC. (APPLICANT) v. PONY EXPRESS COURIER CORPORATION

No. 8110UC1086

(Filed 6 July 1982)

Carriers § 2.7— contract carrier for bank documents—granting of permit

Evidence that the protestant contract carrier was not as flexible as some shippers required and that the applicant was most flexible and reliable supported a finding by the Utilities Commission that protestant's service did not meet the needs of a number of shippers, and the Commission's findings supported its granting of a permit to the applicant to act as a contract carrier of bank documents and other commercial papers within this State. G.S. 62-262(i); N.C.U.C. Rule R2-15(b).

APPEAL by protestant from North Carolina Utilities Commission. Order entered 28 July 1981. Heard in the Court of Appeals 26 May 1982.

The protestant, Pony Express Couriers, appeals the Order of the Utilities Commission which granted Commercial Couriers, the applicant, an expanded contract carrier permit for operating within the State in areas currently served by Pony Express Couriers.

Kimzey, Smith & McMillan, by James M. Kimzey, for protestant appellant.

Boyce, Morgan, Mitchell, Burns & Smith, P.A., by F. Kent Burns, for applicant appellee.

BECTON, Judge.

On this appeal of an administrative agency decision, we must determine the scope of appellate review based on the questions presented by the parties. *Utilities Commission v. Oil Company*, 302 N.C. 14, 21, 273 S.E. 2d 232, 236 (1981). The arguments raised

by Pony Express are (1) whether the Commission found sufficient facts to support its conclusions; and (2) whether there was competent, material and substantial evidence to support the Commission's finding that supporting shippers had need for a specific type of service not otherwise available by existing means of transportation. These arguments require us to determine (1) whether there was an error of law, and (2) whether, under the whole record test, the decision was supported by competent, material and substantial evidence. *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 276 S.E. 2d 404 (1981); G.S. 150A-51.

We disagree with the arguments presented by Pony Express.

G.S. 62-262(i) provides that the following criteria should be considered in determining whether to grant a contract carrier permit:

> If the application is for a permit, the Commission shall give due consideration to:
>
> (1) Whether the proposed operations conform with the definition in this Chapter of a contract carrier,
>
> (2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,
>
> (3) Whether the proposed service will unreasonably impair the use of the highways by the general public,
>
> (4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,
>
> (5) Whether the proposed operations will be consistent with the public interest and the policy declared in this Chapter, and
>
> (6) Other matters tending to qualify or disqualify the applicant for a permit.

In addition, the applicant must prove that "one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation . . . ." N.C.U.C. Rule R2-15(b). *See also Utilities Commission v.*

Petroleum Transportation, Inc., 2 N.C. App. 566, 163 S.E. 2d 526 (1968).

The Commission's findings of fact are set out below:

(1) Applicant, Commercial Couriers, Inc., is a North Carolina Corporation presently engaged, among other things, as a contract carrier of Group 21, bank documents, commercial papers, cash letters, etc., under bilateral contract with the Northwestern Bank within a radius of 105 miles of Winston-Salem. Its service has been good.

(2) Applicant maintains a fleet of equipment specially suitable for the transportation of the commodities involved in this Application and has trained personnel to service and operate this equipment.

(3) Applicant is financially solvent and is operating at a profit. Applicant also has an unlimited line of credit for purchase of vehicles and has additional credit available to it on an unsecured basis.

(4) Applicant has entered into bilateral contracts for the proposed service with the Northwestern Bank, the Bank of North Carolina, Central Carolina Bank and Central Service Corporation. The area covered by these contracts is generally throughout the State of North Carolina. Other shippers indicated a desire to use Applicant's service if it were authorized by the Commission.

(5) The proposed operations of Applicant conform with the definition of a contract carrier by motor vehicle; will not unreasonably impair the efficient service of any existing carriers; will not unreasonably impair the use of the highways by the general public; and the Applicant is fit, willing and able to perform the proposed service as a contract carrier.

(6) The proposed operation will be consistent with the public interest and policy declared in Chapter 62 of the General Statutes.

(7) The Protestant, Pony Express Courier Corporation, is as far as the particular commodities here involved, a contract carrier operating under a permit issued to it by the Commission; that its operations will not be unreasonably impaired by

the granting of the authority sought herein; that the service offered by Protestant to the witnesses who testified for Applicant did not meet the needs of those witnesses.

(8) The Applicant has on file with the Commission as required by its rules cargo and liability insurance, designation of its process agent and a schedule of minimum rates and charges.

(9) Applicant has met the burden of proof prescribed by Statute and the Application should be granted.

Our review of the Commission's findings of fact reveals that all of the factors required by G.S. 62-262(i) were considered and that the applicant made a showing that a number of shippers had need for a service currently not offered by existing carriers. In fact, these findings are more extensive than those found to be sufficient by this Court in *Utilities Comm. v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E. 2d 814, *cert. denied*, 277 N.C. 117 (1970), and *Utilities Comm. v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E. 2d 808, *cert. denied*, 277 N.C. 117 (1970). Consequently, we hold that the findings of fact are sufficient to support the Commission's conclusions of law.

We find no merit in the protestant's argument that there is no competent, material and substantial evidence to support the finding that its service did not meet the needs of the shippers. On review, we view the whole record to determine if the findings are based on competent, material and substantial evidence. *Utilities Comm. v. American Courier Corp.*

Several witnesses testified that Pony Express was not as flexible as their needs required and that Commercial Couriers was most flexible and reliable. The key difference between the service offered by Pony Express, which was generally described to be good, and the service offered by Commercial Couriers was that Commercial offered the flexibility the shippers needed. This flexibility is a service which obviously is not provided by Pony Express.

For the foregoing reasons the Order below is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (R. M.) concur.

LUTHER GORE, PLAINTIFF APPELLEE v. ROMIE HENRY WILLIAMS, DEFENDANT APPELLEE, BENNIE ALLEN FAISON AND NASH JOHNSON & SONS' FARMS, INC., DEFENDANT APPELLANTS

No. 814SC1165

(Filed 6 July 1982)

1. **Automobiles and Other Vehicles § 46; Evidence § 46.1— opinion of automobile's rate of speed—admissible**

In a negligence action arising from an automobile collision, the trial court erred in refusing to allow a witness's opinion as to the speed of one defendant's vehicle since he had a reasonable opportunity to observe the automobile and since the evidence was relevant to the issue of whether one of the defendants was contributorily negligent.

2. **Automobiles and Other Vehicles § 45; Evidence § 23— automobile accident—statement in complaint inconsistent with statement at trial—evidence of complaint admissible**

In an action arising from an automobile accident in which plaintiff, a passenger, sued the driver of the vehicle in which he was riding and the driver of the other vehicle, the trial court erred in not allowing examination of plaintiff concerning statements in his verified complaint concerning the speed of the vehicle in which he was riding as the statements were inconsistent with his testimony at trial and tended to show the witness's lack of credibility.

APPEAL by defendants, Bennie Allen Faison and Nash Johnson & Sons' Farms, Inc., from *Barefoot, Judge.* Judgment entered 23 March 1981 in Superior Court, DUPLIN County. Heard in the Court of Appeals 10 June 1982.

This is a civil action to recover damages for injury to person and property sustained in an automobile collision.

On 15 December 1978, at 7:00 p.m., Romie Henry Williams was operating a 1973 Ford automobile of which Luther Gore was a passenger. Shortly after rounding a curve on Highway 11, Williams collided with a tractor-trailer truck owned by Nash Johnson & Sons' Farms, Inc., and operated by Bennie Faison. Faison had been backing the truck from Highway 11 down a dirt

path to a turkey house. At the time of the accident, the trailer was across both lanes of the highway. Its emergency blinkers were on.

Gore instituted an action for personal injury, alleging that Williams and Faison were jointly and concurrently negligent. Each defendant denied any negligence on his part. Defendants Faison and Farms, Inc., asserted a cross claim against defendant Williams for contribution. Williams filed a cross claim against defendants Faison and Farms, Inc., for contribution and a third party claim against them for personal injury and property damage. Gore later released defendant Williams from his action upon payment of $6,000.00.

A jury considered the issues of negligence, contributory negligence and damages. It found that defendant Faison had been negligent, that Williams had not been contributorily negligent, that Gore should receive $75,000.00 in damages from Faison and Farms, Inc., and that Williams should receive $71,600.00 in damages. The court credited defendants Faison and Farms, Inc., with the $6,000.00 already paid to Gore.

Russell J. Lanier, Jr., and Rivers D. Johnson, Jr., for defendant appellee.

Ragsdale and Liggett, by Jane Flowers Finch and Vance Gavin, for defendant appellants.

VAUGHN, Judge.

Defendants present several assignments of error pertaining to defendant Williams' third party claim. We will address those errors for which we conclude defendants are entitled to a new trial.

[1] In Assignment of Error No. 16, defendants argue that the court erred in excluding testimony of Faison as to the speed of the Williams' vehicle. We agree.

In North Carolina, any person of ordinary intelligence who has had a reasonable opportunity to observe a moving automobile is competent to testify as to that automobile's rate of speed. *Jones v. Horton*, 264 N.C. 549, 142 S.E. 2d 351 (1965). Any inconsistency between the witness' opinion and other evidence in-

troduced at trial affects only the weight of the testimony, not its admissibility. *State v. McQueen*, 9 N.C. App. 248, 250, 175 S.E. 2d 789, 791 (1970).

In the present case, Faison testified that he had observed the Williams' vehicle for at least one-half mile. He was prepared to further testify that, in his opinion, the vehicle was travelling at a rate of 65 to 70 m.p.h. Such evidence was relevant to the issue of whether Williams was contributorily negligent. We, therefore, conclude that the court committed prejudicial error in excluding Faison's opinion as to speed. *See Loomis v. Torrence*, 259 N.C. 381, 130 S.E. 2d 540 (1963).

[2] In Assignments of Error Nos. 15 and 18, defendants argue that the court erred in not allowing examination of Luther Gore concerning statements in his verified complaint and in not allowing the introduction into evidence of the complaint itself. We agree.

A witness may always be impeached by proof that on another occasion he made a statement inconsistent with his statement at trial. *State v. McKeithan*, 293 N.C. 722, 730, 239 S.E. 2d 254 (1977). The prior statement may have been made orally or in a writing. 1 Stansbury, N.C. Evidence § 46 (Brandis rev. 1973).

At the trial of this action, Gore testified that, in his opinion, the car in which he was a passenger was travelling at a rate of 55 to 57 m.p.h. He further stated that Williams braked as soon as the two men saw the tractor-trailer. In his verified complaint, however, Gore had alleged the following:

> "That at the time and place of said accident the defendant, ROMIE HENRY WILLIAMS, was negligent in the following respects:
>
> . . .
>
> B. He failed to keep his vehicle under proper control;
>
> C. He operated his motor vehicle at a speed greater than was reasonable and prudent under the circumstances;
>
> D. He failed to reduce his speed upon approaching a special traffic hazard of a vehicle being parked upon the public highway immediately in front of his lane of travel."

When counsel for defendant Faison attempted to examine Gore concerning the allegations in his original complaint, the court sustained opposing counsel's objection.

We hold that it was prejudicial error for the court to exclude Gore's testimony concerning statements in his complaint. *See Piper v. Ashburn*, 243 N.C. 51, 89 S.E. 2d 762 (1955). The prior inconsistent statements were not sought as substantive evidence but as evidence tending to show the witness' lack of credibility. Moreover, they addressed one of the primary issues at trial: whether defendant Faison was the sole proximate cause of the injuries of Gore and Williams. The court also committed prejudicial error when it denied admission into evidence of portions of the original complaint. Parts of a pleading are competent as admissions against interest and are always admissible against the party who made them. *Chavis v. Insurance Co.*, 251 N.C. 849, 852, 112 S.E. 2d 574, 576 (1960); *Morris v. Bogue Corporation*, 194 N.C. 279, 139 S.E. 433 (1927); *Floyd v. Thomas*, 108 N.C. 93, 12 S.E. 740 (1891).

The errors discussed herein entitle defendants to a new trial. Defendants' other assignments of error need not be expressly considered since they may not occur at the second trial.

Reversed.

Judges CLARK and HILL concur.

STATE OF NORTH CAROLINA v. HARRY JAMES McRAE AKA HAROLD McCRAE

No. 8114SC1418

(Filed 6 July 1982)

1. Witnesses § 1.2— children as competent witnesses

The trial court properly denied defendant's motion to quash the State's subpoena for two children, ages three and four, who were in an automobile at the time of an alleged kidnapping since there is no age below which one is considered incompetent, as a matter of law, to testify.

2. Criminal Law § 64— test concerning consumption of a hallucinogenic drug—non-available—full compliance with court order

The trial court did not abuse its discretion in finding that a hospital had complied with an order in which the hospital was asked to determine, in part, if defendant's body contained a hallucinogenic drug since the hospital submitted a report prepared by a forensic psychiatrist at the hospital stating that there were no tests available to determine whether a person had consumed a hallucinogenic drug several months earlier.

3. Kidnapping § 1.2— sufficiency of evidence of restraint

The trial court did not err in failing to dismiss a kidnapping charge where the evidence showed that defendant entered a woman's car without her permission and ordered her to drive around, told her that if she did as he said, no one would be hurt, and where the woman thought defendant had a pistol under his jacket. From such evidence the jury could reasonably infer that the woman acquiesced to defendant's demands because she feared for her safety. G.S. 14-39.

4. Criminal Law § 115.1— kidnapping and felonious larceny—refusal to instruct on forcible trespass and unauthorized use of a motor vehicle as lesser offenses proper

In a prosecution for kidnapping and felonious larceny, the trial judge properly failed to instruct on forcible trespass and unauthorized use of a motor vehicle since forcible trespass requires proof of an element not essential to kidnapping, entry into a person's premises, and cannot be a lesser included offense of kidnapping, and since all the evidence tended to show that defendant intended to permanently deprive the victim of her car, thereby not supporting the charge of unauthorized use of a motor vehicle. G.S. 14-72.2 and 14-72.

APPEAL by defendant from *Martin (John C.), Judge.* Judgments entered 5 August 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 June 1982.

Defendant was convicted of kidnapping and felonious larceny. Judgments imposing concurrent prison sentences were entered.

The State's evidence tends to show the following. On 22 February 1981, Clara Strickland was sitting in her car in the parking lot of an A & P store. With her were her three-year-old granddaughter and another child four years of age. Between 1:15 p.m. and 1:30 p.m., defendant angrily exited from the A & P store. Mrs. Strickland watched him sit on the hood of a car, jump off, hit the car, and then sit on the hood again. Her attention was briefly diverted, and then she heard her car door open. Defendant entered the car without her permission. He had his hand under his jacket as if he had a gun. When defendant ordered her to start the car and drive where he directed, she complied. At a

later time, she and the children were able to jump out of the car. Defendant continued to drive, causing damage to the Strickland car and other cars on the street.

Defendant testified that he did not remember going to the A & P store on 22 February 1981. The previous night, he had attended a party where he had consumed alcohol and marijuana. Fifteen to twenty minutes after drinking something from a glass handed to him, he had become drowsy and thought the walls were coming toward him. He left the party. The next thing he remembered was waking up in jail.

Attorney General Edmisten, by Assistant Attorney General Reginald L. Watkins, for the State.

Shirley D. Dean, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward several assignments of error. None of them disclose prejudicial error.

[1] Defendant first argues that the court committed prejudicial error in denying his motion to quash the State's subpoena for the two children who were in the automobile at the time of the alleged kidnapping. Defendant's motion, in effect, asked the court to declare the children incompetent witnesses before they had even been called to testify. In North Carolina, however, there is no age below which one is considered incompetent, as a matter of law, to testify. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). The court did not err in allowing the children to remain in the courtroom. Defendant's assignment of error is overruled.

[2] Defendant's second assignment of error is that the court erred in denying his motion to compel the superintendent of Dorothea Dix Hospital to make full compliance with an earlier order. That order had directed the defendant to be committed to Dorothea Dix Hospital for determination, in part, if his body contained a hallucinogenic drug.

We hold that the court did not abuse its discretion in finding that the hospital had complied with the order. A submitted report prepared by a forensic psychiatrist at the hospital stated that

there were no tests available to determine whether a person had consumed a hallucinogenic drug several months earlier. The assignment of error is overruled.

[3] In Assignment of Error No. 3, defendant argues that the court erred in failing to grant his motion for dismissal of the kidnapping charge. Defendant contends that the State offered no evidence of restraint, as required by G.S. 14-39. We disagree.

On a motion for nonsuit, the evidence must be construed in the light most favorable to the State. *State v. Avery*, 48 N.C. App. 675, 269 S.E. 2d 708 (1980). Here, the evidence shows that defendant entered Mrs. Strickland's car without her permission and ordered her to drive him around. He told her that if she did as he said, no one would be hurt. Mrs. Strickland thought defendant had a pistol under his jacket. A jury could reasonably infer from such evidence that Mrs. Strickland acquiesced to defendant's demands because she feared for her safety. It was not necessary for the State to prove use of actual physical force. *State v. Barbour*, 278 N.C. 449, 454, 180 S.E. 2d 115, 118 (1971), *cert. denied*, 404 U.S. 1023, 92 S.Ct. 699, 30 L.Ed. 2d 673 (1972). Defendant's assignment of error is overruled.

[4] In Assignments of Error Nos. 4 and 5, defendant excepts to the court's jury instructions. Defendant contends that the court should have instructed on forcible trespass and unauthorized use of a motor vehicle. We disagree.

When a defendant is indicted for a criminal offense, he may, if the evidence so warrants, be convicted of the charged offense or of a lesser offense, all the elements of which are included in the charged offense and capable of proof by proof of the allegations of fact in the indictment. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970). Kidnapping, as defined by G.S. 14-39, is the confinement, restraint or removal of a person against his will for a felonious purpose. Forcible trespass is the unlawful invasion of the premises of another. *Anthony v. Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934). Since forcible trespass requires proof of an element not essential to kidnapping, i.e., entry into a person's premises, it cannot be a lesser included offense of kidnapping. The court, therefore, did not err in failing to instruct on forcible trespass.

Unauthorized use of a motor vehicle in violation of G.S. 14-72.2 is considered a lesser included offense of larceny, G.S. 14-72, where there is evidence to support the charge. *State v. Ross*, 46 N.C. App. 338, 264 S.E. 2d 742 (1980). Here, the evidence is uncontradicted that after the exit of Mrs. Strickland and the children, defendant told Mrs. Strickland he was "going to have the car." Where all the evidence tends to show that defendant intended to permanently deprive the victim of her car, it would be improper for the court to instruct on unauthorized use of a conveyance. *See State v. Green*, --- N.C. ---, 290 S.E. 2d 625 (1982).

No error.

Judges MARTIN (Harry C.) and HILL concur.

FIRST CITIZENS BANK AND TRUST COMPANY v. NORMAN A. POWELL AND WIFE, DONNA C. POWELL

No. 814SC1070

(Filed 6 July 1982)

Rules of Civil Procedure § 27— interrogatories and requests for admission—default judgment for failure to respond

The issuance of an order compelling discovery pursuant to G.S. 1A-1, Rule 37(a)(2) was not a prerequisite to the entry of an order striking defendants' answer and entering default judgments pursuant to Rule 37(d) for failure of defendants to respond to plaintiff's interrogatories and requests for admissions, and such sanctions will not be held an abuse of discretion absent specific evidence of injustice occasioned thereby.

APPEAL by defendants from *Barefoot, Judge.* Judgment entered 30 July 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 25 May 1982.

This is an appeal from an order striking defendants' answer and entering default judgment in favor of plaintiff for the balance remaining on defendants' indebtedness to plaintiff after application of the proceeds of a foreclosure sale.

Ward and Smith, by Robert H. Shaw III, for plaintiff appellee.

Fred W. Harrison for defendant appellants.

ARNOLD, Judge.

Defendants' only assignment of error is that the trial court abused its discretion by striking defendants' answer and entering default judgment. They argue that the imposition of such severe sanctions for their failure to respond to plaintiff's interrogatories and requests for admission is not within the contemplation of Rule 37(d) of the North Carolina Rules of Civil Procedure. Defendants contend that the proper procedure should have been for plaintiff to move for an order compelling discovery pursuant to Rule 37(a)(2). Even if such an order had been granted, defendants contend that entry of default judgment would have been proper only upon a finding of defendants' intentional failure to comply.

We concede that issuance of a court order is the more common procedure employed by courts, but the clear wording of Rule 37(d) contradicts defendants' position that this is a prerequisite to entry of a default judgment. The statute reads, in pertinent part:

> "(d) . . . If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule."

Subsection (b)(2)c authorizes:

> "c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

While the sanctions imposed by the court have been somewhat severe, they are among those expressly authorized by the statute and we cannot hold that they constituted an abuse of discretion absent specific evidence of injustice occasioned thereby. While the attorney for defendants attempts to excuse his failure to appear at the hearing on plaintiff's motion, he does so on evidence not contained in the record. Moreover, defendants present no evidence tending to excuse their failure to answer or otherwise respond to plaintiff's interrogatories. We find no abuse of judicial discretion.

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. ROBERT RICHARD FOX

No. 8111SC1297

(Filed 6 July 1982)

1. **Criminal Law § 75.11— reading of rights—request for attorney—subsequent reading of rights and waiver**

The trial court did not err in denying defendant's motion to suppress an out-of-court statement which was made after defendant had been read his Miranda rights in South Carolina, said he understood them and said he thought he needed a lawyer where defendant was driven to North Carolina, taken to the office of a detective where he was read his rights, and where defendant signed a waiver of rights form before making the inculpatory statement.

2. **Criminal Law § 50.1— expert opinion that defendant acting in self-defense—inadmissible**

The trial court did not err in refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense since there was nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

APPEAL by defendant from *Smith, Judge.* Judgment entered 23 July 1981 in Superior Court, LEE County. Heard in the Court of Appeals 25 May 1982.

Defendant was tried on a bill of indictment for murder and armed robbery. He was found not guilty of armed robbery and guilty of voluntary manslaughter. Defendant appeals on evidentiary grounds.

Attorney General Edmisten, by Associate Attorney Walter M. Smith, for the State.

Moretz and Moore, by J. Douglas Moretz and G. Hugh Moore, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant brings forward two assignments of error for appellate review. He first charges that the trial court committed prejudicial error when it denied his motion to suppress an out-of-court statement allegedly obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Consideration of this assignment of error requires a review of the totality of the circumstances surrounding defendant's statement. *North Carolina v. Butler*, 441 U.S. 369 (1979). Defendant was arrested on 19 January 1981 in South Carolina and was read his *Miranda* rights. He said he understood them. When subsequently questioned, defendant said only that he thought he needed a lawyer. There was no interrogation. Defendant was then driven to Lee County, North Carolina, and taken to the office of Detective Parker of the Sheriff's Department. Detective Parker told defendant that he would get him a lawyer if he wanted one but that a lawyer would only tell defendant not to make a statement. Parker then told defendant there were a couple of questions he wanted to ask. Defendant asked what the questions were. Parker then read defendant the *Miranda* warnings and defendant signed a waiver of rights form before making the inculpatory statement later admitted at trial over defendant's motion to suppress.

We have carefully considered defendant's contentions and concluded that his Fifth Amendment rights were protected in full. His statement was properly admitted into evidence. We tend to agree with defendant that his statement after his arrest in South Carolina that he thought he needed a lawyer was sufficient to prohibit further questioning at that time, although we uphold the finding of the trial court that it fell short of an assertion of the right to counsel. We conclude that defendant's later submission to questioning after again receiving *Miranda* warnings and signing a waiver form constituted an effective waiver of his right to an attorney. We find the cases cited by defendant to be distinguishable in that none involved a situation in which the defendant's challenged statement was made after *Miranda* warnings and a written waiver of rights without an intervening assertion of the right to counsel.

[2] Defendant's second assignment of error is that the trial court erred in refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. He contends the expert was more qualified than a lay jury to form such an opinion and that his opinion was therefore admissible according to the rule set forth in *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Although defendant has correctly stated the rule, we do not find error in the trial court's conclusion that it was for the jury to ascertain defendant's motive for the killing. Defendant's expert certainly was qualified to give an opinion as to his mental capacity and any mental disorders he may have identified, and the record shows he was permitted to do so. Indeed, the psychiatrist was permitted to testify that defendant had told him he had acted in the belief that the victim was going to kill him and that he had been frightened. We find nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

In the trial of defendant we find

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. DONNIE WHALEY

No. 814SC1301

(Filed 6 July 1982)

Searches and Seizures § 4— nontestimonial identification order—examination to determine visual acuity

A superior court judge erred in entering a nontestimonial identification order to have a defendant charged with involuntary manslaughter examined by a doctor to determine his "visual acuity," since defendant's visual acuity could not have been of any material aid in identifying defendant as the person who was driving the vehicle which caused the victim's death, and such an examination thus did not come within the purview of the nontestimonial identification statutes. G.S. 15A-271; G.S. 15A-273.

State v. Whaley

APPEAL by the State of North Carolina from *Llewellyn, Judge.* Order entered 14 September 1981 in Superior Court, DUPLIN County. Heard in the Court of Appeals on 25 May 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ben G. Irons, II, for the State.

Vance B. Gavin, for defendant appellee.

HEDRICK, Judge.

This is an appeal by the State, pursuant to G.S. § 15A-1445(b), allowing the defendant's motion to suppress evidence obtained pursuant to a "nontestimonial identification order." The record discloses the defendant was arrested and, on 3 August 1981 charged with driving an automobile without a license, failing to decrease speed to avoid an accident, and involuntary manslaughter of April Yvonne Hall. On 19 August 1981, the prosecuting attorney made application to Superior Court Judge Henry Stevens for a nontestimonial identification order to have the defendant examined, pursuant to G.S. § 15A-271, *et seq.*, by Dr. Conrad Faulkner for the purpose of determining his "visual acuity." On 19 August 1981, Judge Stevens issued the order.

On 3 August 1981, in the Superior Court, the defendant waived arraignment, and pleaded not guilty to the charges of operating a motor vehicle without a license, failing to decrease speed to avoid an accident, involuntary manslaughter, and death by vehicle.

On 4 September 1981, defendant made a motion to suppress the evidence obtained pursuant to the nontestimonial identification order, and on 14 September 1981, Judge Llewellyn allowed the motion.

G.S. § 15A-273 in pertinent part provides: "An order may issue only on an affidavit or affidavits sworn to before the judge and establishing the following grounds for the order: . . . (3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense." G.S. § 15A-271 provides: " 'nontestimonial identification' means *identification* by finger-

prints, palm prints, footprints, measurements, blood specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring presence of a suspect [emphasis added]."

We note at the outset that the results of the visual acuity test purportedly made pursuant to the nontestimonial identification order, the evidence sought to be suppressed by the defendant's motion, is not in the record before us, nor was it before Judge Llewellyn when he allowed the motion to suppress.

Judge Llewellyn, in allowing the motion to suppress, concluded that the examination of the defendant by Dr. Faulkner to determine the defendant's visual acuity did not come within the purview of G.S. §§ 15A-271 to -282. We agree.

The obvious purpose and intent of these statutes, G.S. §§ 15A-271 to -282, assuming their constitutionality, is to permit the examination of a suspect pursuant to a nontestimonial identification order only if the results of such examination will be of material aid in determining whether such suspect actually committed the offense charged, assuming that a crime punishable by imprisonment for more than one year had been committed by some person. Manifestly, the focus of these statutes is identification of the suspect as the perpetrator, not a determination of whether the crime has been committed. While the results of an examination to determine the defendant's visual acuity might be of material aid in determining whether he was grossly negligent in the operation of a motor vehicle, we do not perceive how his visual acuity could be of any possible material aid in identifying him as the individual who might or might not have been driving the motor vehicle which caused the death of April Yvonne Hall. Hence, since there was obviously "no identification purpose for the test," the order requiring the test was erroneously entered, and the evidence obtained pursuant to the erroneous order was properly suppressed.

Affirmed.

Judges ARNOLD and WELLS concur.

HOMER JEFFERSON SIZEMORE v. JEFFREY EUGENE RAXTER AND DILLARD EUGENE RAXTER

No. 8127SC1170

(Filed 6 July 1982)

1. **Rules of Civil Procedure § 59— new trial to meet ends of justice**

In a personal injury action in which the jury answered the negligence issue in plaintiff's favor but answered the contributory negligence issue against him, the trial court did not abuse its discretion in granting plaintiff's G.S. 1A-1, Rule 59 motion for a new trial on the ground that "the ends of justice will be met" thereby.

2. **Appeal and Error § 6.8— denial of motion for directed verdict—no immediate appeal**

Interlocutory rulings in the course of trial, such as the denial of defendants' motion for directed verdict, are not immediately appealable.

APPEAL by defendants from *Friday, Judge.* Order entered 22 June 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 11 June 1982.

Defendants appeal from an order granting plaintiff's motion for a new trial.

Roberts and Planer, P.A., by Joseph B. Roberts, III, for plaintiff appellee.

John B. Whitley for defendant appellants.

WHICHARD, Judge.

Plaintiff sought damages for injuries he sustained when struck by an automobile owned by defendant Dillard Raxter and operated by defendant Jeffrey Raxter. The jury answered the negligence issue in plaintiff's favor, but answered the contributory negligence issue against him.

The trial court granted plaintiff's G.S. 1A-1, Rule 59 motion for a new trial. Defendants appeal, contending (1) their motion for a directed verdict on the ground of contributory negligence as a matter of law should have been granted, and (2) the court erred in granting plaintiff's motion for a new trial.

[1] One of the grounds on which the court granted plaintiff's motion was that "the ends of justice will be met" thereby. G.S. 1A-1,

Rule 59(a)(9), permits the granting of a new trial for "[a]ny . . . reason heretofore recognized as grounds for new trial." That justice would be served thereby was, when Rule 59 was adopted, a recognized ground for granting a new trial. *See Walston v. Greene*, 246 N.C. 617, 99 S.E. 2d 805 (1957). The decision "rests in the sound discretion of the trial judge." *Id.* at 617, 99 S.E. 2d at 806. Absent record disclosure of abuse of discretion, "the order is not subject to review on appeal." *Id. See also Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E. 2d 607, 611 (1977); *Atkins v. Doub*, 260 N.C. 678, 133 S.E. 2d 456 (1963); *Byrd v. Hampton*, 243 N.C. 627, 91 S.E. 2d 671 (1956); *White v. Keller*, 242 N.C. 97, 99, 86 S.E. 2d 795, 796-97 (1955); *Strayhorn v. Bank*, 203 N.C. 383, 166 S.E. 312 (1932). No abuse of discretion appears.

[2] Interlocutory rulings in the course of trial, such as the denial of defendants' motion for directed verdict, are not immediately appealable. Defendants' assignment of error to the denial of their motion for directed verdict thus is not reviewable at this time. *Atkins, supra; Byrd, supra; White, supra; Strayhorn, supra.*

Appeal dismissed.

Judges CLARK and WEBB concur.

MARTHA WOODWORTH v. THOMAS WOODWORTH

No. 8112DC1156

(Filed 6 July 1982)

Appeal and Error § 2— notice of appeal given after 10 days—no jurisdiction in appellate court

Where the record reveals that orders from which plaintiff attempts to appeal were entered over one month before notice of appeal was given, under G.S. § 1-279(c) the appellate court obtained no jurisdiction of the appeal since notice of appeal was not given within 10 days after the entry of judgment.

APPEAL by plaintiff from *Hair, Judge.* Orders entered 7 May 1981, 13 May 1981, 11 June 1981, and 16 July 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals on 10 June 1982.

MacRae, MacRae, Perry & Pechmann, by John Pechmann, for the plaintiff appellant.

Blackwell, Thompson, Swaringen, Johnson & Thompson, by E. Lynn Johnson, for the defendant appellee.

HEDRICK, Judge.

Plaintiff purports to appeal from orders entered in open court on 7 and 13 May 1981 denying plaintiff's Rule 12(b)(6) motion to dismiss defendant's motion in the cause, and allowing defendant's motion in the cause modifying a former order of the court with respect to the care, custody, and control of the minor children born of the marriage between the plaintiff and the defendant.

The record reveals, and the plaintiff repeatedly points out, that the orders from which she attempts to appeal were entered in open court on 7 and 13 May 1981, G.S. § 1A-1, Rule 58; yet, notice of appeal was not given until 17 June 1981. G.S. § 1-279(c) provides that notice of appeal must be given within ten days after the entry of judgment. Such notice is jurisdictional, and the appellate court obtains no jurisdiction unless this statute is complied with. *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). The appeal is dismissed.

Dismissed.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 JULY 1982

BANK OF GRANITE v. TATE No. 8125SC1001	Caldwell (80CVD329)	Affirmed
CALDWELL v. BRIGADIER IND. No. 8130DC1169	Haywood (80CVD173)	New Trial
HOFLER v. HILL No. 8115SC1079	Chatham (80SP18)	Reversed & Remanded
MASON v. BURLINGTON IND. No. 8110IC1052	Industrial Commission (H-0708)	Reversed & Remanded
MELTON v. WAGNER No. 8130SC734	Jackson (79CVS44)	No Error
RAMSEY v. NC Farm Bureau No. 811SC1105	Dare (81CVS116)	Reversed
STATE v. BOHANNON No. 815SC1380	New Hanover (80CRS4355)	No Error
STATE v. BUNCH No. 811DC1127	Pasquotank (80CVD290)	New Trial
STATE v. CONYERS No. 8118SC1375	Guilford (81CRS15719)	No Error
STATE v. DRAWDY & BLACK No. 8127SC1414	Gaston (81CRS11429) (81CRS11782)	No Error
STATE v. EASTERLING No. 8118SC1178	Guilford (80CRS40970)	Affirmed
STATE v. HARRIS No. 8118SC1284	Guilford (80CRS47983) (80CRS47984) (80CRS47985) (80CRS47986)	No Error
STATE v. HARRIS No. 8115SC1421	Orange (81CRS3320)	No Error
STATE v. HAULSEY No. 8116SC1368	Robeson (80CRS19857)	No Error
STATE v. HENRY No. 8121SC1243	Forsyth (80CRS50176)	No Error
STATE v. JAMES No. 814SC1356	Onslow (81CRS2442)	No Error

STATE v. JEFFERIES No. 8118SC1382	Guilford (80CRS40986) (80CRS40987) (80CRS40988)	No Error
STATE v. JUSTICE No. 8114SC1318	Durham (81CRS367)	No Error
STATE v. KNIGHT No. 8120SC1303	Richmond (81CRS1891)	No Error
STATE v. MORROW No. 8129SC1383	Rutherford (81CR2148)	No Error
STATE v. OWEN No. 8112SC1374	Cumberland (81CRS9436)	Affirmed
STATE v. PETERSON No. 8112SC1300	Cumberland (81CRS6608)	No Error
STATE v. SMALL No. 8125SC1389	Caldwell (81CRS739)	No Error
STATE v. STEVENS No. 813SC1370	Craven (80CRS14649) (80CRS14651)	Affirmed
STATE v. WALLER No. 817SC1378	Wilson (81CRS1296)	No Error
STATE v. WILKERSON & WILKERSON No. 819SC1384	Franklin (80CRS55) (80CRS127)	Affirmed
STATE v. WILLIAMS No. 8127SC1399	Gaston (81CRS16404) (81CRS16405)	No Error
STATE v. WILLIAMS No. 8127SC1415	Gaston (81CRS9549)	No Error
TASTINGER v. TASTINGER No. 8130DC1175	Macon (80CVD0060)	Affirmed
WHEELER v. GALLOWAY (WHEELER) No. 8110DC818	Wake (77CVD4834)	Modified & Affirmed
YORK v. YORK v. STERLING No. 813SC782	Carteret (80CVS787)	Affirmed
YOUNG v. EDWARDS No. 8124DC1075	Madison (80CVD32)	No Error

NORTH CAROLINA DEPARTMENT OF CORRECTION v. EARL GIBSON

No. 8110SC582

(Filed 20 July 1982)

1. **State § 12— termination of State employee for racial reasons—use of Title VII evidentiary standards proper**

Given the similarity between the language of G.S. 143-422.2 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(3) *et seq.* and the underlying policy of the statutes, it was reasonable for the Personnel Commission to use Title VII standards in a case in which a State employee had reason to believe that his employment was terminated because of his race. G.S. 126-36.

2. **State § 12— dismissed State employee—burden of establishing prima facie case of discrimination**

In an individual discrimination case, the burden of establishing a *prima facie* case of disparate treatment is not onerous. Therefore, where a State employee showed that he was black, that he was discharged from his job, that he was qualified for his job and that three white employees who also failed to make the mandatory supervisory check in a prison were retained while he was dismissed for failing to make supervisory checks, he established a *prima facie* case of racial discrimination in his dismissal.

3. **State § 12— discrimination in State employment—employer's burden of production**

Where a State employee alleged discrimination as the basis of his termination and presented a *prima facie* case, the Department of Correction sufficiently rebutted the presumption by introducing admissible evidence concerning the reasons for the employee's termination.

4. **State § 12— State employee's termination—burden of showing reasons for discharge were pretext for discrimination**

In a Title VII case, once the employee carries the initial burden of establishing a *prima facie* case of racial discrimination and the employer has articulated some legitimate, non-discriminatory reason for the employee's rejection, then the employee must prove that the employer's stated reasons for termination were in fact a pretext for racial discrimination. A black prison employee, who was discharged after failing to make several "flesh" checks of each inmate in a segregation area of a prison and failing to discover an escape of two inmates, met this burden when he showed (1) a conflict in the reasons given by the prison superintendent for his dismissal, (2) 119 inmates had escaped prior to the incident involving this employee without any employees being dismissed, and (3) four white employees testified that they were not certain they always "counted flesh" on their hourly check and also failed to discover the missing prisoners.

5. **State § 12— termination of prison employee—superior court review of Personnel Commission's findings and conclusions—error to reverse**

In an action in which a prison employee alleged racial discrimination as the basis of his discharge from employment, the superior court erred in re-

versing the State Personnel Commission's order finding that the employee should be reinstated where the Commission's findings of fact and conclusions of law were not arbitrary or capricious, they were not made upon unlawful procedures, they were supported by competent, material and substantial evidence when viewed on the record as a whole and where they were conclusive on the reviewing court.

Judge HEDRICK dissents.

APPEAL by respondent from *Godwin, Judge.* Order entered 28 January 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 4 February 1982.

Effective 25 April 1979, respondent, Earl Gibson, was dismissed from his employment as a Correctional Program Assistant-I (CPA-I) with the Sandhills Youth Center of the Division of Prisons of the North Carolina Department of Correction. Alleging racial discrimination, Gibson appealed his dismissal pursuant to G.S. 126-36 and Regulations of the State Personnel Commission. Following a hearing, a hearing officer of the State Personnel Commission, on 18 June 1980, found that Gibson was discriminated against in his dismissal because of race, and ordered reinstatement, back pay, and attorney's fees. On 29 August 1980, the State Personnel Commission adopted the "findings of facts and conclusions of the hearing officer as its own" and affirmed the relief ordered. On 1 October 1980 the Department of Correction filed a Petition for Judicial Review pursuant to the provisions of Article 4, Chapter 150A of the General Statutes. Following a hearing, the Wake County Superior Court, on 28 January 1981, entered an order reversing the decision of the State Personnel Commission and affirming the Department of Correction's action in dismissing Gibson. From the Superior Court order, Gibson appeals.

Attorney General Edmisten, by Assistant Attorney General Richard L. Kucharski, for petitioner.

Lumbee River Legal Services, Inc., by Phillip Wright and Julian T. Pierce, for respondent appellant.

BECTON, Judge.

FACTS

Gibson was dismissed from employment at Sandhills Youth Center (SYC) following an investigation into the escape of two inmates during April 1979 from the segregation area at SYC. The evidence, as it relates to Mr. Gibson, SYC, the escape, and the disciplinary action taken, follows.

Earl Gibson

Gibson, a black male, had been employed as a CPA-I at SYC for fourteen months prior to his dismissal. Superintendent F. D. Hubbard had initially recommended Gibson for employment and described him as an excellent candidate. Prior to his dismissal Gibson had made steady progress in his performance with the Department of Corrections (DOC). He had, in fact, been evaluated on 3 June 1978 and 18 April 1979 and was found to be a satisfactory employee both times.

On 23 April 1979 Gibson was assigned to work the segregation area of SYC. He began work at approximately 11:00 p.m. and worked until approximately 7:00 a.m. on 24 April. His responsibilities included checking each cell once an hour in the segregation area. Prison policy required Gibson to "see flesh" of each inmate at these hourly checks. Gibson was allegedly dismissed based on his failure to assure the presence of two inmates during his shift.

SYC

Sandhills Youth Center is a minimum security prison[1] which houses youthful offenders ages 18 to 21; it does not normally house dangerous inmates. The segregation area of SYC houses inmates who are assigned to either administrative or disciplinary segregation. Inmates are placed in "segregation" in order to house them in a secure facility and in order to remove them from the general population. Although there have been 119 escapes from SYC in the five-year period preceding the escape from the segregation area in April 1979, no person testifying had personal

1. Superintendent Hubbard testified: "I don't think there are any institutions in the State that are more minimum security than Sandhills Youth Center."

knowledge of an escape similar to the one made in April 1979 from a segregation cell.[2]

The Escape

Two inmates, Crumpler and Dunlap, who had been placed in segregation for "being in an unauthorized area" escaped, and this led to Gibson's termination. The escape most likely occurred during the evening of 23 April 1979; it was discovered during the morning of 24 April 1979. Crumpler and Dunlap escaped by making a hole in the ceiling of their cell, going through a heating duct, and thence into the attic and over the roof.

When Gibson reported for segregation duty at 11:00 p.m. on 23 April 1979 he saw, in the segregation cell occupied by Crumpler and Dunlap, that a bed was turned over in the corner with the mattress lying on the floor. The figure of a body was lying on the mattress. On the other side of the cell, Gibson could see part of another bed in the corner although he could not see who was lying on it because the bed was located in a blind spot. Specifically he testified:

> You can't really see all of the corner through the hole in the door. You can peep far enough to see something like the mattress, but you can't really see all the way up the corner. If a man is in the corner, then you won't be able to see him. There were no changes in these circumstances throughout my shift.

Gibson further testified that Gerhard Kunert, the guard who preceded him on duty on the 3:00 p.m. to 11:00 p.m. shift, told Gibson that the cell had been like that for a while and that nothing was wrong. Kunert himself testified that when he came on duty at three o'clock that afternoon, the cell was in the same condition as it was at 11:00 p.m. Kunert testified: "I made my first check around 3:15. The bed was turned over in the cell at that time. I inquired about the bed and was told by the inmate that he wanted to sleep on the floor because it was cooler and better for his back."

2. Apparently there were a few escapes from the segregation area shortly after SYC was opened in 1974; however, Superintendent Hubbard knew of only two escapes "from inside a segregation cell."

Throughout his shift, Gibson saw no change in the cell and assumed that Crumpler and Dunlap were asleep in their beds. He did not see "living, breathing flesh" as he was required.

Gibson served breakfast to the inmates in segregation at the end of his shift the following morning. When he came to the cell of Crumpler and Dunlap, he received no response from either man. He threw a milk carton toward one of the beds, but still no one responded. Gibson then assumed that Crumpler and Dunlap did not want breakfast. He went home at the end of his shift without reporting this incident to his supervisor. Gibson testified: "On previous occasions when I was serving breakfast in segregation, it had been refused quite a few times, at least four or five times."

Carl Smith, the first shift guard on duty in the segregation area who took over for Gibson on the morning of 24 April 1979, did not personally check all of the segregation cells on his 7:30 a.m. check. Rather, he had another employee, Dennis Deese, check a portion of the segregation area, including the area that housed Crumpler and Dunlap. Deese did not see Crumpler or Dunlap and said nothing to Smith about Crumpler's and Dunlap's cell. Smith personally checked all of the cells at 8:30 a.m., but received no response at the cell. After talking to another inmate across the hall from Crumpler's and Dunlap's cell, Smith "bent [his] chest slightly and looked in the hole [in the door and] that is when I saw the bed had fallen over and hit the stool. There was a big hole in the ceiling. . . . Mr. Deese and I went in and he pulled the covers back and it was pillows or blue jeans or some stuff like that."

Disciplinary Action

For his failure to count physical bodies once each hour as required by prison rules throughout his entire eight-hour shift and for his failure to report that he was unable to awake Crumpler and Dunlap for breakfast, Gibson, who is black, was terminated. Angus Currie, the acting supervisor on Gibson's shift, was required to conduct at least one check of the segregation area during Gibson's shift. Currie, who is white, failed to make any checks. He has not been disciplined.[3] For his failure to perform a

3. It was not learned that Currie failed to make any checks until the hearing on 5 December 1979.

proper check of segregation cells by assuring the physical presence of inmates at his 10:30 p.m. check on 23 April 1979, Mr. Kunert, who is white, was given an oral warning with a follow-up letter. For his failure to insure the presence of the two inmates at the 7:30 a.m. check on 24 April 1979, Mr. Deese, who is white, was given an oral warning with a follow-up letter. Carl Smith, who is white and who had Dennis Deese make Smith's 7:30 check, was not disciplined.

Angus Currie also testified about an earlier escape when he and another white guard, O'Neal, were on duty. Currie made one floor check for O'Neal, who was to count inmates hourly, then O'Neal took over. At wake-up time, approximately 6:30 the following morning, O'Neal discovered that an inmate had escaped and found a dummy in the inmate's bed. No disciplinary action was taken against Currie, who is white. O'Neal, a white guard, received a reprimand.

ANALYSIS

Finding no North Carolina case stating the evidentiary standard to be used in the case of a State employee who alleges that he was terminated from his employment because of his race, the Commission used the evidentiary standards developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.* The trial court, while not challenging the use of Title VII evidentiary standards, reversed the Commission and affirmed DOC's decision to dismiss Gibson after concluding that the Commission's decision was made upon unlawful procedure, was affected by error of law, was unsupported by substantial evidence, and was arbitrary and capricious, all in violation of G.S. 150A-51.

For the reasons that follow, we believe (a) that the evidentiary standards developed under Title VII are the appropriate evidentiary standards to be used in employment discrimination cases brought pursuant to G.S. 126-36; (b) that the Commission properly applied the Title VII evidentiary standards to this case and did not shift the burden of proof from Gibson to DOC; (c) that the Commission's decision was not made upon unlawful procedure; and (d) that the Commission's decision was supported by substantial evidence and was not arbitrary or capricious or otherwise affected by error of law.

I

A. Use of Title VII Evidentiary Standards

[1] G.S. 126-36 states in relevant part: "Any State Employee or former State Employee who has reason to believe that . . . termination of employment was forced upon him . . . because of his . . . race . . . shall have the right to appeal directly to the State Personnel Commission." North Carolina's Equal Employment Practices Act, G.S. 143-422.1, *et seq.*, contains the following specific legislative declaration:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race . . . .
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment forments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

G.S. 143-422.2. The relevant part of Title VII states: "It shall be an unlawful employment practice for an employer (1) . . . to discharge any individual . . . because of such individual's race . . . ."

Given the similarity of the language of the State and federal statutes and the underlying policy of these statutes, it was eminently reasonable for the Commission to use Title VII standards in this case. The use of federal standards by our courts, whether developed pursuant to federal statutes or case law, is not new. For example, our courts have looked to federal decisions interpreting the Federal Rules of Civil Procedure, *see Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), and *Connor v. Royal Globe Insur. Co.*, 56 N.C. App. 1, 286 S.E. 2d 810 (1982), and the Uniform Commercial Code, *see Evans v. Everett*, 10 N.C. App. 435, 179 S.E. 2d 120, *rev'd on other grounds*, 279 N.C. 352, 183 S.E. 2d 109 (1971). By way of further example, in deciding a case under North Carolina's Unfair Trade Practices Act, our Supreme Court said: "Because of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the

FTC Act for guidance in construing the meaning of G.S. § 75-1.1." *Johnson v. Insurance Co.*, 300 N.C. 247, 262, 266 S.E. 2d 610, 620 (1980).

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973), is the seminal case setting forth the standard of proof for an individual discrimination case, and the *McDonnell Douglas* evidentiary standards have been used by other state courts.[4] *McDonnell Douglas* involved a three-step process; it sets forth the following "basic allocation of burdens and order of presentation of proof in a Title VII case," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, 67 L.Ed. 2d 207, 215, 101 S.Ct. 1089, 1093 (1981): First, the employee carries the initial burden of establishing, by a preponderance of the evidence, a *prima facie* case of racial discrimination; second, if the employee makes out a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection," *McDonnell Douglas*, 411 U.S. at 802, 36 L.Ed. 2d at 678, 93 S.Ct. at 1824; third, if the employer meets its burden, the employee is given the opportunity to prove that the employer's stated reasons for termination were in fact a pretext for racial discrimination. *Id.* at 802-04, 36 L.Ed. 2d at 677-79, 93 S.Ct. at 1824-26.

1. The Prima Facie Case

[2] "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253, 67 L.Ed. 2d at 215, 101 S.Ct. at 1094. In this case, Gibson needed only to prove by a preponderance of the evidence that he was a member of a racial minority and that he was qualified for his job, "but was rejected under circumstances which give rise to an inference of unlawful discrimination."[5] *Id.*, 67 L.Ed. 2d at 215, 101 S.Ct. at 1094.

4. *Fahn v. Cowlitz County*, 23 Empl. Prac. Dec. (CCH) ¶30986 (Washington 1980); *Kaster v. Independent School District No. 625*, 20 Empl. Prac. Dec. (CCH) ¶30173 (Minnesota 1979); *Smith College v. Massachusetts Com. Against Discrimination*, 18 Empl. Prac. Dec. (CCH) ¶8699 (Massachusetts 1978); *American Motors Corp. v. DILHR*, 8 Empl. Prac. Dec. (CCH) ¶9757 (Wisconsin 1974).

5. Although the *McDonnell Douglas* Court in listing the elements of a *prima facie* case stated that the employee must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications," 411 U.S. at 802, 36 L.Ed.

We reject DOC's contention that Gibson failed to establish a *prima facie* case. Gibson showed that he was black, that he was discharged from his job, and that he was qualified for his job.[6] Gibson also showed that three white employees—Kunert, Deese, and Currie—either failed to make checks of "living flesh" or failed to make mandatory supervisory checks but were nevertheless retained.

> As the Court explained in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577, [57 L.Ed. 2d 957, 967, 98 S.Ct. 2943, 2949-50] (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.

Burdine, 450 U.S. at 254, 67 L.Ed. 2d at 216, 101 S.Ct. at 1094.

2. The Employer's Burden of Production

[3] We must now, under the second prong of the *McDonnell Douglas* test, determine if DOC met its limited burden of rebutting Gibson's *prima facie* case. The burden that shifts to the employer is one of production, not persuasion. To rebut the presumption raised by Gibson's *prima facie* case, DOC's "evidence [must raise] a genuine issue of fact as to whether it discriminated against [Gibson]. To accomplish this, [DOC] must clearly set forth, through the introduction of admissible evidence, the reason for [Gibson's] rejection. The explanation provided must be legally sufficient to justify a judgment for [DOC]." *Id.* at 254-55, 67 L.Ed. 2d at 216, 101 S.Ct. at 1094.

The Commission, accepting the reasons offered by DOC for terminating Gibson, namely, that Gibson's conduct constituted

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2d at 677, 93 S.Ct. at 1824, the *McDonnell Douglas* Court was only describing a model for a *prima facie* case based on the particular facts of that case. Indeed, the *McDonnell Douglas* Court stated in footnote 13 that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.*, 36 L.Ed. 2d at 677-78, 93 S.Ct. at 1824.

6. Gibson was rated "satisfactory" in two performance appraisals, the last of which was done less than a week before he was terminated. Moreover, Mr. Simmons testified that Gibson was a good employee.

significantly greater negligence than that of Kunert, Deese and Currie, because Gibson's negligence occurred during his entire shift and because Gibson also failed to investigate suspicious circumstances when he was unable to awake the inmates after throwing the milk carton at the bed during breakfast, found as a fact that DOC met its burden at this stage. For purposes of this appeal, Gibson concedes that DOC met its limited burden of rebutting his *prima facie* case. The fact that DOC produced more evidence than it needed to produce at this second stage is understandable;[7] however, it does not end the inquiry.

3. The Employee's Burden of Showing Pretext

[4] When an employer meets its burden of production by articulating a legitimate, non-discriminatory reason for discharge of an employee, the factual inquiry proceeds to the third step, and the employee has the burden of showing, by a preponderance of the evidence, that the reasons given for his discharge were pretexts for discrimination. Thus, in the case *sub judice*, Gibson retained the ultimate burden of persuading the Commission that he had been the victim of racial discrimination. And what must Gibson show if he is to prevail? "[Gibson] may succeed . . . either directly by persuading the court that a discriminatory reason *more likely* motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 67 L.Ed. 2d at 217, 101 S.Ct. at 1095 (emphasis added).

The analytical framework—the three-step progression—in *McDonnell Douglas* is obviously based on a practical realization that direct evidence of discriminatory motive or intent is difficult to find. Discriminatory motive is peculiarly within the mind of the discriminator. Or, to quote a noted commentator:

> Perhaps the most striking feature, then, of contemporary race discrimination law is that it typically concerns conduct

7. Employers often seek to prove their case at the second stage rather than to wait to disprove the employee's case at the third stage. As stated in *Burdine*, "although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation." *Id.* at 258, 67 L.Ed. 2d at 218, 101 S.Ct. at 1096.

in which race as such is never mentioned. This is even more true of race than of sex discrimination . . . .

This transition from overt to subtle is observable, not just in employment discrimination, but in every category of race discrimination. Thus, no one bars blacks by name from a housing development; the issue rather takes such forms as the question whether zoning restrictions in effect exclude a disproportionate number of blacks. No one stands in the doorway of a restaurant with a pick handle to repel any blacks who might try to enter; the controversy shifts to such problems as whether the same effect is obtained by the private club device.

Larson, Employment Discrimination, § 66.11 (1981).

Recognizing then that an "admission of discriminatory intent is unlikely and [that] such intent would ordinarily have to be found by a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available,' " *Hoard v. Teletype Corp.*, 450 F. Supp. 1059, 1067 (E. D. Ark. 1978), and recognizing further that the hearing officer has "the task of evaluating the objectivity, sincerity, and honesty of the witnesses to arrive at a necessarily objective conclusion," *Long v. Ford Motor Co.*, 496 F. 2d 500, 506 (6th Cir. 1974), we review the evidence that was presented to the hearing officer.

In his Order, the Hearing Officer stated:

Mr. Gibson has shown that Mr. O'Neal, a white correctional officer, failed to make a proper check (see living, breathing flesh) on several rounds during a night shift which resulted in an escape of an inmate from a non-segregation area and that Respondent only reprimanded Mr. O'Neal for this offense. . . . It is difficulty [sic] to rationalize or comprehend the justification for retaining an employee who missed several checks and was presumably responsible for an escape simple [sic] because he later discovered the escape. . . . It is understandable how an employee could overrely on the supposedly "escape proof nature" of the segregation area, but not necessarily excusable. . . . It is not so easily understandable how an employee could fail to conduct proper checks in an area of the Center where he knew inmates could readily effect an escape.

We believe this is the kind of evidence the Supreme Court had in mind when it stated: "Especially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nonetheless retained. . . ." *McDonnell Douglas*, 411 U.S. at 804, 36 L.Ed. 2d at 679, 93 S.Ct. at 1825. It should be noted that *McDonnell Douglas* refers to acts that are of "comparable seriousness;" it does not require the "acts" to be the same.

On the basis of the Hearing Officer's statement quoted above, DOC contends that the Commission "shifted the focus from requiring Mr. Gibson to prove discriminatory motive to requiring DOC to prove the absence of discriminatory motive by showing a 'compelling justification' for the difference in treatment." DOC's suggestion that an employer has no burden of showing "a compelling justification" for the difference in treatment it accords employees is, of course, true. However, no such burden was placed on DOC in this case. First, the Commission rejected DOC's proffered reasons for treating Gibson and O'Neal differently on credibility grounds. The Commission concluded that DOC had just cause to dismiss both employees and specifically found "the distinction illusory." Exercising its inherent function to determine the credibility and weight of evidence, the Commission also stated: "It is difficulty [sic] to rationalize or comprehend the justification for retaining an employee who missed several checks and was presumably responsible for an escape simple [sic] because he later discovered the escape." Second, Gibson had the burden of showing that DOC's proffered explanation was a pretext, or, stated differently, that DOC had no justification for retaining O'Neal and firing Gibson. Stating throughout its Order that this ultimate burden remained with Gibson, the Commission, without putting a burden of showing compelling justification on DOC, stated further:

> When just cause exists to terminate an employee and absent some compelling justification for his retention, the employee should be dismissed. Yet, no compelling justification can be raised for the instant aberration (Mr. O'Neil's retention) . . . . [T]he Commission can reasonably conclude that, in the absence of some compelling justification for the difference in treatment of the two employees, [DOC] discriminated against [Gibson] due to his race.

Significantly, the Commission was not limited to a comparison of the treatment accorded Gibson and O'Neal. *McDonnell Douglas* does not require Gibson to rely solely on new evidence at the third stage in order to show a "pretext." The evidence establishing a *prima facie* case when combined with testimony elicited on cross examination of defendant, may be sufficient to show the "pretext." As noted in *Burdine*:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

450 U.S. at 255, n. 10, 67 L.Ed. 2d at 216, n. 10, 101 S.Ct. at 1095, n. 10.

In this context it is to be remembered that Gibson presented evidence that three fellow white employees, Kunert, Deese, and Currie, failed to conduct a proper check of the cell which housed inmates Crumpler and Dunlap during the night and morning of the escape; that the segregation unit at SYC was generally considered escape-proof;[8] that SYC had experienced 119 escapes in

8. Superintendent Hubbard testified that a lattice work of rods was above the plaster ceiling in the segregation area "*except*, at that time, where the vent came through the bars. *The bars did not join at that one point . . . over the cell Crumpler and Dunlap were in.*" (Emphasis added.)

Gibson testified that he did not think it necessary always to see flesh since he was told that the segregation area was secure. He testified: "Since I have been here I have asked some of the more experienced men, Mr. Martin and Mr. Person, and they told me about the ceiling, that there were beams or whatever. There was a wire or something going across the top. I have asked them before if anybody had every [sic] escaped out of the top or if they could, but I was told that in the ceiling there was security in all the cells. So I didn't have any reason to suspect anybody of getting out. I figured the only way they could come out was through the door or the windows. I was not aware of the gap in the barwork at the heating duct over Crumpler and Dunlap's cell."

five years; that no one had been fired because of an escape; that Superintendent Hubbard recalls only two dismissals on the basis of negligent conduct from SYC, one being Gibson and the other being Eddie Pride, a black CPA-I who was dismissed for sleeping on the job. (Pride appealed his dismissal and was later reinstated.) Again, separate and apart from a hearing officer's duty to consider all the evidence in determining whether an employer's stated reasons for dismissing an employee were in fact a cover-up for what was in truth a discriminatory purpose is the obligation placed on hearing officers to determine the credibility of witnesses and the weight to be accorded the evidence.

The following example shows why we must give great deference to the finder of facts' subjective judgments based on credibility. At the hearing, and in a memorandum dated 28 April 1979, Superintendent Hubbard suggested that Gibson was not dismissed because of the escapes, but rather, because he failed to count residents in the segregation cells during his entire 8-hour shift and because he failed to react appropriately to a suspicious situation when the inmates failed to show signs of life at breakfast. On 25 April 1979, the morning after the escape, Gibson talked to Superintendent Hubbard. Gibson testified:

> In the beginning, the escape was the reason I got from Mr. Hubbard when I was dismissed. . . . I guess when the administration found out they didn't know what time Crumpler and Dunlap escaped, they had to find another reason to fire me. I just don't believe I was dismissed for failure to see flesh and make the count because other people have made the same mistake. . . . Mr. Kunert says he failed to make one count. If the inmates left between 7:30 and 8:00, he had to fail to make the count more than that . . . Dunlap said they left between 7:30 and 8:00.

(Superintendent Hubbard himself admitted that after Dunlap was recaptured, Dunlap gave a statement that he escaped between 7:00 p.m. and 7:30 p.m. on 23 April 1979.) In further support of Gibson's contention that he was initially told that he was fired because of the escape, Gibson introduced Superintendent Hub-

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Similarly, Kunert testified, "I was under the impression that when they were in segregation they couldn't escape." Simmons, the second shift supervisor, testified: "I did not foresee that they would make an escape of the type they did."

bard's initial memorandum to him dated 28 April 1979 stating, in relevant part, that "this action is deemed necessary and . . . your negligence is most serious as proven by the escape of two medium custody felon inmates assigned to segregation and this not learned until after your tour of duty." On the basis of this conflict in the evidence and considering the facts (a) that 119 inmates had escaped prior to the incident involving Gibson without any employees being dismissed, and (b) that four white employees—Smith, Kunert, Currie and Haley—testified that they were not certain they always "counted flesh" on their hourly checks, the hearing officer may not have given credence to DOC's proffered explanation for the difference in treatment. Moreover, on the issue of racial discriminatory motive, the hearing officer may have treated as significant Superintendent Hubbard's initial comment to the following question: "If race was a factor in your decision to dismiss Mr. Gibson, would you testify to that fact?" Superintendent Hubbard's response was, "It depends on how big a man I am."[9]

For the foregoing reasons, we hold that the evidentiary standards developed under Title VII are the appropriate evidentiary standards to be used in employment discrimination cases brought pursuant to G.S. 126-36, and that the Commission properly applied the Title VII evidentiary standards to this case without shifting the burden of proof from Gibson to DOC.

II

[5] Having shown that the appropriate legal standards were correctly applied by the Commission in this case, we turn to Gibson's second argument—that the trial court exceeded the proper scope of its review when it reversed the Commission and held that the Commission's decision was (a) unsupported by substantial evidence; (b) arbitrary and capricious; (c) made upon unlawful

9. On re-direct examination by DOC's lawyer, the following exchange took place:

Q. You were asked if race played a part in your decision, would you admit that. Your answer, "It depends on how big a man I am." I need to know how big a man are you? Would you admit that?

A. Yes, I would. No, I wouldn't. I wouldn't have any reason to be sitting here right now. If I would admit it, you know . . . I don't think I could be where I am for that matter.

procedures; and (d) affected by error of law, all in violation of G.S. 150A-51. Gibson's second argument clearly sets forth the issues presented for review. The parties, by couching the issues in the language of G.S. 150A-51, have clearly delineated the scope of our review. *See Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E. 2d 232, 236 (1981). Having thoroughly reviewed the record, we agree with Gibson.

> When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. § 150A-51, . . . the findings of fact made by the administrative agency, if supported by competent, material and substantial evidence when viewed on the record as a whole, are conclusive upon the reviewing court.

In re Faulkner, 38 N.C. App. 222, 225-26, 247 S.E. 2d 668, 670 (1978). The trial court is not allowed to "weigh the evidence presented to the [Commission] and substitute its evaluation of the evidence for that of the [Commission]." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E. 2d 752, 761 (1975).

G.S. 150A-51, the general judicial review statute, allows trial courts to reverse a decision of state boards, commissions, and agencies if the decision is "[u]nsupported by substantial evidence . . . in view of the entire record as submitted. . . ." G.S. 150A-51(5).

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C.L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp., supra.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly

> detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp.*, . . .

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

By definition, then, the whole record test is generally used in cases in which there is conflicting or contradictory evidence. Thus, in *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 405, 269 S.E. 2d 547, 564, *pet. for rehearing denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980), our Supreme Court was unwilling to hold as error the Insurance Commissioner's reliance on uncontested evidence presented to him, saying: "Unlike *Thompson v. Wake County* . . . and *In Re Rogers* [297 N.C. 48, 253 S.E. 2d 912 (1979)], where the Court was concerned with conflicting and contradictory evidence, the expert witness's testimony here with respect to unaudited data was not contradicted." When an administrative body finds a fact in accordance with the uncontradicted evidence, little remains for the reviewing court to do, other than to "find no error in the [administrative body's] election to accord the necessary weight and credibility to the testimony. . . ." *Comr. of Ins. v. Rate Bureau*, 300 N.C. at 406, 269 S.E. 2d at 565.

Even when there is conflicting and contradictory evidence and inferences, "it is for the administrative body, in an adjudicatory proceeeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and appraise conflicting and circumstantial evidence. [Citation omitted.] *Id.*, 269 S.E. 2d at 565. Therefore, "[t]he 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979).

In this case, the trial court concluded that the Commission rendered a decision unsupported by substantial evidence and acted arbitrarily and capriciously to the extent that the Commission's decision was affected by its failures (a) to consider uncon-

tradicted evidence which, according to the trial court, showed an absence of discriminatory motive, (b) properly to consider certain specified findings which, in the view of the trial court, tended to negate the allegations of discriminatory motive, and (c) to accept Superintendent Hubbard's reasons for the difference in treatment between O'Neal and Gibson.

We discuss the trial court's concerns *seriatim*. Here follows the only "uncontradicted evidence, not considered by the Commission" that the trial court included in its Order:

> That respondent had made steady progress with the department before his dismissal; that 41% of the work force at the center was Negro; that the Superintendent of the center had written a favorable letter recommending respondent's initial employment; that respondent had received training identical to that of all other correctional officers.

Our review of the Commission's Order reveals, contrary to the trial court's suggestion, that the Commission found and concluded that Gibson made steady progress with the Department before his dismissal and further noted that Gibson received training identical to that of other correctional officers. And while it is true that the Commission did not specifically find that 41% of the work force at the Center was black and that Superintendent Hubbard wrote a favorable letter recommending Gibson's initial employment, it would take, in Gibson's words, a "quantum leap of logic" to say that those two factors were not considered by the Commission and to then hold that those two factors constitute the sufficient evidence necessary to negate the Commission's finding of racial discrimination. It suffices to say that the racial make-up of the Center and the favorable letter of recommendation may have resulted from several factors, including an affirmative action program, and may have nothing to do with an individual discharge case. The weight, if any, to be given to this evidence was a function of the Commission, not the trial court.

We turn now to the following specific findings by the Commission, which, in the trial court's view, tended to show no discrimination: "that Gibson was guilty of the acts charged; that the acts constituted just cause for dismissal; and that Gibson was treated fairly with respect to two white employees who were involved in the situation which precipitated respondent's dismissal."

It suffices to point out that these three facts were obviously considered by the Commission which listed them as findings of fact and which used them in its second step *McDonnell Douglas* analysis (*see* Part IA.2., *supra*). Again, on what, for purposes of this appeal, was uncontradicted and unchallenged evidence, the trial court's judgment on these matters usurps the Commission's authority. This the trial court is not allowed to do under the guise of the whole record test.

Finally, the trial court takes issue with the Commission's ultimate conclusion that Gibson carried his burden of proving racial discrimination. The trial court, taking as true Superintendent Hubbard's explanation for treating Gibson and O'Neal differently, concludes, *a fortiori*, that Superintendent Hubbard did not make an unreasonable management decision when he disciplined Gibson more harshly than O'Neal. Again, the testimony concerning both Gibson's and O'Neal's failures to check "living, breathing flesh" during their tour of duty, including, but not limited to, the number of checks each person missed and the differences between the segregation area and the dormitory area at the Center, was uncontradicted. Neither this Court nor the trial court is compelled to accredit Superintendent Hubbard's proffered reason for the difference in treatment. This is especially true in this case in which we have to determine not what happened, but why something happened. The Commission, hearing the evidence and observing the demeanor of witnesses, was in a much better position than those of us who review "cold" records to determine what the uncontested facts show.

The Commission's findings of fact and conclusions of law were not arbitrary or capricious; they were not made upon unlawful procedures. They were supported by competent, material and substantial evidence when viewed on the record as a whole, and they are conclusive on the reviewing Court.

For the reasons stated, the Order of the trial court is reversed and the case is remanded to the Superior Court for entry of an Order reinstating the Order of the State Personnel Commission.

Reversed and Remanded.

Judge HILL concurs.

Judge HEDRICK dissents.

MARGUERITE OWENS HARRELL, BY HER PARENTS ALLEN W. HARRELL AND IRENE BURK HARRELL v. WILSON COUNTY SCHOOLS, DR. W. O. FIELDS, JR., SUPERINTENDENT AND NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, DR. A. CRAIG PHILLIPS, SUPERINTENDENT

No. 817SC793

(Filed 20 July 1982)

1. **Schools § 10— free appropriate public education for handicapped children— most appropriate education not required**

Statutes requiring a free appropriate publicly supported education for handicapped children, G.S. 115-363 and 20 U.S.C. 1400(c), do not require a local school agency to provide a handicapped student with the most appropriate education. Therefore, the decision of a county school system to place a 13-year-old hearing impaired child in a regular sixth grade class with support services rather than to provide a grant to subsidize the child's education at an out-of-state residential institution was not affected by error of law.

2. **Schools § 10— hearing impaired student—individualized educational program—predisposition of consultant to mainstream handicapped students**

A hearing impaired student was not denied due process because a consultant for programs for the hearing impaired in the public schools of North Carolina with a preference for mainstreaming hearing impaired students rather than putting them in residential facilities served on the committee which developed an individualized educational program for the student.

3. **Schools § 10— hearing impaired student—individualized educational program—compliance with rules and regulations**

A county school system substantially complied with relevant State and federal rules and regulations requiring a multi-disciplinary diagnosis and evaluation in developing an individualized educational program for a hearing impaired student. Furthermore, the decision of the school system to place such student in a regular sixth grade class with support services rather than to provide a grant to subsidize the child's education at an out-of-state residential institution was supported by substantial evidence under the whole record test and was not arbitrary and capricious. G.S. 115-375; 16 NCAC 2E. 1510.

Judge WELLS concurs in the result.

APPEAL by plaintiff from *Stevens, Judge.* Judgment entered 27 February 1981 in Superior Court, WILSON County. Heard in the Court of Appeals 31 March 1982.

Harrell v. Wilson County Schools

This appeal questions whether the Wilson County School System properly determined that a 13-year-old hearing impaired child would receive a free appropriate education by placing her in a regular sixth grade class within the Wilson Public Schools instead of providing a grant to subsidize the child's education at an out-of-state residential institution.

Hopkins & Allen, by Janice Watson Davidson and Grover Prevatte Hopkins, for plaintiff appellant.

Rose, Jones, Rand & Orcutt, P.A., by Z. Hardy Rose and L. Patrick Fleming, Jr., for defendant appellees.

BECTON, Judge.

I

On 17 July 1978, the parents of Marguerite Harrell, a hearing impaired child, applied to the Wilson County Schools for a grant, pursuant to G.S. 115-363 (1977), to cover the cost of sending Marguerite to the Central Institute for the Deaf (CID) in St. Louis, Missouri. CID is recognized as one of the leading institutions in the world which teaches deaf children. It emphasizes an oral program which prepares students for entry into mainstream society. When the grant was initially denied in 1978, the parents elected to send Marguerite back to CID for the 1978-79 school year at their own expense.

In determining how to fulfill its duty under G.S. 115-363, *et seq.* (1977) and 20 U.S.C. 1401, *et seq.*, the school system evaluated Marguerite's needs and, thereafter, determined if the Wilson School System could satisfy her needs. A committee formed to evaluate Marguerite developed an Individualized Education Program (IEP) for Marguerite which provided that she be placed in a regular sixth grade class with support services.

Being dissatisfied with the recommendation of the committee, the parents appealed the decision. The matter was heard on 11 October 1978 before George S. Willard, Jr., who affirmed the decision of the committee. The parents appealed that decision, and, at a State Review Hearing on 20 December 1978, the decision to place Marguerite in the Wilson School System was again affirmed. The parents then appealed that decision to the Superior Court of Wilson County. Judge Stevens, making findings of fact

and conclusions of law, affirmed the administrative decisions to place Marguerite in the public schools. From the adverse decision by the superior court, the plaintiff appeals to this Court.

II

SCOPE OF REVIEW

Our scope of review on this appeal of an administrative agency decision is determined by the "issues presented for review by the appealing party." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E. 2d 232, 236 (1981).

In *Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 463-64, 276 S.E. 2d 404, 408-09 (1981), our Supreme Court said:

> Under the APA, a reviewing court's power to affirm the decision of the agency and to remand for further proceedings is not circumscribed. However, the court may reverse or modify only if
>
> > the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
> >
> > (1) In violation of constitutional provisions; or
> >
> > (2) In excess of statutory authority or jurisdiction of the agency; or
> >
> > (3) Made upon unlawful procedure; or
> >
> > (4) Affected by other error of law; or
> >
> > (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
> >
> > (6) Arbitrary or capricious.

G.S. § 150A-51 (1978).

On this appeal, the plaintiff presents three arguments: (1) that during the assessment, evaluation and placement of Marguerite, the school committee did not comply with due process of the applicable federal and State regulations; (2) that the

IEP developed for Marguerite is not responsive to her special needs as required by federal and State statutes and regulations; and (3) that the school system failed to provide the most appropriate education for Marguerite. These arguments therefore present the following issues under G.S. 150A-51: (1) whether the actions of the school system were in violation of constitutional provisions; (2) whether the decision by the school system regarding an appropriate education for Marguerite was affected by error of law; (3) whether the decision was arbitrary and capricious; and (4) whether the decision was supported by substantial evidence.

III

APPROPRIATE EDUCATION

[1] We address first the plaintiff's argument that G.S. 115-363 (1977) and 20 U.S.C. 1401 *et seq.* require the local school agency to provide a handicapped student with the most appropriate education. We disagree.

G.S. 115-363 (1977) provides that "[t]he policy of the State is to provide a free appropriate publicly supported education to every child with special needs." The federal statute likewise provides that "[i]t is the purpose of this chapter to assure that all handicapped children have available to them, . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. 1400(c) (1982 Cum. Supp.). Title 16 of the North Carolina Administrative Code Chapter 2, subchapter E section 1501(c) provides that a free appropriate public education is special education related services which:

> (1) are provided at public expense, under public supervision and direction without charge;
>
> (2) meet the standards of the state education agency;
>
> (3) are provided in conformity with an individualized education program.

The federal statute defines free appropriate public education as special education and related services which

> (A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State Educational Agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. 1401 (18).

While there are no State cases interpreting our State provisions, the United States Supreme Court recently interpreted the federal provision to mean a free appropriate education, not the best or most appropriate education. *Board of Education v. Rowley,* 50 U.S.L.W. 4925 (28 June 1982). Specifically, with regard to the federal statute the *Rowley* Court said:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free apropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

50 U.S.L.W. at 4932-33.

Although our statute was designed, in part, to bring the State in conformity with the federal statute, *see* G.S. 115-363 (1977), the *Rowley* Court's interpretation of Congress' intent does not control our interpretation of our General Assembly's intent. We believe that our General Assembly "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possi-

ble." *Rowley*, 50 U.S.L.W. 4925, 4936 (White, J., dissenting). Under this standard a handicapped child should be given an opportunity to achieve his full potential commensurate with that given other children.[1]

Nothing we have said, however, helps the plaintiff on the facts of this case. Our statute, as progressive as it may be, was not designed to require the development of a utopian educational program for handicapped students any more than the public schools are required to provide utopian educational programs for non-handicapped students. We believe that the Wilson County School System has fulfilled its obligation to provide Marguerite with a free, appropriate education. We, therefore, hold that the decision was not affected by error of law and overrule this assignment.

IV

DUE PROCESS

[2] Plaintiff argues that she was denied due process of law because she was not provided with a fair tribunal. Specifically, plaintiff argues that because of the presence and influence of Mildred Blackburn, a consultant for programs for the hearing impaired in the public schools of North Carolina with a preference for mainstreaming hearing impaired students rather than putting them in residential facilities, the conferences held to develop Marguerite's IEP were biased. Plaintiff further alleges that Ms. Blackburn's opinions, because of her position, were viewed as expert opinions and were given too much weight. Alleging that this bias prevented the committee from considering that the CID residential facility was the most appropriate place for her, the plaintiff contends that the rules and regulations under which the IEP were developed were also violated. We disagree.

First, the parties agreed at the hearing on 11 October 1978 that the required due process procedures had been adequately followed prior to and during the hearing. The State Review hear-

1. Chapter 115, under which this action was brought, was rewritten by Session Laws 1981, c 423, s.1, effective 1 July 1981, and has been recodified as Chapter 115C. In Chapter 115C, the General Assembly clearly spelled out its intent by declaring "that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential. . . ." G.S. 115C-106.

ing officer found that all State and federal regulations had been followed in determining the needs of the child. No exception was taken to this finding. Further, the trial court found that the parents had been given notice of the hearings.

Due process requires that an individual receive adequate notice and be given an opportunity to be heard. *In re Moore*, 289 N.C. 95, 101, 221 S.E. 2d 307, 309 (1976). This requirement applies to administrative agencies performing adjudicatory functions. *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970); *Thomas v. Ward*, 529 F. 2d 916 (4th Cir. 1975). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S.Ct. 623, 625 (1955). We are convinced that the notice requirements of due process were met in both the hearings below and in the adjudication in the superior court. We also find no merit to the plaintiff's claim that the "bias" of Mildred Blackburn resulted in a denial of due process.

The mere fact that a member of the panel which developed the IEP for Marguerite had expressed a certain professional opinion on mainstreaming versus residential placement does not result in a violation of due process. First, it is possible for members of boards or agencies to make policy decisions and later perform adjudicatory functions as well. "The fact that an administrative tribunal acts in the triple capacity of complainant, prosecutor and judge is not violative of the requirements of due process." 73 CJS Public Administrative Bodies and Procedure § 60, p. 385 (1951). In *Thompson v. Board of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977), this Court addressed the question of bias on the part of a school board charged both with determining if cause existed for suspension of a teacher and for thereafter determining if the teacher should be dismissed. In finding that no bias or violation of due process existed, the Court relied upon United States Supreme Court cases which addressed the issue of bias and prejudgment on the part of agency or board members.

In *Trade Comm. v. Cement Institute*, 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1948), members of the Commission who had investigated the pricing system of the respondent and suggested that it was illegal were asked to disqualify themselves. The

Supreme Court stated that there was no need for them to do so; the fact that the commissioners had formed an opinion as a result of their prior investigation did not mean that they could not later render an objective opinion. 333 U.S. at 702, 92 L.Ed. at 1035, 68 S.Ct. at 804. The court analogized the role of the Commissioners to that of a trial judge. It reasoned that due process would not require a judge to recuse himself simply because he had expressed an opinion on certain types of conduct. *Id.* at 702-03, 92 L.Ed. at 1035, 68 S.Ct. at 804. In *Hortonville District v. Hortonville Education Assoc.*, 426 U.S. 482, 49 L.Ed. 2d 1, 96 S.Ct. 2308 (1976), the Supreme Court rejected the claim of bias by discharged striking teachers that the School District could not terminate their employment since the Board had been involved as a negotiator during the teacher strike. The Court stated that the fact that the Board was involved in the collective bargaining process did not "overcome the presumption of honesty and integrity in policymakers with decisionmaking powers," and that this involvement was not "the sort of bias" that had disqualified other decisionmakers as a matter of federal due process. *Id.* at 496-97, 49 L.Ed. 2d at 11-12, 96 S.Ct. at 2316.

In the case *sub judice*, Mildred Blackburn participated on the committee to determine Marguerite's IEP. She expressed views against residential placement for children such as Marguerite. This view was contrary to that presented by Marguerite's mother. Mainstreaming and residential placements were two of the alternatives considered by the committee. First, viewing the record under the whole record test, we find that there is competent, material and substantial evidence to support the decision below. Second, the degree of involvement, prejudgment and predisposition of Mrs. Blackburn was far less assuming than that of the FTC Commissioners in *Cement Industries* and of the School Board in *Hortonville Education Assoc.* In view of *Cement Industries* and *Hortonville Education Assoc.*, we find that the predisposition or professional theory which Mrs. Blackburn had, and brought to the Committee, was not enough to constitute bias and a violation of due process.

V

COMPLIANCE WITH STATE AND FEDERAL RULES AND REGULATIONS

[3] We have carefully reviewed the record and find that the school system substantially complied with the relevant federal and State rules and regulations in the development of an IEP for Marguerite. Because we so find, we also find no merit to plaintiff's arguments (1) that she was denied due process of the law due to noncompliance with those regulations; (2) that the decision was not supported by substantial evidence under the whole record test; and (3) that the decision was arbitrary and capricious.

The applicable regulations require that a child for whom special education is provided be identified and evaluated before such services are provided. 16 NCAC 2E.1510. For the hearing impaired student the following screening and evaluation procedures are required:

(a) required screening or evaluation before placement:

(i) education evaluation,

(ii) speech/language evaluation,

(iii) audiological evaluation,

(iv) otological evaluation,

(v) vision screening;

(b) recommended screening or evaluation before placement:

(i) medical screening,

(ii) psychological evaluation,

(iii) adaptive behavior evaluation,

(iv) ophthalmological or optometric evaluation.

16 NCAC 2E.1510(3). After the screening and evaluation has been completed, an IEP must be developed for each child within thirty days of the determination that the child is to receive special educational programs or services. 16 NCAC 2E.1512(g)(3). The IEP is developed by the local educational agency which provides the service to the student. "The entire school-based committee may

or may not be involved." 16 NCAC 2E.1512(b). Chapter 16 of the North Carolina Administrative Code section 2E.1512(b) provides that the persons charged with developing the IEP must include a representative of the local educational agency other than the child's teachers, the child's teacher, the parents, and when appropriate, the child. *See also* 34 C.F.R. 300.344 (1978). However, 16 NCAC 2E.1512(b)(7) provides that:

> For a child with special needs who has been evaluated for *the first time*, the local education agency shall have:
>
> (A) a member of the evaluation team participate in the Individualized Education Program meeting, or
>
> (B) a representative of the local education agency, a child's teacher, or some other person present at the meeting who is knowledgeable about the evaluation procedures used with the child and who is familiar with the results of the evaluation. [Emphasis added.]

Further, the IEP must include the following goals and objectives:

> (1) a statement of the child's present levels of educational performance;
>
> (2) a statement of annual goals;
>
> (3) a statement of short-term instructional objectives;
>
> (4) a statement of specific education and related services to be provided to the child;
>
> (5) a description of the extent to which the child will participate in regular education programs and a description of the program to be provided;
>
> (6) the projected dates for initiation of services and the anticipated duration of services;
>
> (7) objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.

16 NCAC 2E.1512(c). *See also* 34 C.F.R. 300.346 (1978).

Upon review of the record in this case, we find that the Wilson School System conducted the required screening and

evaluation of Marguerite. The IEP committee consulted the following: Paul Speziale, a psychologist; Ray Lamm, Director of Instruction; Rosalie Wooten, Exceptional-Children Teacher; Annie Dickets, a regular Administrative Committee member; Mildred Blackburn, Consultant for the Hearing-Impaired Child, State Department of Public Instruction; Danny Hutto, Assistant Superintendent; Sandra Simmons, Staff Member at Eastern North Carolina School for the Deaf; Diane Parker, Director of Programs for Exceptional Children; Connie Michels, Coordinator of Programs for Hearing-Impaired, Atlantic Christian College; and Irene Harrell, parent. It is noted that not all of the persons listed above attended every conference. The IEP Committee consisted of Diane Parker, Martha Wrenn, and Paul Speziale, who consulted Mrs. Harrell.

The conference reports indicate that several alternatives were discussed at meetings held on 11 August, 22 August, and 28 August 1978 before it was determined that Marguerite should be placed in a regular classroom with support services. The records also show that the observation, assessment and testing to determine Marguerite's needs were all done between 27 July 1978 and 17 August 1978; that the IEP was developed as a result of meetings on 22 August and 28 August 1978; and that the committee made its recommendation on 28 August 1978. Further, our review of the IEP reveals that it includes the goals and objectives required by NCAC 2E.1512(c) and 34 C.F.R. 300.346 (1978). It is clear to us that the school system complied with the applicable regulations.

The plaintiff argues that the school system made a decision to mainstream Marguerite and then proceeded to develop an IEP to suit the mainstreaming. That is, what was offered the plaintiff was what the school system could provide, not what the plaintiff needed. This, the plaintiff maintains, was arbitrary and capricious. We find no merit in this argument. The record indicates that an evaluation was performed prior to a determination of what Marguerite's needs were. Based on the evaluation and assessment the committee determined that Marguerite could be served by enrollment in a regular sixth grade class with support services.

In addition, the decision to place Marguerite in a regular sixth grade classroom is consistent with policies established in

federal and State regulations that handicapped children be educated along with the non-handicapped to the extent possible. *See* 20 U.S.C. § 1412(5)(B); and 16 NCAC 2E.1515(a). This policy has a rational basis to promote a valid state goal; it does not violate due process. Therefore, we do not find this decision to be arbitrary and capricious.

The plaintiff argues that the decision by the school system was erroneous because the school system did not consider Marguerite's records from the CID and because it only used the Peabody Individual Achievement Test. We find no merit in this argument. First, the hearing officer who affirmed the school committee's decision had before him numerous exhibits offered by the plaintiff. Among those exhibits were Marguerite's report cards from CID, an IEP prepared by the private school, and several publications regarding education of deaf children. In addition, the hearing officer considered, and included in his findings of facts, the reports from the Coordinator of the Hearing Impaired Program at Atlantic Christian College, and from an audiologist at East Carolina University. The hearing officer, after considering that evidence and the evidence presented by the school system, issued a Decision and Rationale, which affirmed the placement determination of the school system.

In addition, the regulations do not require, as plaintiff suggests, that the records from the CID, her report cards, and work samples be considered by the committee as it reached its decision. The statutes and regulations require that a multi-disciplinary diagnosis and evaluation be performed by the school system. G.S. 115-375; 16 NCAC 2E.1510. This the school system did. Significantly, the trial court made the following findings of fact to which no exception was made and which are supported by substantial evidence in view of the entire record:

> 5. At a conference on July 27, 1978, including, among others, Dr. W. O. Fields, Superintendent of the school system, and Mrs. Harrell, it was determined that it would be necessary to evaluate Marguerite to determine if the school system could furnish her with an appropriate educational program.
>
> 6. A multi-disciplinary diagnosis and evaluation of Marguerite was made by the respondent. She was assessed

> in all areas related to her disability. The respondent conducted conferences on August 11, 14, 22 of 1978 with the petitioners and various educational experts. After the conferences had been concluded, an individualized education program was developed for the child by the School System.

Further, the local hearing officer also made extensive findings of fact which supported the decision to place Marguerite in a regular sixth grade class.

The plaintiff also argues that the IEP is unresponsive to her needs. Specifically, she argues that the IEP was incomplete in that it did not include a statement of the educational services to be provided for the child and a description of the extent to which the child will be in the regular classroom. The IEP states that the percentage of time to be spent in the classroom and with resource persons was "to be determined by child's needs." While a more specific determination of the above requirements is desired, it is our opinion that on the facts of this case, the answers were sufficient. We note that this IEP was developed between 22 August and 28 August 1978, and that the initial request for funds was not made until 17 July 1978 for the 1978-79 school year. We believe that the school board acted diligently and in good faith in evaluating Marguerite's needs and developing the IEP within this relatively short period of time. We also note that the trial court found that Marguerite was enrolled in the Wilson School System in September 1980 and that she is progressing with her studies.

For the foregoing reasons, the judgment below is

Affirmed.

Judge HILL concurs.

Judge WELLS concurs in the result.

IN RE: CHARLES J. WILLIAMS

No. 8110SC1124

(Filed 20 July 1982)

1. **Municipal Corporations § 9.1— police officer—appeal from failure to promote—issue presented**

The trial court did not err in concluding that the sole issue presented to the Raleigh Civil Service Commission by respondent's appeal from a decision of the chief of police not to promote him to the rank of captain was one of "wrongful discrimination" since such issue encompassed respondent's contention that his nonpromotion was a violation of the merit principle even if it was not attributable to racial discrimination.

2. **Municipal Corporations § 9— Civil Service Commission—no authority to promulgate personnel rules**

The Raleigh Civil Service Commission did not have the authority to promulgate rules setting forth essential elements of the "merit principle" in the promotion of municipal employees, since the Raleigh City Council had the ultimate responsibility for the promulgation of personnel rules.

3. **Municipal Corporations § 9.1— police officer—nonpromotion based upon merit**

Findings of fact made by the Raleigh Civil Service Commission would support only the conclusion that the chief of police relied on merit and fitness in promoting two officers other than respondent to the rank of captain where the findings showed that one promoted officer had been ranked first by a promotion review board, that the second officer's promotion was based on his qualifications for a specific job in the sensitive area of personnel, and that the nonpromotion of respondent was based on oral criticism of his qualifications by two ranking officers, including his immediate commanding officer, and where there was no finding that respondent's overall qualifications for promotion were superior to those of either of the promoted officers and that the chief of police failed to promote him in the face of those superior qualifications.

Judge WELLS concurs in the result.

APPEAL by respondent from *Godwin, Judge.* Order entered 20 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals on 8 June 1982.

The origin of this case may be traced to a letter sent by respondent, a lieutenant with the Raleigh Police Department, seeking an appeal to the Raleigh Civil Service Commission of "the apparent decision of the Chief of Police not to promote . . . [respondent] to the rank of Captain;" essentially, the alleged ground for respondent's appeal was that he was "better qualified for such promotion than the officers who have apparently received it." The petitioner City of Raleigh, and respondent

stipulated that the Raleigh Civil Service Commission had jurisdiction of respondent's appeal, and the Commission conducted an evidentiary hearing thereon.

The Commission made the following findings of fact with respect to the circumstances surrounding the filling of two vacancies for captain in the Raleigh Police Department:

Initially, only respondent's and two other lieutenants' resumes were requested for consideration for the vacancies. Upon the complaints of other lieutenants and their captains, the Chief of Police requested submission of the resumes of all Raleigh police lieutenants. The Chief also asked each captain and major to recommend those lieutenants whom the captains and majors believed to be qualified for promotion to the rank of captain; this request by the Chief was vague and set forth no criteria upon which to base the recommendations, and the Chief's request established no maximum or minimum number of persons to be recommended by each captain or major. Such vagueness resulted in some ranking officers recommending many persons for captain, and others recommending only a few. The recommendation process resulted in the Police Chief narrowing down the number of eligible lieutenants, based on the number of recommendations each received, to six. Respondent was among those six. The Chief of police then submitted this eligibility list of six candidates to a Promotion Review Board consisting of two majors and three captains. In setting up the Board, the Chief established no criteria for membership thereon, and provided its members with no criteria to apply in their evaluation of the six eligible lieutenants. Further, "[t]he Chief neither decided nor announced in advance what, if any, weight would be given to the result of the Board's review." The Review Board adopted the following categories as its own criteria: judgment, attitude, communication skills, leadership qualities, and overall opinion of candidates. Thereupon, the Review Board issued to the Chief a ranking of the six candidates according to their relative qualifications for promotion as follows: (1) Lieutenant Ellis Meekins—First; (2) Lieutenant Charles J. Williams—Close Second; (3) Lieutenant Ernest Lassiter—Third; (4) Lieutenant Curtis Winston—Fourth; (5) Unknown; (6) Unknown.

The remaining pertinent findings of fact are as follows:

17. On April 26, 1979, the Chief then selected for promotion to the grade of Captain, Lieutenant Meekins.

18. On April 26, 1979, Lieutenant Winston was promoted to the rank of "Acting Captain" of grade for which there is no authority in the City Personnel Procedure.

19. Upon retirement in July, 1979, of then Major Bunn, Lieutenant Winston was appointed to the permanent grade of Captain, without any further competition, selection or formal acknowledgment of the latter Personnel action.

20. In selecting Lieutenant . . . [Winston] for promotion, Chief Heineman considered principally his qualifications for a specific job at the Police Academy in the area of personnel.

. . .

22. The apparent preferential treatment extended to the Appellant, Williams, by orally requesting his resume before or without requesting the resumes of other Lieutenants except Lassiter and Diedrich, prejudiced certain ranking officers against him, including his then immediate commanding officer, Captain James Stell. Captain Stell, who, then and now, considers Williams qualified for promotion, failed to recommend him because of his dissatisfaction with the promotion procedure and because of his understanding that he was only requested to recommend two candidates for promotion.

23. In deciding not to promote the appellant, Williams, the Chief relied heavily upon oral criticism of his qualifications by Captains James Stell and Larry Smith, which are contradicted by written Officer Evaluation Reports on Lieutenant Williams which were available at the time of that decision, including the one prepared by Williams' most recent previous commanding officer and which are contradicted by a written Evaluation Report prepared later by Williams' then commanding officer, Captain Stell, but covering the same period in which Stell's oral criticism was allegedly said to have been made.

24. Chief Heineman did not consider the seniority, education, or variety of experience of any candidate in the promotional process.

25. Chief Heineman has no specific recollection of the exact sequence of the events surrounding and included in the promotional procedure and no written record of the sequence of those events.

26. The Chief of Police is the only rank within the Police Department charged with the responsibility of making promotions. Neither Majors nor Captains have the right or responsibility to make promotions.

. . .

28. Lieutenant Charles J. Williams testified that of three Lieutenants who were considered for promotion, the Appellant, Williams, has greater educational qualifications than Meekins and greater tenure than Winston. At the time the promotions were announced, Williams' experience in the Raleigh Police Department had been more varied than that of either of the other two. His testimony was unrebutted.

Upon such findings of fact, the Commission entered the following pertinent conclusions of law:

2. The Raleigh Civil Service Act (Chapter 1154 of the Session Laws of North Carolina, 1971) requires that personnel actions including promotions to the grade of Captain in the Raleigh Police Department be based on the merit principle.

. . .

4. Essential to the concept of the merit principle are that:

(a) Decisions for promotion coincide with the existence of vacancies.

(b) Promotions not be made prior to the existence of a vacancy.

(c) Preferential consideration for future promotion not occur prior to the existence of a vacancy.

(d) Promotions be based upon objective criteria, established and published in advance of the promotional process.

(e) Promotions be the result of a procedure, established and published in advance and said procedure be followed, consistently.

(f) Promotional criteria be based upon reason, that is, that they have a rational basis.

(g) The promotional process be designed to minimize prejudice to all candidates and potential candidates for promotion.

(h) The results of the promotion consideration be announced along with the reason that the successful candidate(s) was/were selected.

5. The process by which Raleigh Police Chief Frederick Heineman selected Lieutenants Meekins and Winston for promotion lacked, in a substantial way, the above essential elements as shown by conclusion of law Number 4.

6. Lieutenant Charles J. Williams was prejudiced and otherwise adversely affected by the failure of such process to include said essential elements in a substantial way.

. . .

9. Lieutenant Charles J. Williams was and is qualified for promotion to Captain.

10. The City of Raleigh has refused to provide the Civil Service Commission competent evidence that either of the Lieutenants—Meekins or Winston—would indeed possess qualifications to be promoted to Captain.

Thereupon, the Commission ordered the City of Raleigh to promote respondent "to Captain at the occurrence of the next vacancy," and to pay him "at the scale of Captain's pay from April 26, 1979, until such date as his status may be changed," and that interest be paid on such back pay.

The petitioner, City of Raleigh, thereupon petitioned "the Wake County Superior Court for a writ of certiorari to review the . . . order" of the Commission. The petition was allowed.

Upon the court's review of the record of proceedings before the Commission, the court concluded that the

> Commission was without authority to promulgate, publish and consider rules which it deemed to be essential elements of the "Merit principle"; . . . that the sole issue presented to the . . . Commission by respondent's appeal to it was whether [the] Chief of Police . . . wrongfully discriminated against respondent when he passed over respondent and promoted Lieutenants Meekins and Winston; . . . that there was no evidence presented to the . . . Commission which would support a finding or conclusion that respondent was wrongfully discriminated against as he was passed over, . . . and that the Commission made no such finding or conclusion.

From the superior court's order reversing the order of the Commission, respondent appealed.

Dawn Stroud Bryant, for petitioner appellee.

William E. Brewer, Jr., for respondent appellant.

HEDRICK, Judge.

[1] The first assignment of error to be treated is respondent's contention that "[t]he Court erred in concluding that the sole issue presented to the Raleigh Civil Service Commission by respondent's appeal to it was whether [the] Chief of Police . . . wrongfully discriminated against respondent when he passed over respondent and promoted Lieutenants Meekins and Winston." The gravamen of respondent's argument under this assignment of error is that the court's ruling limited respondent's appeal to the sole issue of whether he had been a victim of racial discrimination, and that such ruling therefore improperly avoided the question raised by respondent of whether the "merit principle" was violated when other lieutenants were promoted over him.

The "merit principle" to which respondent refers appears in section (b) of the then-controlling Raleigh Civil Service Act, found in 1971 N.C. Sess. Laws Ch. 1154, § 1, which reads as follows:

> *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 because of reasons not related to merit, fitness or availability of posi-

tions, shall have the right, after exhausting all administrative remedies, to appeal his cause to the Civil Service Commission.

Respondent is correct insofar as he suggests that his appeal presented a question of whether his nonpromotion was a violation of the merit principle even if it was not attributable to racial discrimination. He is wrong, however, in contending that the court's limiting the appeal to the issue of "wrongful discrimination" avoided the "merit principle" question. "Discrimination" is defined as follows: "the act or an instance of discriminating: as (1) the making or perceiving of a distinction or difference . . . (2) recognition, perception, or identification esp. of differences: critical evaluation or judgment." Webster's Third New International Dictionary 648 (1968). Hence, an issue of "wrongful discrimination" would encompass the question of whether wrongful differentiations were made by the Chief of Police in his assessments of candidates for promotion; such a wrongful differentiation would be one based on grounds unrelated to merit. The court, in considering the sole issue of wrongful discrimination, therefore did not fail to pass on the "merit principle" issue. This assignment of error has no merit.

[2] The next assignment of error to be considered is respondent's contention that the court's reversal of the Commission's order was predicated on a ground which was erroneous or, if not erroneous, insufficient for reversal. The alleged improper ground for reversal was the court's conclusion that the "Commission was without authority to promulgate, publish and consider rules which it deemed to be essential elements of the 'Merit Principle.' "

The essential elements of the "Merit principle" referred to in the court's order were delineated by the Commission in Conclusion of Law number 4 of the Commission's order, set out *supra*. Respondent argues that the Commission did have the power and authority to delineate these essential elements.

An administrative "agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority." *In re Broad & Gales Creek Community Association*, 300 N.C. 267, 280, 266 S.E. 2d 645, 654 (1980).

Although "[t]he authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and enforcement of a law . . . may be delegated," *Motsinger v. Perryman*, 218 N.C. 15, 20, 9 S.E. 2d 511, 514 (1940), there is nothing in the Raleigh Civil Service Act to indicate that the Commission was conferred the power to delineate the essential elements of the "Merit principle." Rather, the Act vests in the City Council the ultimate responsibility for the promulgation of personnel rules as follows:

> (e) *Personnel Rules.* The officer administering the personnel system shall prepare personnel rules. The City Manager shall refer such proposed rules to the Civil Service Commission which shall report to the Manager its recommendations thereon. The rules including the recommendations of the Civil Service Commission and the recommendations of the City Manager shall be presented to the City Council. The Council upon consideration of the recommendations shall then adopt the official personnel rules.

1971 N.C. Sess. Laws Ch. 1154, § 1. Furthermore, the Commission's "essential elements" require more of a promoting official than is required by the "Merit principle," in that the "essential elements" include procedural requirements as well as considerations of substantive qualifications; *e.g.*, the Commission required that promotional criteria and procedure be established and published in advance of the promotional process. Noncompliance with such procedural details does not necessarily constitute a violation of the "Merit principle," and the promoting official was free to make its promotional decisions as it chose, except for the specific statutory constraints imposed by the Act's "Merit principle" and prohibition of wrongful discrimination. *See* 3 McQuillin, The Law of Municipal Corporations § 12.131 (3d ed. 1982).

The Commission's "essential elements" were therefore unauthorized and not binding on the Chief of Police, and his failure to comply therewith was not *ipso facto* a violation of the "Merit principle" requiring relief from the Commission. Under this assignment of error, however, respondent also contends that even if the Commission's "essential elements" were improper, the court should not have reversed the Commission since the Commission did make findings of fact to support a conclusion that the

true "Merit principle" had been violated. This argument coincides with respondent's final assignments of error and will be discussed thereunder.

[3] The last assignment of error brought forward in respondent's brief is in pertinent part as follows: "[t]he Court erred in reversing and setting aside the Order of the . . . Commission because . . . the conclusions of law are supported by the findings of fact." Notwithstanding his assertions to the contrary, respondent appellant does have the burden of prevailing on this issue, since otherwise the court's order reversing the Commission would have to stand on the basis of its conclusion "that the Commission made no such finding" "that respondent was wrongfully discriminated against."

In resolving this issue, there is a two-fold inquiry. First, there must be a determination of what the statutory "Merit principle" requires in promotions; secondly, there must be a determination of whether the Commission's findings of fact are sufficient to support a conclusion that the "Merit principle" was violated.

The "Merit principle" requires that promotions be made "solely on the basis of merit and fitness." Hence, the condition precedent to any Commission-ordered relief from a City promotion decision is a showing that such decision was based on some consideration other than the candidates' merit and fitness.

The Commission's findings of fact relevant to the Chief of Police's decision to promote Lieutenants Meekins and Winston over respondent are as follows:

Some of the procedures undertaken by the Chief in the promotional process appeared to be favoritism towards respondent, and prejudiced certain ranking officers against respondent; nevertheless, respondent's name was one of six submitted to the Promotion Review Board, and such Board ranked him a close second behind Meekins, and two places in front of Winston. The Chief gave the promotions to Meekins and Winston, notwithstanding respondent's testimony that he had greater educational qualifications and more varied experience than Meekins, and greater tenure and more varied experience than Winston. The Chief "did not consider the seniority, education, or variety of experience of

any candidate in the promotional process." In deciding not to promote respondent, the Chief relied heavily upon oral criticism of his qualifications by his immediate commanding officer, Captain James Stell, and by Captain Larry Smith; these oral criticisms conflicted with contemporaneous written Officer Evaluation Reports, one of which had been prepared by Captain Stell. In selecting Winston for promotion, the Chief considered principally his qualifications for a specific job at the Police Academy in the area of personnel.

These findings of fact are insufficient to support a conclusion that the Chief relied on anything other than merit or fitness in not promoting respondent. There is no finding that the Chief's decision was based on an unwarranted bias against respondent or on an illegitimate favoritism towards Meekins or Winston. Rather, the findings show that Meekins had been ranked first by the Promotion Review Board, and that Winston's promotion was based on his qualifications for a specific job in the sensitive area of personnel. Further, the findings show that the nonpromotion of respondent was based on oral criticism of his qualifications by two ranking officers, including his immediate commanding officer. Finally, the fact that a person of less experience and education than another is promoted over that other does not necessarily imply that the promotional decision was based on considerations other than merit and fitness. In determining which candidate has the most merit and fitness for a job, criteria other than educational degrees, examination scores, and years of tenure are relevant; for instance, the Chief of Police in the present case testified to the importance of considering a candidate's attitude in ascertaining his merit and fitness for a particular position. There is no finding that respondent's overall qualifications for promotion were superior to those of either Meekins or Winston, and that the Chief of police failed to promote him in the face of those superior qualifications. The Commission committed an error of law when it concluded that the facts found by it amounted to a violation by petitioner of the "Merit principle." "Ordinarily, a municipal body, when sitting for the purpose of review, is vested with quasi-judicial powers, and a decision of the board, while subject to review by the courts upon certiorari, will not be disturbed *in the absence* of arbitrary, oppressive, or manifest abuse of authority, or *disregard of the law.*" *Springdale Estates Association v. Wake*

County, 47 N.C. App. 462, 467, 267 S.E. 2d 415, 418 (1980). [Emphasis in original.] In the present case, the Commission did misapprehend the law, and was properly reversed by the superior court on certiorari. This assignment of error is overruled.

The order of the trial court is

Affirmed.

Judge ARNOLD concurs.

Judge WELLS concurs in the result.

GUSTER McCOLLUM v. GROVE MANUFACTURING COMPANY

No. 8118SC966

(Filed 20 July 1982)

1. **Sales § 22— products liability claim against manufacturer—no latent defects and concealed dangers—no breach of standard of care**

In a personal injury action in which plaintiff was struck by a crane designed and manufactured by defendant, plaintiff failed to show any breach of the standard of care owed by the manufacturer where the plaintiff failed to prove the existence of a latent defect or of a danger not known to the plaintiff or other user.

2. **Sales § 22— products liability—restricted visibility of crane—no evidence of latent defect**

Plaintiff failed to show negligence in the restricted visibility afforded the operator of a crane by the design of that crane where he testified that he knew of the restricted visibility of the crane operator and where all people involved in the use of the crane knew of the restricted visibility of the crane.

3. **Sales § 22— products liability—failure to equip crane with warning devices—no duty to do so where defects obvious**

Under our case law which follows the "patent danger" rule, a manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. Therefore, where plaintiff instituted an action to recover damages for injuries sustained when he was struck by a crane designed and manufactured by defendant, his claim based on negligence in defendant's failure to equip the crane with warning devices must fail since (1) the defect in the crane was obvious and (2) plaintiff failed to show that the negligence proximately caused the injuries he sustained.

4. Negligence § 5; Sales § 23— crane not inherently dangerous instrumentality

In an action instituted by plaintiff to recover damages for injuries sustained when he was struck by a crane designed and manufactured by the defendant, plaintiff failed to show that the crane was an inherently dangerous instrumentality where the crane was being used for its intended purpose at the time of the accident and, over a six year period, the crane was involved in only one other accident.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 16 March 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 April 1982.

Plaintiff instituted this action to recover damages for injuries sustained when he was struck by a crane designed and manufactured by the defendant. In his negligence count, plaintiff contends that the crane operator's vision was restricted because of the crane's design; that the crane had no warning devices to alert those working nearby of the crane's movement; and that the crane was inherently dangerous. By separate counts, plaintiff sought to recover from defendant on the theories of strict liability and breach of warranty. Defendant answered, denying the material allegations of the Complaint and asserting, among other defenses, the negligence of the plaintiff and the negligence of the crane operator.

Stanley E. Speckhard and Donald K. Speckhard, for plaintiff appellant.

Bateman, Wishart, Norris, Henninger & Pittman, by Robert J. Wishart, for defendant appellee.

BECTON, Judge.

I

FACTS AND PROCEDURAL HISTORY

The parties stipulated that the plaintiff was struck by a crane on 15 June 1977 while working for Carolina Cast Stone Company, Inc. (Carolina Cast Stone); that the crane had been designed and manufactured by the defendant, Grove Manufacturing Company, in June 1975 and had subsequently been sold to Carolina Cast Stone; and that the crane was in substantially the same condition at the time of the accident as it had been when it left the defendant's possession.

Plaintiff's evidence tended to show that Carolina Cast Stone manufactured heavy pre-cast stones for the building industry, that these stones were stored in vertical positions leaning on A-frames in the company yard, and that cranes were used to move the stones about. The boom of the crane manufactured by defendant was positioned in front of the crane operator and to his right, resulting in a blind spot to the operator. The plaintiff was in the operator's blind spot when struck. At the time of the accident, Charles Mattison was operating the crane, and plaintiff's job was to connect the cable on the boom of the crane to the stones to be moved. Charles Cagle, who was then yard supervisor for Carolina Cast Stone, was standing to the crane operator's left.

Cagle testified that "as the crane approached, [plaintiff] got into a position that disturbed me a bit, and I yelled to [plaintiff] to move but it was too late and he was pinned between the stone and the crane." According to Cagle, the crane operator told Cagle that he had heard Cagle call to the plaintiff and had reacted by hitting both the accelerator and the brakes at the same time. Cagle stated further:

> We customarily used a signal man when engaged in close work. I don't believe the work we were engaged in at the time of the accident could be described as close work. There was no signal man at that time. . . . I was not directing Charlie Mattison, the crane's operator, immediately prior to the accident.

Mattison testified differently. He stated that he was responding to a signal from Cagle as he approached the stone panel. He also testified that the plaintiff came in front of the crane in his blind spot and that he did not see plaintiff. Mattison denied telling Cagle that he had panicked or that he had hit both the accelerator and the brakes at the same time. The crane was on a large concrete pad. Mattison testified, "The right front wheel slipped off of [the concrete] and that's when it hit the panel and that's where I saw [plaintiff]."

Plaintiff testified that the crane stopped and was stationary for a few minutes before he went in front of it, and that "before I knew anything, the crane was on me."

Phillip Joseph Bisesi, an expert in mechanical engineering, testified that the boom was in the center of the crane and that

the cab was behind it to the left of center, resulting in an obstruction to the operator's vision across a 25° angle. He indicated that the front bumper of the crane was 95 inches across and that the operator's vision was obstructed across 60 inches of the bumper, assuming no allowance for any change of position of the operator. Bisesi testified that a curved mirror placed on the front of the crane would enable the operator to see in front of the entire bumper.

At the close of plaintiff's evidence, the defendant moved for a directed verdict, and the motion was allowed. The plaintiff's motion for a new trial was denied, and plaintiff appeals.

II

ANALYSIS

For the reasons that follow, the trial court was correct in granting defendant's motion for a directed verdict and in denying plaintiff's motion for a new trial.

"A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977). On such a motion, the court must consider the evidence in the light most favorable to the plaintiff, taking all evidence which tends to support plaintiff's position as true, resolving all evidentiary conflicts in favor of the plaintiff, and giving the plaintiff the benefit of all inferences reasonably to be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978). All evidence admitted, whether competent or not, must be given full probative force. *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978). The testimony of the plaintiff's witnesses must be accepted at face value. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E. 2d 197 (1973).

(1) The Negligence Claim

[1] The essential elements of an action for products liability based upon negligence include "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury."

City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980).

As to the standard of care, a manufacturer is under a duty to those who use his product to exercise that degree of care in its design and manufacture that a reasonably prudent man would use in similar circumstances. *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967); *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302 (1960). The manufacturer of a machine which is dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. In a case against such a manufacturer, the plaintiff must prove the existence of a latent defect or of a danger not known to the plaintiff or other users. *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170 (1959); *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14 (1957); *Hamel v. Wire Corp.*, 12 N.C. App. 199, 182 S.E. 2d 839, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 687 (1971). Liability may also be imposed upon a manufacturer who sells a product that is inherently dangerous. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960); *Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868 (1960); *Davis v. Siloo Inc.*, 47 N.C. App. 237, 267 S.E. 2d 354, *disc. review denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980). We conclude that the plaintiff's evidence herein failed to show any breach of the standard of care.

a) Restricted Visibility

[2] Plaintiff first alleges negligence in the restricted visibility afforded the operator by the design of the crane. Initially, we note that the evidence tended to show that some restricted visibility is inevitable. Cagle testified: "All cranes have a visibility problem." The plaintiff's expert witness, Phillip Bisesi, testified that the operator's forward visibility could be improved by positioning the boom of the crane behind the operator, but that this would create a visibility problem to the rear. Assuming, *arguendo*, that the positioning of the boom of the crane herein may be held a defect, plaintiff's evidence tended to show that the resulting restricted visibility was a condition known to all people involved in the use of the crane. Plaintiff himself testified as follows:

> To some point I knew that the crane had a blind spot. . . . Part of my job as hookup man was to know where the crane

> was. . . . I guess you would say that it was part of my job to stay out of the way of the crane if it was going to hurt me. I knew there were times when the crane operator couldn't see me but I could see the crane.

Although plaintiff testified that he did not know that he was in the operator's blind spot at the time of the accident, the important point is that he did know of the restricted visibility of the crane operator. Thus, there is no evidence of a latent defect or of a concealed or unknown danger in the design of the crane.

b) Lack of Warning Device

[3] Plaintiff next alleges negligence in defendant's failure to equip the crane with warning devices. He offered evidence that the crane had no bells or lights to warn those nearby of its forward movement. Bisesi testified that the crane operator's visibility could have been improved by placing a mirror on the front of the crane.

Under our case law, a manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. We examine the controlling cases. The plaintiff in *Tyson v. Manufacturing Co.* was looping tobacco on a tobacco harvester. The harvester lurched, and the plaintiff lost her balance and caught her hand between a sprocket and conveyor chain. Plaintiff charged the manufacturer of the harvester with negligence in that the sprockets were inadequately guarded. Our Supreme Court affirmed a judgment of nonsuit in favor of the manufacturer. It wrote:

> In cases dealing with a manufacturer's liability for injuries to remote users, the courts have always stressed the duty of guarding against *hidden* defects and of giving notice of concealed dangers. [Citations omitted.] As was said in *Lane v. City of Lewiston*, 91 Me. 292, 39 A. 999, "no one needs notice of what he already knows."
>
> Plaintiff was experienced in looping tobacco on a tobacco harvester, and had been working on the tobacco harvester on which she was injured most of the summer in 1955, when tobacco was being pulled. There is no evidence of negligence in the design or construction of the machine. Entirely lacking is the slightest evidence that the sprockets and conveyor

> chain on the platform of the tobacco harvester had a latent defect or a danger concealed from plaintiff, or that they were in operation inherently dangerous to her.

249 N.C. at 561-62, 107 S.E. 2d at 173.

In *Kientz v. Carlton*, the plaintiff was injured when his foot went underneath a lawn mower and was struck by the rotating blade. He brought an action against Carlton, for whom he was working at the time, and Sears, Roebuck & Co., who had sold the mower to Carlton. He presented evidence that the mower was not equipped with certain safety features. Nonsuit was granted Sears, and our Supreme Court affirmed, noting in part: "The absence of the several alleged safety features was obvious, not latent." 245 N.C. at 241, 96 S.E. 2d at 18.

Both *Tyson* and *Kientz* cited with approval the New York case of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E. 2d 802 (1950). *Campo*, however, was overruled by *Micallef v. Miehle Co.*, 39 N.Y. 2d 376, 384 N.Y.S. 2d 115, 348 N.E. 2d 571 (1976). Many other jurisdictions have also rejected the *Campo* "patent danger" rule. *See* Annot., 95 A.L.R. 3d 1066, § 3 (1979).

Tyson and *Kientz* remain the law in this jurisdiction. These cases squarely hold that a manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. Since *Tyson* and *Kientz* were decided in the 1950's and since the "patent danger" rule has been overruled in the jurisdiction (New York) in which it had its genesis, our courts and General Assembly may be

> persuaded by reasoning in cases from other jurisdictions to the effect that the law ought to discourage misdesign rather than to encourage it in its obvious form, and that it would be anomalous to hold that a manufacturer had a duty to install safety devices but that a breach of that duty results in no liability, if the danger is obvious, for the very injury the duty was meant to protect against.

95 A.L.R. 3d 1066, 1075.[1]

1. G.S. Chap. 99B, dealing with products liability, became effective October 1979 but does not specifically address the issue raised herein. Moreover, the statutes do not affect pending litigation, and this case was filed in September 1979.

Although the *Micallef* rationale—that the "patent danger" rule (1) encourages manufacturers to be "outrageous in their design," *id.* at 1074; and to eliminate safety devices when hazards are obvious; and (2) places the entire accidental loss on the person injured even though the manufacturer was partly at fault—is particularly compelling,[2] it does not help the plaintiff in this case. For even if we could say that defendant negligently failed to equip the crane with warning devices, plaintiff has nevertheless failed to show that such negligence proximately caused the injuries he sustained. The evidence points unerringly to the conclusion that the crane slipped off of the concrete pad, and that—not the lack of a warning device—caused the plaintiff's injuries.

c) Inherently Dangerous Instrumentality

[4] Plaintiff has also alleged that the crane was inherently dangerous. We disagree. The crane was being used for its intended purpose at the time of the accident. Mattison operated the crane on a daily basis from April 1976 until the fall of 1980 without hitting anyone other than the plaintiff. Carolina Cast Stone began using the crane in the summer of 1975 and was still using it at the time of trial in March 1981. During that time the

2. It should be noted that the "patent danger" rule remains the law in several jurisdictions. *See generally,* Annot., 95 A.L.R. 3d 1066 §§ 4 and 5. For example, interpreting Georgia case law, the Fifth Circuit Court of Appeals wrote:

> Appellant argues that because the New York courts have overruled *Campo,* . . . we should find that *Campo's* rationale no longer stands as the law of Georgia. His reasoning, however, is faulty. Although Georgia courts have adopted *Campo's* holding, they are not controlled by the New York judiciary's subsequent decisions. We, on the other hand, in reviewing this diversity case, are absolutely bound by the decisions of the Georgia courts, one of which recently affirmed the *Campo* approach.

Wansor v. George Hantscho Co., Inc., 595 F. 2d 218, 220, n.7 (5th Cir. 1979) (citations omitted).

Similarly, in an action against the manufacturer of a crane to recover for injuries sustained when the crane came in contact with a power line, the Minnesota Supreme Court, in *Halvorson v. American Hoist and Derrick Co.,* 307 Minn. 48, 57, 240 N.W. 2d 303, 308 (1976), said:

> We hold that American Hoist did not owe this injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that risk was: (1) obvious; (2) known by all of the employees involved; and (3) specifically warned against in American Hoist's operations manual.

crane was involved in only one other accident, and that accident involved the boom hitting a power line. Cagle, who was responsible for supervising safety procedures for Carolina Cast Stone, testified, "[I]n my opinion, the Grove Manufacturing crane was not unusually dangerous for the purpose it was intended, but was only dangerous in the sense that all heavy equipment is dangerous."

We find no evidence that the crane was an inherently dangerous instrumentality. *See generally, Anderson v. Butler,* 284 N.C. 723, 202 S.E. 2d 585 (1974) (forklift held not inherently dangerous *per se*); *Tyson v. Manufacturing Co.* ("Entirely lacking is the slightest evidence that the sprockets and conveyor chain on the platform of the tobacco harvester . . . were in operation inherently dangerous to [plaintiff]." 249 N.C. at 562, 107 S.E. 2d at 173); *Kientz v. Carlton* (evidence held insufficient to show lawn mower inherently dangerous instrumentality).

(2) The Strict Liability and Breach of Warranty Claims

Plaintiff also alleged claims based upon strict liability and breach of warranty in his Complaint. He does not argue in support of these theories on appeal, but we have considered them and find that the directed verdict was proper. In products liability cases, the duty of the manufacturer in tort must be determined by the principles of negligence. We have not adopted the doctrine of strict liability except for a few exceptional situations not applicable herein. *See Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980); *Davis v. Siloo Inc., Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E. 2d 862 (1979). Plaintiff may not recover on a breach of warranty theory since he presented no evidence of an express warranty addressed to him and since he lacks the contractual privity necessary for an action based upon an implied warranty.[3] *See Davis v. Siloo Inc.; Fowler v. General Electric Co.*

The judgment below is

3. Again, because plaintiff filed this suit in September 1979, he cannot take advantage of the Products Liability Act, G.S. Chap. 99B, which became effective 1 October 1979.

Affirmed.

Judge HEDRICK and Judge HILL concur.

JUNIUS THORPE, ADMINISTRATOR OF THE ESTATE OF SHIRLEY ANN THORPE v. CHARLES E. WILSON, JR., ADMINISTRATOR OF THE ESTATE OF ROBERT MANSON WILSON

No. 8110SC874

(Filed 20 July 1982)

1. **Executors and Administrators § 19.1— wrongful death claim—statute of limitations—recovery of automobile liability insurance**

The failure of plaintiff to file a wrongful death claim against a decedent's estate within six months as required by G.S. 28A-19-3(b)(2) as it existed at the time of the accident in question in 1976 did not bar the claim where plaintiff was seeking to collect damages out of an automobile insurance policy, an undistributed asset of the estate.

2. **Pleadings § 34; Rules of Civil Procedure § 15— amendment of complaint—correction of name of party**

Plaintiff's amendment of his complaint in a wrongful death action to name "Charles E. Wilson, Jr." rather than "Charles E. Wilson, Sr." as the defendant administrator related back to the time of the original complaint pursuant to G.S. 1A-1, Rule 15(c) where Wilson, Jr. was the only administrator of the intestate's estate, he was properly served when his mother accepted the documents at his residence even though the name of his father appeared on the complaint, and the effect of the amendment was merely to correct the name of a person already in court.

3. **Death § 7.4— wrongful death—lost income and household services—testimony by expert in economics**

The trial court in a wrongful death case properly permitted an expert in economics to testify as to the present monetary value of the future net income plaintiff's intestate could have earned had she not been killed and the present monetary value of the household services lost to the intestate's parents as a result of her death.

4. **Damages § 11.2— action against personal representative—no punitive damages**

There can be no recovery for punitive damages against the personal representative of the deceased wrongdoer, however aggravated the circumstances may be.

Thorpe v. Wilson

APPEAL by defendant from *Godwin, Judge.* Judgment entered 14 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1982.

Plaintiff in his representative capacity instituted this action on 10 May 1977, seeking recovery of damages for the wrongful death of his intestate Shirley Ann Thorpe. Plaintiff's intestate, Shirley Ann Thorpe, and defendant's intestate, Robert Manson Wilson, were both killed 16 April 1976, in a head-on collision on U.S. 70, approximately five miles west of Raleigh. Plaintiff alleged that the collision resulting in the death of his intestate was caused by the negligence of defendant's intestate.

Charles E. Wilson, Jr. qualified as the administrator of the estate of Robert M. Wilson on 22 April 1976, and published notice to creditors for four weeks beginning 30 April 1976. Russell W. Dement, Jr., wrote to Great American Insurance Company, defendant intestate's automobile liability insurer, and advised that he was representing plaintiff in a claim for wrongful death against the estate of Robert M. Wilson. Mr. Dement was allowed to withdraw as plaintiff's counsel of record seven months after filing the complaint. Eugene Boyce became attorney of record three months later.

A motion by defendant for summary judgment was allowed to the extent that any judgment obtained on behalf of the plaintiff's estate would be barred as against any assets of Wilson's estate except the amounts of any liability insurance coverage applicable to the claim. Defendant's petition for a writ of certiorari to review the order was denied.

Defendant admitted liability, and the case was tried on the damages issue only. The jury returned a verdict for plaintiff in the amount of $85,000. Defendant appeals, bringing forward five assignments of error. Plaintiff sets forth three cross assignments.

Boyce, Morgan, Mitchell, Burns and Smith, by Greg L. Hinshaw and Lacy M. Presnell, III, for plaintiff appellee.

Johnson, Patterson, Dilthey and Clay, by Robert W. Sumner and Robert M. Clay, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant argues, by his first assignment, that plaintiff's wrongful death claim is barred by the six-month limitation provision of G.S. 28A-19-3(b)(2) as it existed 16 April 1976. The applicable statute read as follows in 1976:

> (a) All claims, except contingent claims based on any warranty made in connection with the conveyance of real estate, against a decedent's estate which arose *before* the death of the decedent, including claims of the United States and the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 within six months after the day of the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.
>
> (b) All claims against a decedent's estate which *arise at or after the* death of the decedent, including claims of the United States and the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis *are forever barred against the estate,* the personal representative, the collector, the heirs, and the devisees of the decedent *unless presented* to the personal representative or collector as follows:
>
> > (1) A claim based on a contract with the personal representative or collector, within six months after performance by the personal representative or collector is due;
> >
> > (2) Any claim other than a claim based on a contract with the personal representative or collector, *within six months after the claim arises.* . . .

G.S. 28A-19-3(b)(2) replaced former G.S. 28-113 when it was enacted in 1973. Taken alone, it bars all actions on claims that are

not presented to the administrator within the six-month time limitation. This result was tempered somewhat in 1977, with the amendment of G.S. 28A-14-3 which allowed creditors to maintain claims against the undistributed assets of the estate unless the personal representative has given them personal notice that their claims will be barred if not presented within the required six months. Subsection (i) was added to G.S. 28A-19-3 in 1979, specifically excluding insurance coverage from the six-month statute of limitation.

Defendant argues, because plaintiff's claim arose on 16 April 1976, between the time of the repeal of G.S. 28-113 and the enactment of G.S. 28A-19-3 in 1973, and the amendments of 1977 and 1979, that the administration of Robert Wilson's estate is not affected by the exclusions. He argues that G.S. 28A-19-3(b)(2) applies strictly as it existed on 16 April 1976, barring plaintiff's wrongful death claim as to all of the assets of the estate including undistributed assets. We disagree, having conclusively determined the issue in the case of *Force v. Sanderson*, 56 N.C. App. 423, 289 S.E. 2d 56 (1982).

We held in *Force v. Sanderson, id.*, that the failure of plaintiff to file a claim against a decedent's estate within the six months stipulated by G.S. 28A-19-3 did not bar recovery for wrongful death where plaintiff was seeking to collect damages out of an automobile liability insurance policy. The court, quoting *In Re Miles*, 262 N.C. 647, 138 S.E. 2d 487 (1964), a case which referred to G.S. 28-113, the antecedent of G.S. 28A-19-3, said that

> By the provisions of G.S. 28-113, if a claim is not presented in six months, the representative is discharged as to assets paid. Even if this statute applies to a claim for unliquidated damages, which we do not concede, it would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate and without cost against the administratrix c.t.a. of the Miles estate. *In re Estate of Bost*, 211 N.C. 440, 190 S.E. 756. In our opinion, failure of petitioner to file a claim for unliquidated damages with appellant does not bar his action, where he is seeking to recover damages for an alleged wrongful death of his intestate, and to collect it out of the automobile liability insurance policy issued to Miles, deceased.

Force v. Sanderson, supra at 426, 289 S.E. 2d at 58. *In Re Miles, id.*, was deemed controlling in *Force v. Sanderson*, supra, and we reaffirm its holding here. We do not subscribe to the view advanced by defendant that *Sanderson* was based exclusively upon the *Miles* decision, and that *Miles* is no longer authoritative since based upon repealed G.S. 28-113. On the contrary, the reasoning of *Miles*, acknowledged by the *Sanderson* Court to be based on the predecessor statute, was squarely and properly applied to G.S. 28A-19-3. We agree with plaintiff that the essence of *Miles*, which was that the failure to file a claim against the estate did not bar the wrongful death action because an automobile liability policy is an undistributed asset of the estate, survived the repeal of G.S. 28-113. The cases cited by defendant in his memorandum of additional authority for the proposition that *In Re Miles*, supra, is no longer authoritative, are either inapposite or unauthoritative.

Our resolution of this issue makes it unnecessary for purposes of the assignment to discuss the efficacy or timeliness of the letter sent by plaintiff's attorney on 27 April 1976 stating that he would be representing plaintiff in his wrongful death claim, as presentation of the claim. We decline to hold, however, that Great American Insurance Company was an agent for its insured for purposes of receiving presentation of the claim. Notice was given no one but the carrier. Plaintiff's first cross assignment is overruled.

[2] It is next contended that plaintiff failed to obtain, within the period of two-year statute of limitation for wrongful death, proper jurisdiction over the estate of defendant's intestate because plaintiff named on the summons and complaint Charles E. Wilson, Sr., rather than Charles E. Wilson, Jr., as administrator of the estate. Plaintiff amended his complaint to change the name of the administrator to Charles E. Wilson, Jr., on 31 March 1978, pursuant to Rule 15 of the Rules of Civil Procedure. Defendant maintains, however, that there can be no relation back to the original complaint, as Rule 15(c) does not apply to an amendment that substitutes a new party for the party brought before the court by the original pleadings.

Defendant's argument is without merit. It is clear from the record that Charles E. Wilson, Jr., was properly served when his

mother accepted the documents at his residence even though the name of his father appeared on the complaint. Defendant was the only administrator of Wilson's estate. Indeed, defendant's father was deceased at the time of service. "Names are to designate person, and where the identity is certain a variance in the name is immaterial." *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43, 43 (1896). Errors or defects in the pleadings not affecting substantial rights are to be disregarded. *Id.* If, as here, the effect of amendment is merely to correct the name of a person already in court, there is no prejudice. This is true even though the change relates back to the date of the original complaint. *Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E. 2d 671 (1972). The amendment did not introduce a new defendant or change the cause of action. The assignment is, therefore, overruled.

[3] Defendant asserts by his third assignment that the court erred in allowing into evidence testimony from an economist as to the present monetary value of the future net income plaintiff's intestate could have earned had she not been killed. Defendant first contends that although plaintiff tendered Dr. J. Carl Poindexter, Professor of Economics and Business at North Carolina State University, as an expert, the court did not announce that he was an expert. Defendant then complains that Dr. Poindexter no more than speculated that plaintiff's intestate would have been gainfully employed for the remainder of her life; that he formulated his opinion regarding the present monetary value of future net earnings of an individual such as Shirley Ann Thorpe without any evidence of the amount of expenses she would have incurred; and that his opinion was based only upon an average individual in a class of persons like Miss Thorpe; and, therefore, his testimony was "based upon nothing more than speculation, conjecture and guesswork."

Dr. Poindexter testified in regard to his qualifications, and answered hypothetical questions without objection concerning his competency as an expert. "By admitting the evidence, the Court held in effect that the witness was an expert in the field covered by his testimony." *Apex Tire and Rubber Co. v. Merritt Tire Co., Inc.*, 270 N.C. 50, 54, 153 S.E. 2d 737, 740 (1967). Furthermore, Dr. Poindexter meticulously explained the assumptions, formulae, facts, and figures he used in determining the present monetary value of the future net income of plaintiff's intestate. He indicated

that he eliminated from his computation personal consumption expenses typical of an individual in the statistical category of which Miss Thorpe was a member.

It cannot be said that the judge erred in admitting this testimony. Expert testimony is practically the only evidence available to prove future earnings in a case such as the one at bar. Dr. Poindexter relied by necessity upon probabilities. His testimony, founded upon a large measure of certainty, gave the jury a fair framework within which it could reach a conclusion regarding the possible future earnings of plaintiff's intestate. "The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation." *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E. 2d 342, 348 (1975). Dr. Poindexter's testimony was couched in terms of statistical probability, not possibility, and was some evidence indicating Shirley Ann Thorpe's earning capacity over a period of years. His testimony can only be said to give competent substantiation to the jury's award of damages, and was clearly admissible. Defendant's third assignment of error is overruled.

Defendant argues by his fourth and fifth assignments that the court committed prejudicial error when it allowed testimony regarding the present monetary value of the household services lost to Miss Thorpe's parents as a result of her untimely death. He says that the uncertainty about the number of years that Miss Thorpe would have remained in the home had she lived rendered Dr. Poindexter's testimony on this point so speculative as to render its admission into evidence erroneous. We disagree. Our discussion above pertaining to his third assignment is also applicable here.

Defendant also contends that Dr. Poindexter based his figures upon an average of 80 hours of housework per month, but that the evidence showed Miss Thorpe spent no more than 60 hours a month doing housework. Defendant misapprehends the evidence. Miss Thorpe's father testified that plaintiff's intestate lived at home and spent two to three hours at household chores each day. This amounts to 60 to 90 hours per month. There was also evidence to the effect that because her mother could not drive, Miss Thorpe, at some expense of time, transported her to

the places she needed to go. Dr. Poindexter correctly based his projections upon an average of 80 hours, the minimum hourly wage, and a flexible time frame of five to 20 years which gave the jury the opportunity to decide how long plaintiff's decedent might have remained in the home. The admission of the testimony was not error, nor did the trial judge err in charging the jury that the evidence tended to show that Miss Thorpe performed household services 60 to 90 hours a month.

[4] By his second and third cross assignments, plaintiff contends that the trial court erred by dismissing his claim for punitive damages and in granting defendant's motion in limine precluding plaintiff from making statements, asking questions and offering evidence regarding the claim for punitive damages. The general rule in this and other jurisdictions is that there can be no recovery for punitive damages against the personal representative of the deceased wrongdoer, however aggravated the circumstances may be. *McAdams v. Blue,* 3 N.C. App. 169, 164 S.E. 2d 490 (1968). The sole purpose of the allowance of punitive damages is to punish the wrongdoer. The death of the wrongdoer precludes his being punished by the assessment of punitive damages. By statute, G.S. 28A-18-2(b)(5), plaintiff could recover "Such punitive damages as the *decedent* could have recovered had he survived . . ." but we find no statutory provision allowing the recovery of punitive damages in a case where the wrongdoer does not survive. The punitive damage claim was properly dismissed, and the court correctly allowed defendant's motion in limine. Plaintiff's second and third cross assignments are overruled.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

LACY J. MILLER MACHINE COMPANY, INC., JOSEPH T. BUIE, JR., AND JAMES T. DONLEY v. GARY M. MILLER, INDIVIDUALLY, AND GARY M. MILLER, EXECUTOR OF THE ESTATE OF LACY J. MILLER

No. 8122SC1139

(Filed 20 July 1982)

1. **Corporations § 18.1— stock purchase agreement—issue of book value of corporation—summary judgment improper**

The trial court erred in directing the executor of an estate to convey the deceased's stock to the corporate plaintiff pursuant to a stock purchase agreement where there was an issue as to whether the book value of the corporation, upon which the price of the stock was based, was properly determined according to the agreement.

2. **Corporations § 18.1— stock purchase agreement—tendering payment within time specified—no material breach of agreement**

In an action arising from a stock purchase agreement, failure to tender payment within the time specified in the agreement was not a material breach of the contract where corollary insurance proceeds had not been collected and the ownership of all the stock had not been determined within the period specified in the contract and where the contract provided an outside limit of six months within which tender was made.

3. **Corporations § 18.1— stock purchase agreement—specific performance—no inconsistency in asserting ownership to part of stock**

In an action which evolved from a stock purchase agreement, requesting specific performance of the agreement was appropriate even though plaintiffs asserted ownership to a part of the stock in a separate action since it is not inconsistent to determine first the ownership of the stock before tendering the consideration for it.

APPEAL by plaintiffs and defendant from *Hairston, Judge.* Judgment entered 25 June 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 June 1982.

This is an action involving a stock purchase agreement. Lacy J. Miller who died on 13 May 1980 made an agreement with the corporate plaintiff under which the corporate plaintiff was to purchase Mr. Miller's stock in the corporation after Mr. Miller's death. Gary M. Miller, as executor of the estate of Lacy J. Miller, refused to convey Mr. Miller's stock to the corporation and this action was filed. The plaintiffs alleged several claims and prayed that the corporate plaintiff be adjudged the owner of the stock upon payment to the defendant of $1,357,130.00. The plaintiffs also prayed for judgment for $445,067.00 and $195,034.02. They

base the claim for $445,067.00 on what they contend is an overevaluation of the stock in the corporation. They say there is a contingent liability of the plaintiff corporation in a suit which has been filed against it which should reduce the book value of the stock. They also allege that stock which the plaintiff corporation owns in Carnes-Miller Gear Company, Inc. has been overvalued which further reduces the value of stock in the plaintiff corporation. They base the claim for $195,034.02 on what they contend are advances made by the plaintiff corporation to the estate of Lacy J. Miller. The plaintiff also prayed for damages against the defendant for breach of contract, that the individual plaintiffs each have $5,000,000.00 in punitive damages, and the corporate plaintiff have $10,000,000.00 in punitive damages.

The defendant filed an answer in which he denied the material allegations of the complaint and counterclaimed. In his counterclaim he alleged that the individual plaintiffs had misapplied corporate funds, concealed assets of the corporation and paid themselves exorbitant salaries. He alleged that the plaintiff Buie had usurped a corporate opportunity.

Plaintiffs and defendant made motions for summary judgment. The papers filed in support of the motions for summary judgment established the following: Prior to his death, Lacy J. Miller owned approximately 70% of the stock in the corporate plaintiff. The two individual plaintiffs owned the balance of the stock. The corporation entered into an agreement with the stockholders, which was amended several times, for the purchase of the stock of each stockholder at his death. The first agreement, dated 5 September 1968, was between Lacy J. Miller and the corporation and provided in pertinent part:

> "1. *Death of Stockholder.* In the event of the death of the Stockholder, all of the stock owned by him at his death shall be purchased by the Corporation.
>
> 2. *Purchase price.* The purchase price for the stock (in accordance with the provisions of Paragraph 1) shall be $2.00 per share, unless the book value of the stock shall be greater than $2.00 per share, and if the book value of the stock is greater than $2.00 per share, the purchase price shall be the book value of the stock. The book value shall be determined as of the

last day of the preceding month prior to the Stockholder's death. The book value shall be determined by an independent certified public accountant selected by the president of the Corporation, and the expense of the said accountant shall be paid by the Corporation. The determination of the book value will be made in accordance with sound accounting practice . . . ;

* * *

4. *Payment of the purchase price.* The purchase price shall be paid in cash within 10 days after receipt by the Corporation of the life insurance proceeds collected on life insurance described in Paragraph 3 hereof, but in any event the purchase price must be paid within a period of six months after the death of the Stockholder."

In an amendment to the original agreement the parties by agreement dated 1 January 1970 made the contract binding on the two individual plaintiffs and provided that the price per share would be $5.00 or book value, whichever was higher. In an amendment to the agreement dated 16 May 1973, the parties agreed that the corporation would purchase life insurance to fund the purchase of the stock. It was agreed that the corporation would pay $5.00 per share in addition to the price set by the agreement of 1 January 1970, and it was further agreed as follows:

"(5) Payment of Purchase Price

The purchase price at $5.00 per share shall be paid in Cash out of the insurance proceeds to the Estate of the deceased within thirty (30) days after the qualification of legal representative of such Estate."

After the death of Lacy J. Miller, James T. Donley, the president of the corporate plaintiff, retained W. H. Turlington and Company, a firm of certified public accountants, to determine the book value of the stock. An affidavit by W. H. Turlington was filed in which he said that his firm reviewed the financial statements for the four-month period ending 30 April 1980. He said a review was made rather than an audit because an audit

had been done as of 31 December 1979 by another accounting firm. He stated that for the four-month period from the date of the audit to the date of the review, the figures would not materially differ from what they would have been had an audit been made. W. Leon Rives, a certified public accountant with W. H. Turlington and Company, made an affidavit in which he stated the review conformed to generally accepted accounting principles. W. H. Turlington and Company noted in its review that the corporation carried on its books at costs stock it owned in Carnes-Miller Gear Company, Inc. They said the stock should be carried at equity which would increase its value by $138,000.00. They also noted that the corporation had recorded a provision for liability as the result of litigation in the amount of $500,000.00. The accountants said that in their opinion all the conditions required for accruing this contingent liability had not been met. According to the review performed by W. H. Turlington and Company, the book value of the stock owned by Lacy J. Miller at the time of his death was $1,357,130.00.

The defendant filed an affidavit by Bernard L. Beatty, Associate Professor at the Wake Forest University Graduate School of Management, in which he discussed a review in comparison to an audit. He was somewhat critical of a review but did not say that a review does not conform to sound accounting principles. The defendant also filed an affidavit by Rachel Hailey, a shipping clerk for the corporation, in which she stated that prior to the 31 December 1979 audit that from $300,000.00 to $400,000.00 of finished goods were concealed from the auditors as well as a substantial amount of other material in the inventory.

Prior to tendering the purchase price to the defendant, the individual plaintiffs filed an action in which they contended they owned a certain portion of stock in the corporation that was claimed by the defendant as executor of the estate of Lacy J. Miller. This action was terminated favorably for the defendant.

Some of the insurance proceeds were not collected for several months after Mr. Miller's death. On 11 November 1980 the plaintiffs tendered $1,357,130.00 to the defendant and asked for delivery of the stock which had been owned by Mr. Miller to the corporation. The defendant refused the tender.

The court entered a partial summary judgment in which it dismissed the plaintiffs' claim against the defendant as an individual and dismissed all claims of the plaintiffs for punitive damages. The court allowed the plaintiffs' motion for summary judgment as to its claim to have specific performance of the contract by directing Gary M. Miller as executor to convey the stock to the corporate plaintiff upon the payment to him of the tendered amount. The court conditioned the entry of this order upon the dismissal of the plaintiffs' claims against the defendant for $445,067.00. Plaintiffs and defendant excepted to this judgment.

House, Blanco and Osborn, by Don R. House and Lawrence U. McGee; and Wilson, Biesecker, Tripp and Sink, by Joe E. Biesecker, for plaintiff appellants and appellees.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, and Craig B. Wheaton, for defendant appellant and appellee.

WEBB, Judge.

The plaintiffs have not assigned error to the dismissal of all claims against Gary Miller individually and the claims for punitive damages. These portions of the judgment are affirmed.

[1] As to the portion of the judgment which ordered the executor to deliver the stock formerly owned by Lacy J. Miller to the corporation upon payment of the tendered amount, we hold this was error. One of the material facts in this case is whether the book value of the corporation, upon which the price of the stock is based, was properly determined according to the contract. The plaintiffs have the burden of showing there is not a material issue as to this fact. They will also have the burden of proof as to this fact at the trial. The stock purchase agreement provides that the book value of the corporation at the designated date shall be determined by a certified public accountant in accordance with sound accounting practices. In order to show there was not a genuine issue as to this material fact, the plaintiffs relied on the affidavits of W. H. Turlington and W. Leon Rives who are certified public accountants. These affidavits showed there was a review of the financial statements of the company and the review conformed to sound accounting practices. The af-

fidavits were not contradicted on this point, and there is nothing in the record to show Mr. Turlington and Mr. Rives are not credible witnesses. A party with the burden of proof may be entitled to summary judgment where he relies on the uncontradicted affidavit of a witness to establish that a genuine issue does not exist as to a material fact. If the circumstances show, however, that a material issue exists, the motion should be denied. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). In this case we do not believe the plaintiffs have shown there is not a genuine issue as to the proper determination of the book value of the corporation. W. H. Turlington and Company reviewed the audited financial statements of the company in order to determine the book value as of 30 April 1980. The validity of W. H. Turlington and Company's review depended upon the accuracy of the 31 December 1979 audit. The affidavit of Rachel Hailey was to the effect that a substantial part of the company's inventory was concealed from the auditors at the time of the December 1979 audit. This indicates that the audit upon which the review was made was inaccurate. For this reason we believe there is an issue as to the correctness of the review and the book value of the stock.

If the defendant can establish that the review of the audit was impaired because of the concealment of assets, the plaintiffs would also not be entitled to an equitable decree enforcing the contract because they would not have clean hands. *See Hood v. Hood*, 46 N.C. App. 298, 264 S.E. 2d 814 (1980).

[2] The defendant also contends the plaintiffs did not tender payment within the time specified by the contract. He argues that the 1968 agreement provides that payment shall be made within 10 days after receipt of the life insurance proceeds and the 1973 agreement provides payment from the insurance proceeds shall be made within 30 days after the qualification of the personal representative of the estate. The defendant contends the failure of the plaintiffs to tender within either of these times is a material breach by the plaintiffs of the contract. We believe the contract shows that a failure to tender within either of these times is not a material breach. It provides that "in any event the purchase price must be paid within a period of six months after the death of the Stockholder." We believe this language contemplates that there may be reasons why the tender cannot be made within the shorter periods. In this case not all the insurance pro-

ceeds had been collected and the ownership of all the stock had not been determined within these periods. The tender was made within six months of the death of the decedent which is the outside limit provided in the contract.

[3] The defendant argues further that specific performance is not appropriate because the plaintiffs engaged in inconsistent conduct. He says this is so because the plaintiffs asserted ownership to a part of the stock in a separate action. We do not believe this bars the plaintiffs from bringing this action. It is not inconsistent to determine first the ownership of the stock before tendering the consideration for it. The defendant argues that if the plaintiffs had been held to own this part of the stock, they could have then disregarded the stock purchase agreement. This is not correct. The agreement is binding on all parties to it, and if the defendant had so chosen, he could have enforced it.

The defendant also contends the plaintiffs were guilty of laches, that the terms of the agreement are not specific, and there is not a mutuality of remedy. We believe the record shows the plaintiffs moved expeditiously to execute the contract. They are not guilty of laches. We also hold that the terms of the contract are specific and mutually enforceable on all parties.

In allowing the plaintiffs' motion for summary judgment, the court dismissed its claim for judgment against the estate for $445,067.00. This claim is based on what the plaintiffs contend is what should be a reduction in the book value of the stock. Since we have held that there must be a trial as to the book value of the stock, we reverse this portion of the judgment.

Affirmed in part; reversed in part, and remanded.

Judges CLARK and WHICHARD concur.

STATE OF NORTH CAROLINA v. ALEXANDER WILLIAMS

No. 8112SC1191

(Filed 20 July 1982)

Narcotics § 4.4— constructive possession—failure to show control over premises

The State's evidence was insufficient to show that defendant occupied or was in control of the premises in question and that he was thus in constructive possession of heroin found in an abandoned house behind a dwelling where it tended to show only that officers who obtained a warrant to search the premises had seen defendant in front of the dwelling on four occasions during a two-week period prior to the execution of the warrant; a mailbox outside the dwelling displayed the names "Mr. and Mrs. Williams"; officers found in the dwelling a prescription bottle and bills for electricity and trash service bearing defendant's name or a name similar to it; officers found in the abandoned house a plastic bag containing another plastic bag with heroin therein and a third plastic bag with tinfoil squares therein; and defendant's fingerprint was on one of the tinfoil squares.

Judge HEDRICK dissenting.

APPEAL by defendant from *Herring, Judge.* Judgment entered 1 June 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 April 1982.

From a jury verdict finding the defendant, Alexander Williams, guilty of possession of heroin with intent to sell and deliver and a judgment committing defendant to prison for ten to fifteen years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Barrington, Jones, Witcover & Armstrong, P.A., by Carl A. Barrington, Jr., for defendant appellant.

BECTON, Judge.

I

About midnight on 18 August 1980, two Fayetteville City Police officers, B. E. Hyde and Roy Baker, observed the defendant on the porch at 800 Deep Creek Road from about 60 feet away as they drove by the house. These officers had also observed the defendant in front of that dwelling on three occasions during the

two weeks preceding 18 August 1980; however, they had never seen defendant inside the house. A mailbox outside the dwelling displayed the name "Mr. and Mrs. Williams."

Having been informed that Gloria Walker had sold heroin to an undercover buyer at 800 Deep Creek Road on 18 August 1980, the officers, on the evening of 19 August 1980, obtained a search warrant and searched the dwelling. When the officers arrived, six females, including Gloria Walker, were present. The defendant was not at 800 Deep Creek Road on the evening of 19 August 1980.

The dwelling at 800 Deep Creek Road contained three bedrooms, a living room, a kitchen and dining room combination, and a bath. When the officers entered, they saw "needles, and syringes, and cookers, and other paraphernalia laying on the table in the dining room. . . ." During the search of one of the back bedrooms, the officers also discovered (i) a Public Works Commission (PWC) (local electric company) bill dated 23 June 1978 bearing the name, Alex Williams; (ii) a PWC bill dated 24 June 1980, bearing the name, Alex Williams; (iii) a Travelers Trash Service bill dated 26 June 1980, bearing the name, Alea Williams; (iv) a prescription bottle of non-controlled pills dated 26 September 1979 and 26 March 1980, bearing the name, Alexander Williams.

The officers also searched an old abandoned house located behind the dwelling at 800 Deep Creek Road. Officer Hyde testified: this is a "four-room, delapidated house that is about to fall down . . . there is no security at all, no doors and no windows." While searching the old abandoned house, the officers found, amid the trash and junk, a plastic bag containing two smaller plastic bags. One of the smaller plastic bags contained a substance later identified as 2.7 grams of heroin, at a concentration of 12%; the other smaller plastic bag contained 12 to 15 small tinfoil squares, but it contained no traces of any controlled substance.

S. R. Jones, an expert in latent fingerprint comparison, testified that he lifted several latent partial prints from the pieces of tinfoil in the second smaller bag. Only one print was identifiable. Basing his "entire opinion on less than 20% of the entire thumbprint," he testified that the latent print on one of the pieces of tinfoil was made by the defendant.

After the State rested its case, the defendant moved for a directed verdict of not guilty. When that motion was denied, defendant chose to offer no evidence and to renew his motion for a directed verdict. That motion was also denied. We now discuss defendant's assignments of error based on the denial of his motions.

II

Defendant argues that the trial court erred by failing to grant his nonsuit motions and by failing to set the verdict aside. For the reasons that follow, we agree.

Evidence which raises merely a surmise, conjecture or suspicion of guilt (even though the suspicion so aroused by the evidence is strong) is insufficient to overcome a nonsuit motion. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). At the nonsuit stage, the trial court has to determine whether a reasonable inference of the defendant's guilt of the crime charged can be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Rowland*, 263 N.C. 353, 357, 139 S.E. 2d 661, 665 (1965).

We look first at the evidence and then the case law which compels the conclusion that the evidence in this case is insufficient to be submitted to the jury.

During the course of the trial, reference was made to the defendant on only a few occasions. First, Hyde testified that he saw the defendant in the front yard of 800 Deep Creek Road on four occasions prior to the time the search warrant was executed, and that the mailbox in front of the dwelling displayed the name, Mr. and Mrs. Williams. Second, Hyde testified that during the search of 800 Deep Creek Road on 19 August 1980, he found a prescription bottle of non-controlled pills and three documents bearing, in one form or another, the defendant's name or a name similar to his. Third, the latent fingerprint expert testified that defendant's fingerprint was found on one of twelve to fifteen small pieces of tinfoil found in a plastic bag in the abandoned house behind the dwelling at 800 Deep Creek Road.

Significantly, the State failed to show that defendant owned or occupied the dwelling house. There was no evidence that de-

fendant had any clothing or other personal effects in the dwelling. Similarly, no latent prints of the defendant were found in the dwelling, and there was no evidence that defendant was ever *in* the house, as opposed to his being seen four times in the front yard or on the porch of the house. Further, there was no evidence that the defendant was ever in the abandoned house.

The fact that defendant was present at the dwelling on four occasions during a two-week period prior to the execution of the search warrant does not remove the "issue from the realm of suspicion and conjecture." *State v. Scott*, 296 N.C. 519, 526, 251 S.E. 2d 414, 419 (1979). *See also State v. Cutler.* Because the State failed to establish ownership in the defendant, the jury could only guess whether defendant, a relative, a friend, or an acquaintance of defendant *owned* the dwelling at 800 Deep Creek Road. If the jurors guessed that defendant owned the premises, they would have to guess again about whether defendant *occupied* the dwelling or rented it to one or more of the six women found in the residence or to others. And even if the defendant did not own or occupy the building, the jury would have to guess again about whether defendant was a user of heroin, as opposed to a possessor with intent to sell, who frequented the dwelling house to purchase heroin for his use. Simply put, there is no evidence that the defendant either actually or constructively, possessed or exercised any degree of control over the dwelling or the open abandoned shed behind the dwelling and, *a fortiori*, the heroin found therein, so as to submit to the jury a charge of possession with intent to sell heroin.

The State cites six drug cases in support of its contention that a reasonable inference of defendant's guilt can be drawn from the facts in this case. Those cases are all distinguishable.

First, we agree with the cited quote in *State v. Allen*, 279 N.C. 406, 410, 183 S.E. 2d 680, 683 (1971), *quoting People v. Galloway*, 28 Ill. 2d 355, 358, 192 N.E. 2d 370, 372 (1963) (emphasis added).

> "Where narcotics are found on the premises *under the control* of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of

> narcotics, absent other facts which might leave in the minds of the jury . . . a reasonable doubt as to his guilt."

With this statement of the law we have no quarrel. In this case, however, there is no evidence to show that the premises in question were under the control of the defendant. In *State v. Walsh*, 19 N.C. App. 420, 425-26, 199 S.E. 2d 38, 42, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 658 (1973), our Court held that occupancy of a house with others was sufficient to raise an inference of possession. In the *Walsh* case, however, occupancy was established. Similarly, in *State v. McDougald*, 18 N.C. App. 407, 197 S.E. 2d 11, *cert. denied*, 283 N.C. 756, 198 S.E. 2d 726 (1973), there was no question concerning occupancy. McDougald was present when the search was conducted, and there was evidence that he had been living there for several years. In *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974), the defendant and his wife had lived in the apartment searched for approximately three years. Although the defendant's wife was present, the defendant was temporarily absent when the officers conducted the search. Again, there was no question concerning ownership or occupancy. Moreover, drugs were found in a dresser drawer under men's underclothing, and in men's clothing in the closet.

Two cases cited by the State involved contraband found some distance from the home in outbuildings which were not secure. Those cases are also distinguishable. In *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), the defendant lived in a combination residence and store in rural Beaufort County. The officers searched the residence-store and a pigpen located about twenty yards behind defendant's home. They found marijuana in defendant's bedroom and a box of marijuana leaves in a shed in the pigpen. Our Supreme Court specifically noted that defendant's residence-store was in "rural Beaufort County." As can be seen, there was no question of ownership or occupancy in the *Spencer* case. The court said:

> In instant case, the pig shed where the marijuana was found was located approximately twenty yards from and directly behind defendant's residence. Defendant had been seen on numerous occasions in and around the outbuildings directly behind his house. *Thus, when considered with the fact that marijuana seeds were found in defendant's bedroom,* this

> evidence raises a reasonable inference that defendant exercised custody, control, and dominion over the pig shed and its contents.

Id. at 129-30, 187 S.E. 2d at 784 (emphasis added). In *State v. Owens*, 51 N.C. App. 429, 276 S.E. 2d 478 (1981), this Court concluded that the circumstances "point unerringly to defendant [because] defendant, by his own evidence, has directed suspicion away from the occupant of the nearby trailer, leaving himself as the only likely constructive possessor of the marijuana patch." *Id.* at 432, 276 S.E. 2d at 480. Interestingly enough, the defendant in *Owens* would have won his case had he not put on evidence. The *Owens* Court said:

> The defendant moved to dismiss upon the close of the State's evidence. G.S. 15A-1227. The trial court erred in denying the motion because there was not substantial evidence that defendant was in constructive possession of the patch of marijuana plants located near his trailer. The arresting officer testified that he did not know whether the other trailer, beside the one occupied by defendant, was occupied. The worn path leading from the marijuana patch ended in grass between the two trailers, some 10 or 15 feet behind the two trailers, and the path or trail would have been easily accessible to both defendant and an occupant of the other trailer if the other trailer were occupied.

Id. at 431, 276 S.E. 2d at 479.

Having distinguished the drug cases cited by the State, we turn to the fingerprint evidence which the State contends is sufficient to take the case to the jury. "The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could have been impressed only at the time when the crime was perpetrated." *State v. Minton*, 228 N.C. 518, 521, 46 S.E. 2d 296, 298 (1948). Moreover, "[t]he burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt." *State v. Scott*, 296 N.C. at 526, 251 S.E. 2d at 419. Although the defendant's thumbprint may have been impressed upon the foil when it was purchased, handed to someone or thrown away, the jury *could* speculate that it was placed there when the defendant

cut the foil into squares. That, however, would not remove the case from the realm of speculation or conjecture, because there is no evidence of when, or by whom, the heroin was placed in the separate plastic bag.

In *State v. Bass*, 303 N.C. 267, 272-73, 278 S.E. 2d 209, 213 (1981), a burglary, rape and larceny case,

> [t]he State's evidence [establishes] only these facts and circumstances: (1) four latent prints found on a window screen of the house in which the crimes charged were committed had eleven points of similarity with known inked impressions of a defendant's prints; (2) no prints of defendant were found inside the house; and (3) when informed of the presence of his fingerprints at the scene and asked why they were there and if he entered the house, defendant responded, "I can't say that I did. I don't know. I am not going to say I did and I am not going to say I didn't."

Viewing this evidence in the light most favorable to the State, our Supreme Court said: "This evidence does not constitute 'substantial evidence' that defendant's prints could only have been imprinted at the time the crimes charged were committed." *Id.*, 278 S.E. 2d at 213. The Court noted further, citing *State v. Miller*, 289 N.C. 1, 4, 220 S.E. 2d 572, 574 (1975), that "[w]hat constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury." 303 N.C. at 272, 278 S.E. 2d at 213.

In this case, we find that there was insufficient evidence to submit the possession of heroin with intent to sell charge to the jury. Consequently, the judgment of the trial court is

Reversed.

Judge HILL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion the evidence is sufficient to require submission of the case to the jury and to support the verdict. Although the

majority points out that the mailbox contained the names of "Mr. and Mrs. Williams;" that a "Public Works Commission (PWC)" bill was found in the back bedroom with the name of "Alex Williams" on it; and that "a Travelers Trash Service bill dated 26 June 1980, bearing the name, Alex Williams" on it, it ignores these significant bits of evidence in arriving at the conclusion that the evidence was insufficient to raise an inference that the defendant was in control of the premises and thus in constructive possession of the heroin. When all of the evidence is considered in the light most favorable to the State, as we are bound to do, the cases cited and relied upon by the State are not so readily distinguishable as the majority indicates.

I vote to find no error.

JAMES DOW HARRIS v. LINDA TONKEL HARRIS

No. 8112DC893

(Filed 20 July 1982)

1. **Divorce and Alimony § 16.4; Husband and Wife § 11.1— breach of separation agreement—right to bring alimony action**

Where a separation agreement waived the wife's right to alimony but gave her the right to sue for alimony, damages or other relief upon the husband's breach of any provision of the agreement, the husband's failure to make child support payments as provided for in the agreement gave the wife the right to bring an action for alimony even though the agreement was fully executed regarding property rights. G.S. 50-16.6(b).

2. **Divorce and Alimony § 16.4; Husband and Wife § 11.1— enforcement of separation agreement—effect on right to bring alimony action—failure to offer restitution**

Where a separation agreement gave the wife the right to sue for alimony, damages or other relief upon the husband's breach of any provision of the agreement, the wife's action to recover arrearages in child support required by the agreement did not prohibit the wife from thereafter bringing an action for alimony. Nor did the wife's failure to offer restitution bar her alimony action where the court found that the consideration given to her in exchange for the release of her marital rights was negligible.

3. **Divorce and Alimony § 16.1— indignities to wife—sufficiency of findings**

Although the evidence was insufficient to support the court's finding that plaintiff husband lived with a woman after his separation from defendant, the

court's conclusion that plaintiff's conduct constituted indignities to the person of the defendant so as to render her condition intolerable and her life burdensome was supported by evidence and findings of plaintiff's announcement to defendant that he no longer loved her, followed by plaintiff's sudden abandonment of defendant in favor of another woman, the precipitous decline in defendant's lifestyle and standard of living, and plaintiff's remarriage.

4. **Divorce and Alimony § 16.8— alimony—time of dependency of wife**

Although the trial court should have clearly indicated in an alimony order that its findings as to the wife's dependency were based on the status of the parties at the time of the hearing, the failure to do so was not error in this case.

5. **Divorce and Alimony § 16.2; Rules of Civil Procedure § 13— counterclaim for alimony—governing statute**

Defendant's counterclaim for alimony pursuant to the provisions of a separation agreement did not have to meet the requirements of G.S. 50-16.8(b) but was governed by G.S. 1A-1, Rule 13.

6. **Divorce and Alimony § 16.8— alimony award—capability of earning more money—absence of prejudice**

Plaintiff husband was not prejudiced by the trial court's finding in an alimony order that he was capable of earning more money as an accountant than he earned from his salary with a hospital system where plaintiff failed to show that such finding was related to any conclusion or that it contributed to the award of alimony, and where the award was otherwise supported by the evidence and findings.

APPEAL by plaintiff from *Hair, Judge.* Judgment entered 9 February 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 7 April 1982.

Plaintiff and defendant separated on 19 September 1979, and entered into a separation agreement dated 21 September 1979. Defendant released plaintiff from his marital support obligation, subject to a retained right to sue for alimony, damages, and other relief upon plaintiff's breach of any provision of the agreement. The two minor children of the marriage were placed in the custody of defendant, and plaintiff agreed to pay $1200 a month for their support. The couple's personal property was divided, defendant receiving an automobile. Plaintiff transferred to defendant all of his interest in the marital home, and half of his interest in a business known as Creative Furnishings and Gifts in Fayetteville.

Plaintiff, by his complaint dated 12 December 1979, stated that the provision of the separation agreement concerning visita-

tion rights was not a "workable solution" and that he was unable to pay the amount of child support called for in the agreement. He sought a determination of child custody and support.

Defendant counterclaimed for breach of contract, alleging that plaintiff had paid the full monthly child support only once since the execution of the separation agreement. She also alleged adultery, abandonment, and that plaintiff had subjected her to indignities rendering her condition intolerable and her life burdensome. She requested dismissal of the complaint and enforcement of the separation agreement, or in the alternative, an award of alimony, child support and attorney's fees. A reply was filed on 18 March 1980.

A judgment and order was entered continuing custody of the children with defendant, including a judgment of $4,125 against plaintiff for arrearages. Plaintiff was ordered to pay child support and make rental payments. Defendant was awarded attorney's fees but was denied alimony.

Plaintiff filed a motion to modify the judgment of 1 April in December 1980 because of changed circumstances. He failed to pay child support and defendant filed a motion for a contempt order on 7 January 1981. The court filed an order to show cause, and a hearing on both motions was conducted on 4 February 1981.

In a judgment filed 5 March 1981, the trial judge concluded that plaintiff had breached the separation agreement, that the agreement was not a bar to the permanent alimony sought by defendant, and that plaintiff's conduct constituted indignities to defendant rendering her condition intolerable and her life burdensome. He ordered plaintiff to pay $400 per month in child support and $300 monthly in permanent alimony. Plaintiff appeals, bringing forth ten assignments of error.

Barrington, Jones, Witcover and Armstrong, by Henry W. Witcover, for plaintiff appellant.

McLeod and Senter, by Joe McLeod, for defendant appellee.

MORRIS, Chief Judge.

[1] Plaintiff, by his first and second assignments, contends that the trial judge erred in ordering an award of alimony. He argues

that the separation agreement was fully executed regarding property rights, and contained a waiver of the property right of alimony; and that there was no allegation or evidence of fraud, mistake, duress, illegality or undue influence in the execution of the agreement, and no rescission or restitution. Plaintiff maintains that defendant must have rescinded the separation agreement and made restitution of the benefits she gained thereunder before she could have sued for alimony, and that his failure to make child support payments as provided for in the agreement should not have given defendant a right of action for alimony. He refers generously to case law to support his position. In the cases cited, however, the husband was shown to have fully performed his part of the contract of separation. In view of paragraph 19 of the separation agreement providing for a right to sue for alimony upon the husband's breach of any provision of the agreement, we must hold that defendant was put to her election as to what relief she would seek upon plaintiff's failure to perform. Paragraph 19 reads:

> *Breach. If the Husband breaches any provision of this agreement,* the Wife shall have the right, at her election, to sue for damages for such breach, rescind this agreement, and maintain an action for separation or *alimony pendente lite or permanent,* or seek other remedies or relief as may be available to her.

(Emphasis added.) Plaintiff's well-researched argument ignores this specific provision. Furthermore, G.S. 50-16.6(b) states:

> Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed.

The separation agreement does not separate the property settlement provisions (paragraphs 3-8 and 13) from paragraph 16 dealing with child support to the extent that a breach is removed from the consequences of paragraph 19. We are, moreover, advertent to the rule that questions of support and custody may not be finally determined by an agreement between the parties, but that they remain matters for the court, *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966); but we decline to hold that the court's continued involvement in the promotion of the children's welfare removes a breach of the agreement regarding child sup-

port as it was written or could be modified by the court, from the effect of paragraph 19. The language of the agreement is plain, and the court upon finding a breach, did not commit error in awarding alimony to defendant when so requested, pursuant to the rights reserved in the agreement. Plaintiff's first two assignments are overruled.

[2] Plaintiff next argues that the trial judge erred in failing to rule that without rescission and restitution, the agreement barred the claim for alimony, and that defendant made her election of remedies when she ratified the agreement by seeking enforcement of the agreement. Enforcement of the contract and alimony are available options under both the agreement and the case law. See *Wilson v. Wilson*, 261 N.C. 40, 134 S.E. 2d 240 (1964). We do not find a conflict between the award of a money judgment on 1 April 1980, and the award of alimony on 9 February 1981. The judgment rendered in April for nonperformance of plaintiff's obligation was a debt, *id.*, representing his obligation up to that time. The effect of the order of 9 February granting alimony was to rescind the agreement, but it did not erase the debt arising on the obligation of child support and accruing under the terms of the contract up to that time. Defendant is, indeed, only "entitled to such an award as would be proper if no contract had been signed. If there has been a partial performance, she must account for the net benefits, *if any*, which she may have received." (Emphasis added.) *Id.* at 47, 134 S.E. 2d at 245. There is evidence tending to show that the consideration given defendant in exchange for the release of her marital rights was negligible, and the judge made findings to that effect. Defendant's award of alimony is, therefore, not barred by her failure to offer restitution, there being no property or benefit for her to return.

Plaintiff, by his fourth assignment, contends that the court erred in finding that the separation agreement was designed to provide for the substantial needs of defendant and two minor children, and was designated child support when the agreement specifically provided the contrary. There is no merit in this contention. The separation agreement was designed to provide for the needs of the family, and no argument may realistically be made otherwise. We apprehend that the finding to which plaintiff objects may suffer from error in syntax, but nothing more.

[3] Plaintiff next argues that the trial judge erred in finding that he lived with a woman subsequent to the separation of the parties and the execution of a separation agreement, and subsequent to the court's judgment of 1 March 1980. He also maintains, by this, his fifth assignment of error, that the judge erred by finding that his conduct constituted indignities to defendant. He states that the court wrongly based its award of alimony on these findings. The judge found

> 9. That prior to the separation of the parties on or about August or September of 1979, the plaintiff returned home one day and told the defendant, his wife, that he had fallen in love with his secretary, one Beverly Glenn;
>
> He told her he did not love her any more;
>
> That as a result of the plaintiff's conduct they entered into Separation Agreement;
>
> That since the separation of the parties in 1979, and subsequent to the Judgment of March of 1980, the plaintiff did live with Beverly Glenn; that he was divorced from the defendant on October 27, 1980; that he married Beverly Glenn on October 27, 1980.

We agree that the court committed error in that there is no evidence in the record tending to show that plaintiff lived with a woman, and the announcement by plaintiff to defendant that he "did not love her any more" did not *alone* amount to such conduct as would render defendant's life burdensome. See *Traywick v. Traywick*, 28 N.C. App. 291, 221 S.E. 2d 85 (1976). This mistake was not prejudicial to plaintiff, however, as the evidence of plaintiff's announcement, followed by the sudden abandonment of his wife in favor of Beverly Glenn, the precipitous decline in defendant's lifestyle and standard of living, and plaintiff's remarriage would support the court's conclusion.

[4] Plaintiff asserts that the court erred by making an award of alimony without making conclusions of law supported by findings of fact based in turn on the evidence, that defendant at the time of the hearing was a dependent spouse or plaintiff a supporting spouse. On the contrary, there is testimony in the record by defendant that she "had problems making ends meet." It is also

clear that a marital relationship existed, and that plaintiff is capable of making the payments required. See G.S. 50-16.1(3), (4) and G.S. 50-16.5(a). Although the court should have clearly indicated that its findings were based on the status of the parties at the time of the hearing on 9 February, we hold that the failure to do so was not error, as the judgment, read as a whole, makes it clear that defendant's dependent circumstances and the needs of her unemancipated child were as they were upon the signing of the separation agreement. The assignment is overruled.

[5] It is contended in plaintiff's seventh assignment that error was committed by the trial court's award of alimony pursuant to a counterclaim which failed to meet the requirements of G.S. 50-16.8(b). G.S. 50-16.8(a) and (b) state:

> (a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section and in G.S. 50-19.
>
> (b) Payment of alimony may be ordered:
>
> (1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or
>
> (2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or
>
> (3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

The statute obviously does not apply to the facts at hand. Rule 13 of the North Carolina Rules of Civil Procedure is the applicable statute, and defendant's counterclaim based on the separation agreement was in compliance with it. The requirement that the order granting alimony contain as a conclusion one of the ten grounds of G.S. 50-16.2, *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978), is fulfilled as well. We have already said that the judge's conclusion that "the conduct on the part of the plaintiff with one Beverly Glenn constituted indignities to the person of the defendant so as to render her condition intolerable and life

burdensome," though perhaps based in part on the erroneous finding that he lived with Beverly Glenn before marrying her, does not mean that the conclusion is otherwise unsupported.

Plaintiff contends that the trial judge erred in finding that "defendant has needs for herself in excess of $700.00 per month" when there was no evidence of her separate needs, only evidence of a consolidated amount for her and a minor child. This argument is specious in light of the record's indication that defendant presented a revised budget setting out the needs of defendant. We overrule this assignment.

[6] Plaintiff contends that the court erred in finding that he was capable of earning more money as an accountant than he earned from his salary with the Cumberland Hospital System, arguing that the record is devoid of any evidence thereof. Yet plaintiff testified "I have the ability to prepare tax returns, if I wanted to . . . ," and that he closed a tax service in which he owned a one-half interest, "just agreeing that it would cease doing business." Whether this evidence supports the finding that plaintiff was capable of earning money in excess of the amount of his salary we need not determine. Plaintiff refers to the finding as a gratuitous personal opinion of the judge. Whether the judge should have made a specific finding regarding willful disregard of marital obligation is unimportant, as the alimony award is otherwise supported by the evidence and plaintiff has failed to show that this finding is related to any conclusion or that it contributed to the award of alimony, which was otherwise supported by the evidence and findings.

Plaintiff, by his final assignment, contends that the court erred by questioning defendant about her co-ownership with Alonzo Parrish, plaintiff's former business associate, of a business which was closed. The questioning was relevant to the matter of earnings and property. The judge's comments regarding the situation were not prejudicial.

In the findings and conclusions made thereon, we find no prejudicial error. The judgment is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

In re Allen

IN THE MATTER OF: TAMMY JEAN ALLEN, JENNY LYNN ALLEN, CLARENCE DANSVILLE ALLEN, JR., AIMEE MARIE ALLEN, AND SUZANNE RENEE ALLEN, MINOR CHILDREN; CUMBERLAND COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER, AND CLARENCE D. ALLEN, SR., AND CAROLYN ALLEN, RESPONDENTS

No. 8112DC1154

(Filed 20 July 1982)

1. Parent and Child § 1— termination of parental rights—constitutionality of statutes

G.S. 7A-289.32(2), the statute under which parental rights are terminated, is not unconstitutionally vague in that it does not define "neglected child" since the definition of neglected child is clearly set out in G.S. 7A-517(21). Further, G.S. 7A-289.32(4), which provides that when a child has been placed in foster care, parental rights may be terminated for the failure of the parent to pay a reasonable portion of the child care costs for six months preceding the filing of the petition, is not unconstitutionally vague.

2. Parent and Child § 1— termination of parental rights—findings supported by evidence

In a proceeding to terminate parental rights, the findings relating to the behavioral and emotional problems of the minor children which were the subject of the proceeding were supported by the evidence.

3. Parent and Child § 1— termination of parental rights—failure to provide support—sufficiency of evidence

The trial court did not err in finding that "respondents have failed to pay a reasonable portion of the cost of the children's care" where only some of the payments under a Voluntary Support Agreement were made and where the father presented evidence that he had been unable to make some payments because his salary as an Army staff sergeant had been docked $600.00 and because he had incurred unexpected traffic fines and attorneys' fees and where the mother contended she was unable to pay any of the child care costs because she was an unemployed housewife and because she was later incarcerated. The trial court should have made separate findings as to the mother's failure to pay; however, there was no prejudice since evidence of any one of the six grounds enumerated in G.S. 7A-289.32 is sufficient to terminate parental rights and there was sufficient evidence to support a finding that the children were abused and neglected under G.S. 7A-289.32(2).

4. Parent and Child § 1— termination of parental rights—written order entered more than 10 days after oral order made in court—no error

The judicial procedure to be used in termination of parental rights cases which is prescribed in G.S. 7A-289.22 *et seq.* does not put the trial court under a 10 day rule to enter a written judgment. G.S. 7A-289.31 and G.S. 1A-1, Rule 58.

In re Allen

APPEAL by respondents from *Cherry, Judge.* Judgment entered 30 June 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 9 June 1982.

The parents of five minor children appeal an order by the district court which terminated their parental rights because the children were found to be abused and neglected and because the parents failed to pay a reasonable portion of the child care costs incurred by the Cumberland County Department of Social Services.

Sandra Edwards for Cumberland County Department of Social Services, and Cooper, Davis & Eaglin, by Paul B. Eaglin, for the five minor children, petitioners-appellees.

Chandler, Cooke, Glendening, P.A., by James H. Cooke, Jr., for Carolyn Allen, respondent appellant.

Barrington, Jones, Witcover & Armstrong, P.A., by C. Bruce Armstrong, for Clarence D. Allen, Sr., respondent appellant.

BECTON, Judge.

On this appeal, Clarence Allen raises the following issues: (1) whether G.S. 7A-289.32(2) and (4) is unconstitutionally vague; and (2) whether the court erred by basing its order upon findings of fact which are unsupported by the evidence. Carolyn Allen, in addition to raising the same issues as did Clarence Allen, brings forth the following arguments: (1) whether the trial court erred in denying respondents' motions for directed verdict at the end of the petitioners' evidence; (2) whether the court erred in denying respondents' motion for directed verdict at the end of all of the evidence; (3) whether the trial court erred in altering and amending, on its own motion, the judgment announced in open court, since more than ten days passed between the time the judgment was announced in open court and the time the subsequent written judgment was filed; and (4) whether the evidence presented to the trial court established the statutory grounds for terminating parental rights. We disagree with the respondents, and we affirm the order below.

I

[1] First, we address the respondents' argument that G.S. 7A-289.32(2), the statute under which their parental rights were

terminated, is unconstitutionally vague in that it does not define "neglected child." This question has been addressed by this Court in *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). In *Biggers*, this Court found that G.S. 7A-289.32(2) was not unconstitutionally vague because the definition of a neglected child was clearly set out in our statutes. G.S. 7A-517(21) defines a neglected juvenile as one

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

The *Biggers* Court found that identical language under former G.S. 7A-278(4) was not unconstitutionally vague. 50 N.C. App. at 341, 274 S.E. 2d at 241-42. The Court stated that the terms used "are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and, parents are, therefore, given sufficient notice of the types of conduct that constitute child neglect in this State." *Id.*, 274 S.E. 2d at 241-42. We, therefore, overrule this assignment of error.

We also find Clarence Allen's separate argument, that G.S. 7A-289.32(4) is unconstitutionally vague, to be without merit. G.S. 7A-289.32(4) provides that when a child has been placed in foster care, parental rights may be terminated for the failure of the parent to pay a reasonable portion of the child care costs for six months preceding the filing of the petition. This provision was upheld by the *Biggers* Court, 50 N.C. App. at 341, 274 S.E. 2d at 242, and was also found to be without constitutional infirmity in *In re Clark*, 303 N.C. 592, 603-06, 281 S.E. 2d 47, 56 (1981), wherein *Biggers* was quoted with approval. The provision was said to be "sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit." 50 N.C. App. at 342-43, 274 S.E. 2d at 242, *quoted* in *In re Clark*, 303 N.C. at 605, 281 S.E. 2d at 56.

II

[2] Second, both respondents argue that the trial court's findings of fact are not supported by the evidence "taken in the light most favorable to the petitioner." On appeal, when a trial court's order is reviewed as not being supported by the evidence we look to see whether there is clear, cogent and convincing competent evidence to support the findings. *Santosky v. Kramer*, --- U.S. ---, 71 L.Ed. 2d 599, 102 S.Ct. 1388 (1982); *In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, 444 (1982); G.S. 7A-289.30(e). If there is such competent evidence, the findings are binding upon us on appeal. *In re Smith*, 56 N.C. App. at 149, 287 S.E. 2d at 444. The trial court made the following findings of fact:

> II. That all of the children have from time to time been in the custody of or under the supervision of the Cumberland County Department of Social Services because of the neglect of the respondents.
>
> III. That the children, Tammy, Jenny and Clarence Allen, who are the subject of this action have been allowed to suffer serious emotional damage causing extreme aggression toward adults and other children, nightmares, bed-wetting, preoccupation with sex and inappropriate sexual behavior and knowledge and antisocial behavior and attitudes; and that the respondents have failed and refused to respond to the efforts of the Cumberland County Department of Social Services to involve them in Parent Effectiveness Training or other counseling designed to help them alleviate their personal problems and those of the children.
>
> IV. That while in the care of the respondents, all of the children have frequently been found to be dirty, unfed and urine soaked; that the children have not been taught by the respondents to control their aggression and their improper sexual behavior has been ignored if not encouraged by the respondents; that none of the children have received from the respondents any concept of schedules for eating, sleeping or any activity normally a part of the routine of a child; and that the children are not and have not received proper care, supervision or discipline from the respondents.
>
> V. That because of the lack of discipline and supervision on the part of the respondents and because of the lack of

proper emotional understanding, the children, while with the respondents, have been in an environment injurious to their welfare; and that should they return to that environment they would be likely to suffer both physical and emotional injuries.

VI. That Tammy Allen is subject to petit mal seizures; that the respondents never attempted to have the condition diagnosed or treated; that such a condition is treatable by medicine and other remedial care recognized under the laws of North Carolina; and that the respondents have failed and neglected to provide such treatment which was available to them.

VII. That Suzanne Allen suffered from a severe case of diaper rash; that there was no evidence of proper medical care of other remedial action by the respondents; and that medical treatment and other remedial care recognized under the laws of North Carolina was reasonably available to the respondents.

VIII. That the respondent, Carolyn Allen, has left the home on occasions from two days to two weeks without providing for the care and supervision of the children and that the respondent, Clarence Allen, Sr., was either unable to or neglected to provide for such care and supervision.

We have reviewed the record, and we find that the trial court's findings are supported by ample clear, cogent and convincing evidence in the form of testimony from DSS social workers and officials, foster parents who keep the children, teachers in the Cumberland County Schools, a licensed psychologist at the Cumberland County Mental Health Clinic in the Children's Program, and a psychological associate with the Children's Treatment Center. These witnesses gave detailed accounts of the emotional and mental health of the children as well as their physical health and appearance when the children were in the custody of their parents, when the children were first placed in foster care, and several months after the children had been placed in foster care. Several witnesses testified regarding the extreme unruly and undisciplined habits of the children, their lack of appreciation for the concepts of order and discipline, and of their abnormal and aggressive sexual behavior. This evidence supports

the trial court's findings listed above. Therefore, the respondents' assignment of error relating to these facts is overruled.

[3] The trial court also made the following findings of fact:

> IX. That the children have been placed in the custody of the Cumberland County Department of Social Services for a period in excess of six months at a cost of $13,982.08 of which $917.00 has been paid by the respondents; that Clarence D. Allen, Sr. is and has been during this period an active duty member of the United States Army with a monthly income in excess of $1,000.00; and that the respondents have failed to pay a reasonable portion of the costs of the children's care.

The Allens entered into voluntary support agreements on two occasions. Effective 1 March 1979, they were to pay $40.00 per month toward the foster care of Aimee. At least three monthly payments had been made for Aimee's care by the time she left foster care on 13 June 1979. In 1981, the respondents again entered into a Voluntary Support Agreement effective 1 March 1981 whereby they were to pay $213.00 per month for all five children. Some payments were made under this agreement. There is no evidence to suggest that the respondents ever challenged this amount as being an unreasonable portion of the child care costs. Whether that amount is a reasonable portion of the child care costs is, therefore, not before us. Mr. Allen presented evidence that he had been unable to make some payments because his salary as an Army staff sergeant had been docked $600.00 and because he had incurred unexpected traffic fines and attorneys' fees. Because the trial court, in this case, had to decide the credibility issues and the weight, if any, to be given to the evidence in determining if Mr. Allen failed to pay a reasonable portion of the cost of care for his children, we reject Mr. Allen's argument. The evidence supports the finding of fact and they are therefore, binding upon us.

Carolyn Allen contends that she was unable to pay any of the child care costs because she was an unemployed housewife and because she was later incarcerated. Consequently, she argues that, as to her, Finding of Fact No. 9 is not supported by clear, cogent and convincing evidence. The evidence is clear that Carolyn Allen failed to pay the costs. We believe, however, that since she offered different justifications for nonpayment, the bet-

ter practice would have been for the trial court to have made separate findings as to her failure to pay. Such a distinction is necessary because this Court pointed out in *Biggers* that what a "reasonable portion" is "must be based upon an interplay of '(1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount.' *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980); G.S. 50-13.4(c)." 50 N.C. App. at 341, 274 S.E. 2d at 242. We find no prejudice in this error, however, since evidence of any one of the six grounds enumerated in G.S. 7A-289.32 is sufficient to terminate parental rights. *Biggers;* G.S. 7A-289.32. Since the evidence is sufficient to support a finding that the children were abused and neglected under G.S. 7A-289.32(2), we overrule this assignment of error by Carolyn Allen.

III

We now address the additional arguments presented by Carolyn Allen. She first contends that a directed verdict should have been granted to her at the close of the petitioners' evidence and at the close of all of the evidence. On a motion for directed verdict, the evidence and all inferences which can be drawn therefrom, is viewed in the light most favorable to the nonmovant. *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973). Viewing the evidence presented during the petitioners' case and the evidence presented by the respondents in the light most favorable to the petitioners, we find the evidence sufficient to satisfy the statutory grounds for terminating the respondents' parental rights. Consequently, these arguments and the argument that the evidence does not establish statutory grounds for terminating parental rights are found to be without merit.

IV

[4] Finally, we address Carolyn Allen's argument that the trial court erred by altering or amending, on its own motion, the order which was made during open court over ten days after the oral judgment was entered in open court. We have reviewed the order issued by the court in open court and find that those findings are essentially the same as those enumerated in greater detail and previously cited in this opinion. We find that no altering or amending has been done.

Mrs. Allen argues that the written order was entered more than ten days after the oral order was made in court. There is no rule which requires a trial judge to prepare a written order within ten days of the entry of his order in open court.

The judicial procedure to be used in termination of parental rights cases is prescribed by the legislature in G.S. 7A-289.22 *et seq.* The Rules of Civil Procedure, while they are not to be ignored, are not superimposed upon these hearings. *See In Re Pierce*, 53 N.C. App. 373, 388-89, 281 S.E. 2d 198, 207-08 (1981) (judgment properly corrected under Rule 60(a)). G.S. 7A-289.31 refers to the court issuing an order. It does not speak of the entry of judgment and nowhere is it found that the court is under a ten day rule to enter a written judgment. In *In Re Pierce*, 53 N.C. App. at 380, 281 S.E. 2d at 202-03, this Court said:

> The sections of Art. 24B comprehensively delineate in detail the judicial procedure to be followed in the termination of parental rights. This article provides for the basic procedural elements which are to be utilized in these cases . . . . Due to the legislature's prefatory statement in G.S. 7A-289.22 with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, we think the legislative intent was that G.S. Chap. 7A, Art. 24B, exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the basic rules of civil procedure of G.S. Sec. 1A-1 be superimposed upon the requirements of G.S. Chap. 7A, Art. 24B. Therefore, in this case we need only ascertain whether the trial court correctly followed the procedural rules delineated in the latter.

We find no error in the entry of the written order under G.S. 7A-289.31.

Further, after a review of the Rules of Civil Procedure, we find no error under G.S. 1A-1, Rule 58. A trial court is directed to enter judgment pursuant to Rule 58. The trial court is given the "authority under G.S. 1A-1, Rule 58 to approve the form of the judgment and direct its prompt preparation and filing. . . ." *Condie v. Condie*, 51 N.C. App. 522, 528, 277 S.E. 2d 122, 125 (1981). In *Condie*, the trial court entered an order in open court on 16 April

1980. Written judgment was signed on 20 May 1980, more than a month later, and the written judgment was filed on 30 May 1980. This Court said that entry and filing of the written judgment in *Condie* was a proper exercise of the authority granted the trial court under Rule 58. Consequently, we find no error in the entry of the written order.

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

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. GREGORY SCOTT DAVIS

No. 813SC1388

(Filed 20 July 1982)

1. **Criminal Law § 144— modification of judgment during session—deletion of aggravating factor**

The trial court had the authority during the session to change a judgment in an armed robbery case by deleting one of its findings with respect to aggravation even though notice of appeal had been entered by defendant.

2. **Criminal Law § 138— fair sentencing act—deletion of aggravating factor—failure to reduce sentence**

The trial court did not abuse its discretion in failing to reduce the term of imprisonment imposed for armed robbery after it deleted one of the aggravating factors it had found where the court again weighed the aggravating against the mitigating factors and again found by the preponderance of the evidence that the aggravating factors outweighed the mitigating factors. G.S. 15A-1340.4(b).

3. **Criminal Law § 138— fair sentencing act—weight of aggravating and mitigating factors—discretion of court**

Although the trial court is required to consider all statutory aggravating and mitigating factors to some degree in imposing a sentence for a felony, the court may very properly emphasize one factor more than another in a particular case, and the balance struck by the court will not be disturbed if there is support in the record for such determination. G.S. 15A-1340.4(a).

4. **Criminal Law § 138— fair sentencing act—aggravating and mitigating factors—necessity for setting out in judgment**

Although the trial judge is required to consider all of the statutory aggravating and mitigating factors in imposing the sentence for a felony, he is

only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present and is not required to list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence.

APPEAL by defendant from *Brown, Judge.* Judgment entered 15 September 1981 in Superior Court, PITT County. Heard in the Court of Appeals 8 June 1982.

Defendant entered a plea of guilty to armed robbery and to assault with a deadly weapon inflicting serious injury. After considering evidence at defendant's sentencing hearing, held 15 September 1981, the trial court imposed a sentence of forty years. Defendant appealed.

Subsequent to the imposition of sentence and entry of appeal, the trial court, on 16 September 1981, modified its findings of fact as follows:

> Mr. Davis, yesterday when the Court entered judgment in your case, I found as one of the factors in aggravation that you knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the life of one person. And during the evening recess and after reviewing the statute, the Court has determined that that would not be a proper fact in aggravation in your case.
>
> And, therefore, the Court strikes its findings in aggravation that you knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The Court makes no other change in its judgment as to its findings in aggravation and mitigation, and finds again that the facts in aggravation outweigh the factors in mitigations [*sic*], and that the factors found were proven by a preponderance of the evidence.

The trial court found the following factor in aggravation of punishment: the defendant had prior felony convictions. In mitigation of punishment, the trial court found that "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer" and that defendant had provided helpful information to the sheriff's department.

At the sentencing hearing, defendant testified to the following:

1. He is twenty-two years old and prior to his arrest worked as a painter.

2. He felt that it was necessary to participate in this and other crimes in order to please his friends. He "may have some type of mental problem."

3. Although defendant denied carrying a shotgun or participating in the assault of one of the victims of the robbery, there was evidence to the contrary at the hearing.

4. Defendant was willing to aid in the apprehension of two of the assailants and to testify at any time in the future for the state in order to aid in their convictions.

Attorney General Edmisten, by Assistant Attorney General Elaine J. Guth, for the State.

Dixon, Horne & Duffus, by Randy D. Doub, for defendant.

MARTIN (Harry C.), Judge.

A defendant has a right of appeal if he pleads guilty and the sentence exceeds the presumptive term set by N.C.G.S. 15A-1340.4 and if the judge was required to make findings as to aggravating and mitigating factors. N.C. Gen. Stat. 15A-1444(a1) (Cum. Supp. 1981). Appeal under this subsection, however, is limited to the issue of whether the sentence entered is supported by evidence introduced at the trial and sentencing hearing. *Id.*

[1] Defendant contends that the trial judge did not have authority to change the judgment in this case after it had been entered and after defendant gave notice of appeal. Defendant was sentenced on Tuesday, 15 September 1981, and on 16 September 1981, the court amended the judgment by deleting one of its findings with respect to aggravation. The court again found that the aggravating factors outweighed the mitigating factors by the preponderance of the evidence, and did not change the term of imprisonment.

Although this issue is not subject to appellate review under N.C.G.S. 15A-1444(a1), we have considered it, and hold that the court did not commit error in amending its judgment. The amend-

ment was made during the session. All orders and judgments are in fieri during the session and may be amended or vacated by the court during the session. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). This is true even though notice of appeal has been entered. *State v. Belk*, 272 N.C. 517, 158 S.E. 2d 335, *cert. denied*, 393 U.S. 880 (1968); *In re Tuttle*, 36 N.C. App. 222, 243 S.E. 2d 434 (1978). Contrary to defendant's argument, there is no evidence that the court changed the judgment because defendant had given notice of appeal. Moreover, the deletion was in defendant's favor and could not be prejudicial.

Defendant challenges the validity of the findings of fact that the court deleted from its judgment. This issue is moot.

[2] The trial court did not abuse its discretion in failing to reduce the term of imprisonment after it deleted one of the aggravating factors it had found. After doing so, the court again weighed the aggravating against the mitigating factors and again found by the preponderance of the evidence that the aggravating factors outweighed the mitigating factors. N.C. Gen. Stat. 15A-1340.4(b) (Cum. Supp. 1981). As a result, the trial court did not reduce the prison term.

The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.

[3] The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be

disturbed if there is support in the record for his determination. *People v. Piontkowski*, 77 Ill. App. 3d 994, 397 N.E. 2d 36 (1979) (so holding under a similar state statute). *Accord, State v. Brookover*, 124 Ariz. 38, 601 P. 2d 1322 (1979) (rehearing denied); *State v. Marquez*, 127 Ariz. 3, 617 P. 2d 787 (1980).

Under the circumstances of this case, the trial court did not abuse its discretion by imposing the prison sentence to which defendant objects. Having determined by the preponderance of the evidence that the aggravating factors outweighed the mitigating factors, Judge Brown then, in his discretion, could sentence the defendant to a prison term in excess of the presumptive sentence. Defendant and another man committed a robbery with the use of a double-barreled 12-gauge shotgun. One victim was beaten across the arm with the shotgun; another was knocked unconscious with the shotgun and required hospitalization. Two persons were robbed. The defendant had a previous record of felony convictions. After investigation began but before arrest, defendant voluntarily acknowledged his own wrongdoing to a law enforcement officer and also provided helpful information to the Pitt County Sheriff's Department. The sentence was within the statutory limit and does not constitute gross abuse of discretion. *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922); *State v. Goode*, 16 N.C. App. 188, 191 S.E. 2d 241 (1972).

[4] Defendant argues that the trial court erred in failing to find several mitigating factors. We do not agree. We note that defendant did not object at the sentencing hearing to any of the findings of fact, nor did he tender any proposed findings of fact to the trial court. Upon the evidence in this record on appeal, we hold that defendant has failed to show any abuse of discretion by the trial court in failing to make the findings of which he now complains for the first time. There is nothing in the record to indicate that the court failed to consider any of the statutory factors. Although the trial judge is required to consider all of the statutory aggravating and mitigating factors, he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present. He is not required to list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence. *Marquez, supra.* In sentencing, the following principles still apply:

> In our opinion rules of mathematical certainty and rigidity cannot be applied to the sentencing process. Justice may be served more by the substance than by the form of the process. We prefer to consider each case in the light of its circumstances. . . . Sentencing is not an exact science, but there are some well established principles which apply to sentencing procedure. The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation.
>
> . . . .
>
> In our opinion it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. . . . He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Pre-sentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

State v. Pope, 257 N.C. 326, 334-35, 126 S.E. 2d 126, 132-33 (1962). *See also State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978); *State v. Harris*, 27 N.C. App. 385, 219 S.E. 2d 306 (1975).

This record on appeal does not disclose prejudicial error in defendant's sentencing hearing, and the judgment is

Affirmed.

Judges VAUGHN and HILL concur.

MARY T. PITTMAN AND T. P. THOMAS, JR. v. JAMES MILLER THOMAS, INDIVIDUALLY AND AS EXECUTOR OF THE WILL OF CATHARINE MILLER THOMAS, DECEASED, SARAH ANNE THOMAS (ROWLETT), DORIS ELIZABETH THOMAS TAYLOR, MARY LUCILE PITTMAN, WALTER JAMES PITTMAN, JR., LUCILE WEST ABITT BOND, CATHARINE LUCILE THOMAS GOSSAM, AND CAROLE ANN THOMAS, A MINOR

No. 817SC1131

(Filed 20 July 1982)

1. Trusts § 12— precatory words—sufficient to create testamentary trust

Precatory words will create a trust when it appears from the instrument as a whole that the testatrix so intended, provided that the subject matter, the objects of the intended trust, and the trust purpose are described with sufficient certainty. Therefore, where a testatrix stated in item VII of her will that "I request that my Executor see that (a grandchild) is given sufficient funds to complete her education. The amount to be used cannot be determined at this time but is a confirmed promise. The same situation in the case of (another grandchild) is recognized by James Miller Thomas and may also be provided for (other grandchildren)," she established a trust fund to insure that no beneficiaries be forced to abandon an educational goal for financial reasons.

2. Trusts § 1— testamentary trust—trust res described with sufficient certainty

The extent of the interest of a beneficiary of a trust need not be definite at the time of the creation of a trust if it is definitely ascertainable within the period of the rule against perpetuities. Therefore, where a testator intended to create a trust for the education of certain named grandchildren, the interests of the beneficiaries were ascertainable within the period of the rule against perpetuities and there was a satisfactory res since the testator provided a means for making it certain by suggesting that the amount of money necessary to accomplish the purpose of the trust was to be fixed by the executors in the exercise of their discretion.

Judge VAUGHN dissenting.

APPEAL by defendants Thomas from *Fountain, Judge.* Judgment signed 3 August 1981 in Superior Court, WILSON County. Heard in the Court of Appeals 8 June 1982.

Catharine Miller Thomas died on 11 July 1979, leaving a holographic will dated 1 October 1976. Plaintiffs instituted this action for the purpose of determining the validity of item VII of the will or, in the alternative, for the purpose of having item VII construed. Item VII reads as follows:

> I request that my Executors see that Sarah Anne Thomas is given sufficient funds to complete her education.

> The amount to be used cannot be determined at this time but is a confirmed promise. The same situation in the case of Dorris Elizabeth Thomas Taylor is recognized by James Miller Thomas and may be also provided for Mary Lou Pittman, Walter James Pittman, Jr., Carole Ann Thomas, James Miller Thomas; Lucile West Abbitt Bond and Catharine Lucile Thomas.

With the exception of James Miller Thomas, an executor of the estate and her youngest son, the beneficiaries named in item VII are the testatrix's grandchildren, ranging in age from thirty-one to seventeen. Of these, only Sarah Anne Thomas (Rowlett) and Carole Ann Thomas were present at trial to testify.

Sarah Anne Thomas attended various colleges between 1970 and 1975. She did not obtain a degree. She married in May of 1979 and is now a farmer. In addition to approximately $4,000 she received from her grandmother, she borrowed $5,500 in order to pay for her college education. Between 1974 and 1976 her family incurred major medical expenses on behalf of her youngest sister, Catharine Lucile. It was partly due to the additional financial burden of her schooling and to the disruption in the family that she determined to discontinue her education. In addition, her "career goals were not concrete." Her grandmother encouraged her "to go back to school and finish up." The trial court concluded that although Sarah Anne had completed her education, she was entitled under item VII of the will to recover the legitimate costs of her education not previously paid for by the testatrix.

Carole Ann Thomas is enrolled as a freshman at the College of William and Mary. She plans to attend medical school at Duke University. Her grandmother financed her private school education. She has always been an excellent student. Carole's mother testified that in May of 1979, at the request of the testatrix, she compiled figures estimating the cost of sending Carole through undergraduate and medical school. The director of budget and finance at Duke University Medical Center testified that the cost of a four-year medical school education would approximate $90,000. The trial court concluded that Carole Ann Thomas was not entitled to the payment of any educational expenses under item VII of the will.

Although there was no evidence of the educational history or plans for the education of Doris Elizabeth Thomas (Taylor), the court held that she was entitled to any legitimate educational expenses beyond high school, whether previously paid or subsequently incurred.

Finally, the court determined that item VII of the will did not require any contribution to the educational expenses of Mary Lou Pittman, James Miller Thomas, Lucile West Abbitt Bond, Catharine Lucile Thomas, or Walter James Pittman, Jr.

Defendants James Miller Thomas, individually and as executor of the estate, and Carole Ann Thomas, through her guardian ad litem, appeal.

Rose, Jones, Rand & Orcutt, by Z. Hardy Rose and William R. Rand, for plaintiff appellees.

Tharrington, Smith & Hargrove, by Wade M. Smith and Steven L. Evans, for defendant appellant James Miller Thomas.

George A. Weaver, Guardian ad Litem, for defendant appellant Carole Ann Thomas.

MARTIN (Harry C.), Judge.

We begin with the basic proposition that in the construction of a will the court is required to give effect to the true intent of the testatrix so far as it can be ascertained from the whole instrument and from the conditions and circumstances attendant to its making, if such intent is consistent with the rules of law and does not contravene public policy. *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). However, the intent of a testatrix to make a testamentary disposition of her property must be expressed in such terms that a court can determine her intention or wish without resort to conjecture. "Both the thing given and the person to whom it is given must, in testamentary dispositions of property, be set forth with such certainty that the court can give effect to such gift when the estate is to be distributed." 1 Bowe-Parker, Page on Wills § 5.11 (rev. 3d ed. 1960); *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246 (1956).

We agree with Judge Fountain's conclusion that item VII of the subject will is not void. Item VII, taken together with the

language of the entire will and the conditions and circumstances existing at the time the will was made, manifests an intent on the part of the testatrix to create a testamentary trust.

[1] Ordinarily, mere precatory words will not create an express trust. *Andrew v. Hughes*, 243 N.C. 616, 91 S.E. 2d 591 (1956). Nevertheless, precatory words will create a trust when it appears from the instrument as a whole that the testatrix so intended, provided that the subject matter, the objects of the intended trust, and the trust purpose are described with sufficient certainty. *Brinn v. Brinn*, 213 N.C. 282, 195 S.E. 793 (1938). Where precatory language is addressed to an executor, the courts are inclined to create a trust. G. Bogert, The Law of Trusts § 19, at 43 (5th ed. 1973).

It is apparent from the will as a whole that Mrs. Thomas was keenly interested in seeing that all of her children and grandchildren were given every opportunity to pursue their educational goals. To this end she provided, in her will, a specific gift of $10,000 for each grandchild who had not been so provided for under her husband's will. It further appears that the financial difficulties which threatened the immediate educational goals of two of her grandchildren, Sarah Anne and Doris Elizabeth, prompted her to establish the additional benefits of item VII. Nowhere do we find, however, that it was Mrs. Thomas's intention to pay for all the educational expenses of all her grandchildren. It appears, rather, that she expressed a willingness, while alive and through item VII of her will, to provide financial assistance *if and when* needed. We do not construe the word "complete" in item VII as an open-ended offer to entirely subsidize the education of any beneficiary. We hold that by item VII Mrs. Thomas established a trust fund to insure that no beneficiary be forced to abandon an educational goal for financial reasons. *Brinn, supra.* In light of this holding, the trial court erred in ordering that Sarah Anne be reimbursed for educational expenses incurred during the testatrix's lifetime. Sarah Anne received inter vivos gifts to the extent that the testatrix deemed necessary at the time.

We further hold that all those named under item VII are entitled to the status of beneficiary. The fact that Catharine Lucile Thomas, Walter James Pittman, Jr., and Carole Ann Thomas are each entitled to the benefit of an additional $10,000 to defray educational expenses does not preclude their inclusion under item

VII. Mrs. Thomas made it clear in item VI of her will that these legacies were intended to parallel those given under the will of her husband to the grandchildren then living at her husband's death.

[2] The more difficult question to settle is whether the trust res is described with sufficient certainty. As the will clearly establishes that money is the subject matter of the trust, it is only the amount that is left uncertain. The amount of property to which the trust is attached must be established with reasonable certainty or be capable of being definitely ascertainable. Restatement (Second) of Trusts § 76 (1959). It is ordinarily sufficient if the general scheme of the trust is reasonably evident. 76 Am. Jur. 2d Trusts § 39 (1975). The extent of the interest of a beneficiary of a trust need not be definite at the time of the creation of a trust if it is definitely ascertainable within the period of the rule against perpetuities. Restatement of Trusts, *supra*, § 129. The interests of the beneficiaries under item VII are definitely ascertainable according to this principle.

> If the settlor's description of the trust property is satisfactory, except that he does not state what is to be the extent or size of the interest to be held in trust, any difficulty can usually be obviated by applying the rule that, in the absence of express evidence otherwise, the trustor is deemed to have intended to give the trustee such an interest as is needed for the achievement of the objects of the trust.

G. Bogert, The Law of Trusts and Trustees § 111 (2d ed. 1965). The language of item VII suggests that the amount of money necessary to accomplish the purpose of the trust is to be fixed by the executors in the exercise of their discretion. As such, "there is a satisfactory res because, although not defined by the settlor at the time of trust creation, he has provided a means for making it certain." *Id.*

The judgment of the trial court is vacated and the cause remanded to the Superior Court of Wilson County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judge HILL concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I vote to affirm the judgment of Judge Fountain.

DR. ROBERT C. GUNTHER v. BLUE CROSS/BLUE SHIELD OF NORTH CAROLINA

No. 8128SC810

(Filed 20 July 1982)

1. **Trial § 57— nonjury trial—incompetent evidence presumed disregarded by judge**

In a nonjury trial, it is presumed that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings, and defendant failed to rebut this presumption by showing that the judge acted upon incompetent evidence in finding the facts.

2. **Trial § 58— exceptions not bolstered by authority—findings supported by evidence**

In a nonjury trial concerning the coverage of a medical insurance policy where defendant excepted to the admission of certain evidence as being incompetent but neither bolstered its assignment of error by citation of authority nor addressed the matters admitted on cross examination, appellant's assignments of error were overruled and the court's findings were found to be supported by the evidence.

3. **Evidence § 29.4— reading from medical text—failure to lay proper foundation—not prejudicial**

Although, under G.S. 8-40.1, plaintiff had failed to lay a proper foundation for the reading of a medical text, the error was not prejudicial since two of defendant's exhibits were also taken from the same medical text and defendant's own psychiatric expert described the manual as reliable and authoritative.

4. **Insurance § 43.1— health insurance policy—using wrong word in findings—nonprejudicial**

In an action to recover hospitalization benefits for plaintiff's son's mental illness, the trial court erred in referring to a section of the policy as stating that benefits were provided for "the diagnosis or treatment of illness, injury, or restoration of *psychological* functions" since the policy referred to

physiological functions; however, the inaccuracy of syntax was not prejudicial since the contested expenses were incurred for the treatment of a mental *illness.*

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 24 April 1981, Superior Court, BUNCOMBE County. Heard in the Court of Appeals 31 March 1982.

Plaintiff, by his complaint dated 27 August 1979, alleged that he and his dependents were insured against certain medical expenses under a contract of insurance entered into with defendant. He alleged that his dependent, Karl Gunther, was hospitalized from 14 July 1978 to June 1979 in Highlands Hospital, Asheville, and that defendant was obligated to pay a portion of the expenses of the hospitalization; but that defendant had paid only a portion of the expenses for which it was obligated, and that it failed and refused to pay to the full extent obligated under the terms of the contract of insurance. He prayed for the recovery of $16,257.20, costs of the action, and attorney's fees.

Defendant admitted that plaintiff was provided certain coverage under one of its group benefit plans, but averred that it had provided appropriate coverage under the provisions of the policy. Defendant stated that the expenses sought to be recovered by plaintiff were specifically excluded under the terms of the Certificate of Health Insurance upon which the action was based. Defendant counterclaimed for reimbursement of $8,942.25 for certain services and supplies paid to third parties for the benefit of plaintiff.

The court found, based on the evidence and stipulations, that plaintiff's son, Karl, had been hospitalized in Highlands Hospital from 11 July 1978 to 14 July 1979 for treatment of mental illness, specifically classified as borderline personality. The court found that Karl displayed sufficient symptoms of the condition to be so categorized. Its judgment included a finding that during his hospitalization Karl received individual and group psychotherapy, activity therapy, and attended a psychotherapeutic school. The court determined that the insurance policy in question provided benefits for his hospitalization through 30 May 1979, but that Section 502A(2) of the policy excludes expenses that are "not reasonable and necessary for the diagnosis or treatment of illness, in-

jury or restoration of psychological function, or for custodial or domiciliary care." The court found further

> 8. That there is no agreement among the psychiatric profession as to the method of treatment of a borderline personality; that is to say, whether or not said disorder should be treated by long-term hospitalization or by outpatient treatment on a crisis intervention basis, both methods being used;
>
> 9. That the policy in question does not define the term "reasonable and necessary for the diagnosis or treatment of injury, illness or restoration to psychological function" or the term "custodial and domiciliary care", and the Court construes said terms to require that hospitalization be more than merely maintaining a patient, but that there must be either medical treatment for the purposes of establishing the diagnosis of the patient's illness, or reasonable medical treatment which could or may alleviate or reduce the illness or its symptoms;
>
> 10. That the hospitalization of Karl Gunther did not come within the exclusions herein set forth in said policy at any time prior to May 30, 1979.

Based on his findings, the judge found that benefits accorded Karl were not within the exclusion of the policy. He then awarded plaintiff $16,257.20, the total amount due by defendant for Karl's hospitalization through 30 May 1979. Defendant appeals.

Riddle, Shackelford and Hyler, by John E. Shackelford, for plaintiff appellee.

Jackson, Jackson and Bennington, by Frank B. Jackson, for defendant appellant.

MORRIS, Chief Judge.

Defendant brings forward 17 assignments of error, the first five of which question the admissibility of certain evidence adduced at trial.

[1] Defendant contends that the trial court erred by denying defendant's motion to strike testimony given by plaintiff on direct examination by which plaintiff indicated that Mr. Don McIntire, a

representative of defendant, told him in January of 1980 that Karl Gunther would receive benefits for one year's hospitalization, to a maximum of $250,000. Defendant argues that no proper foundation establishing Mr. McIntire's actual, apparent, or implied authority to speak for defendant was laid and that plaintiff's assertion as to what Mr. McIntire told him was, therefore, inadmissible hearsay. The judge made no finding of fact based on the testimony. Indeed, the judgment granted benefits only through 30 May 1979, though Karl was hospitalized from July 1978 until July 1979. In a nonjury trial, it is presumed that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668 (1958). Defendant has failed to rebut this presumption by showing that the judge acted upon incompetent evidence in finding the facts. The assignment is overruled.

[2] Defendant, by his second assignment, maintains that the court erred in admitting into evidence the affirmative response of Dr. Darwin Dorr, a clinical psychologist, when asked on direct examination whether prolonged hospitalization was a recognized method of treating a borderline personality. Defendant argues that neither the question nor the answer elicited specified what group or individual endorsed that method of treatment.

He asserts by his third assignment that the court erred in admitting the testimony of Dr. Richard Selman, a psychiatrist, that certain treatment rendered by him was medically necessary without qualification as to the time periods involved, since a fundamental issue in dispute was whether the hospitalization of Karl Gunther subsequent to 12 December 1978 was medically necessary and whether the nature of the treatment he received was excluded under the terms of the policy. It is evident to us from the record, however, that the time to which the witness referred begins 5 February 1979, when Dr. Selman first made a diagnosis of borderline personality, and the period of hospitalization thereafter.

Defendant fails to bolster either assignment by citation of authority, and we are unaware of any supporting authority for the exceptions taken. These matters could easily have been addressed by defense counsel on cross examination. The court's find-

ings are fully supported by the evidence adduced. Appellant's assignments of error numbers 2 and 3 are, accordingly, overruled.

[3] Defendant bases his next two assignments upon G.S. 8-40.1. He alleges that the court erred in admitting a reading by Dr. Selman from the American Psychiatric Association's *Diagnostic and Statistic Manual III,* plaintiff's exhibit 3. He points to plaintiff's failure to lay a foundation establishing the manual as a reliable authority, the lack of an agreement between counsel for the parties to receive the exhibit, and its substantive nature, and assigns error to its admission into evidence. G.S. 8-40.1 provides:

> In all actions in the district and superior courts to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, the hearsay rule shall not exclude statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, even though the declarant is available as a witness. If admitted, the statements may be read into evidence but may not be received as exhibits unless agreed to by counsel for the parties.

We hold that any error that may have been committed by the introduction of the evidence in question was not prejudicial. Defendant's exhibits 3 and 4 were also taken from the *Diagnostic and Statistic Manual,* and his own psychiatric expert, Dr. Hans Lowenbach, described the manual as reliable and authoritative. It is unnecessary to attempt to gauge the impact of the attorneys' failure to agree to receive the exhibit, or to classify the evidence as either illustrative or substantive, as there was plenary additional evidence upon which the court could have made its findings of fact. Assignments of error numbers 4 and 5 are overruled.

Defendant excepts to several of the court's findings of fact, contending that the evidence is insufficient to support them. We have examined the record carefully, and find, on the contrary, that the questioned findings numbered 2, 3, 4, 5, 6 and 8 are supported by the pleadings, stipulations, and evidence. Defendant's assignments of error numbers 6 through 11, based on exceptions to those findings, are therefore overruled.

[4] Defendant next argues that the court erred in its findings of fact numbers 9 and 10, alleging that the evidence was insufficient to support them. We disagree. Section 502 of the policy states:

> A. Except as may be otherwise specifically provided, no benefits are provided under this certificate for:
>
> . . .
>
> (2) Services or supplies . . . (2) not reasonable and necessary for the diagnosis or treatment of illness, injury, or restoration of physiological functions . . . (3) for custodial and domiciliary care, ...

We note that the policy language refers not to the "psychological" rehabilitation to which the court referred in its judgment, but to the restoration of "physiological" function. The judge's mistake in this regard was not harmful to defendant, however. Since the phrase in question excludes services or supplies not reasonable and necessary for the diagnosis or treatment of "*illness*, injury, or restoration of physiological functions . . ." (emphasis added), the finding must be regarded as superfluous to the extent the court used the wrong word, the contested expenses having been incurred for the treatment of a mental *illness*, nevertheless. The finding is apposite, and we find this inaccuracy of syntax to be nonprejudicial.

Defendant submits that the court erred in its finding and conclusion of law based thereon when it chose to formulate its own definition of the terms "custodial" and "domiciliary" care, in the face of testimony from defendant's expert, Dr. Lowenbach, that care is custodial if the patient's condition is such that "in spite of adequate treatment for an adequate length of time, there is no reasonable likelihood to expect that a person can live outside of an institution giving such care without relapsing into the same symptomatology," and his explanation that "domiciliary" care was the replacement of an unsuitable home with a suitable one. Moreover, defendant argues that the court erred in its findings and conclusion that Karl's hospitalization did not come within the exclusion in the policy any time before 30 May 1979, as his treatment after 12 December should have been excluded pursuant to the definitions of custodial and domiciliary care espoused by Dr. Lowenbach, and that the court erred by its failure to render judgment for him on his counterclaim.

The defendant had the burden of proving that the expenses incurred for Karl's hospitalization came within the stated exception of the policy. *See Flintall v. Charlotte Liberty Mutual Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963). Applying even the restrictive interpretations of the exclusionary language espoused by defendants, the evidence supports the judge's finding that Karl's hospitalization should not be excluded from coverage. Dr. Selman testified that he decided in February that Karl

> needed to remain in the hospital for four or five more months, to be able to make the progress enough to be able to continue his treatment on an outpatient basis. We discussed the fact that he would need to be in treatment for a long period of time, and that the initial part of that would need to be in the hospital. The treatment plan I have initially conceived when he was admitted to the hospital, that is activity therapy, group therapy, and psychotherapy would be continued, throughout his hospitalization this initial plan remained intact.

Though there was some evidence that Karl's continued hospitalization depended upon plaintiff's resolution of certain personal and family problems, other evidence was sufficient to allow the judge to find that continued treatment in the hospital was medically necessary. Defendant's assignments of error numbers 12 through 17 are without merit.

The judgment of the trial court is, based on the above,

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. NEIL STANLEY LEWIS

No. 8124SC987

(Filed 20 July 1982)

1. **Criminal Law §§ 42.1, 43.5— television news film—human skulls—admissibility in evidence**

In a prosecution for being an accessory before and after the fact to the crimes of disturbing graves in violation of G.S. 14-150, a television news film was properly admitted to illustrate a sheriff's testimony where the sheriff sufficiently authenticated the film as an accurate portrayal of conditions he observed at the crime scene. Furthermore, the trial court properly admitted into evidence two human skulls found at the crime scene.

2. **Cemeteries § 3— accessory before and after fact to crimes of disturbing graves—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for being an accessory before the fact and an accessory after the fact to the crimes of disturbing graves where it tended to show that defendant encouraged the actual perpetrators to open graves and steal jewelry and dental work from the bodies interred there; defendant told them he would melt down and dispose of any gold they could steal and advised them what implements to take to the graveyard; defendant, at his own home, helped the perpetrators remove gold from teeth taken from the bodies; and defendant denied to the sheriff knowing anything about the robbery of the graves.

3. **Criminal Law § 11— accessory after the fact—failure to instruct on one alleged perpetrator**

In a prosecution upon an indictment charging that defendant was an accessory to a crime committed by three other named men, defendant was not prejudiced by the court's omission of the name of one of the men from a portion of its instructions to the jury because there was no evidence linking defendant and such man.

4. **Criminal Law § 11— accessory after the fact—erroneous instruction—absence of prejudice**

Although the trial court's instruction that defendant would be guilty of accessory after the fact to the crime of disturbing a grave if he assisted the perpetrators in escaping or attempting to escape detection, arrest or punishment "by accepting part of the proceeds of the crime of disturbing a grave and refusing to disclose his knowledge of the crime when asked to do so by law enforcement officers" was erroneous in that accepting part of the proceeds of the crime did not make defendant an accessory after the fact, such error was not prejudicial to defendant since all of the elements of the crime charged were presented to the jury and the erroneous portion of the instruction increased the state's evidentiary burden.

5. **Cemeteries § 3; Indictment and Warrant § 9.3— accessory after fact to disturbing graves—indictment—evidential allegations as surplusage**

An indictment was sufficient to charge defendant with being an accessory after the fact to the crime of disturbing graves in violation of G.S. 14-150 without the evidential allegation that defendant assisted the perpetrators "in concealing and disposing of things removed from said graves." Therefore, such allegation was mere surplusage and should be disregarded.

6. **Criminal Law § 138.1— accessory after the fact—more lenient sentence to perpetrators**

The trial court did not abuse its discretion in sentencing defendant to two consecutive ten-year terms upon his conviction on six counts of being an accessory after the fact to the crime of disturbing graves although the actual perpetrators received lesser sentences.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 25 April 1981 in Superior Court, MADISON County. Heard in the Court of Appeals 5 April 1982.

On the morning of 13 June 1980, Kevin Sams, Luther Aikens, and Louis Bollo entered the Safford family cemetery near Hot Springs. Equipped with implements, they set to work disturbing several graves. The men left hours later with human teeth, dental work, and various items of jewelry removed from the bodies interred there. Behind them the graveyard bespoke haste and desecration. Six graves had been opened. At trial, witnesses testified that bodies and bones were strewn about. The state introduced at trial a television news film depicting the scene, and the court permitted an expert to examine two skulls in the presence of the jury.

Kevin Sams, testifying for the state, said that he approached the sheriff and admitted his participation in the grave robbery. His testimony, and that of Aikens and Bollo, tended to show that defendant's residence was located a short distance from the cemetery. Aikens worked for defendant refurbishing his house, and introduced him to Kevin Sams, who was also working for defendant in June of 1980. Aikens testified, "In late April Mr. Lewis was on his front porch. You can see the cemetery from there. He said he couldn't understand how come it hadn't been robbed. That best he could find out there was a lot of money in it . . . if we was to do it, he would take a cut out of it. Take the stuff, melt it down, take (it) to California to sell it." Defendant told Aikens what tools they would need.

Sams, Bollo, and Aikens committed the robbery and went to defendant's home immediately thereafter. Defendant told them that they needed a chisel with which to remove gold from the teeth and, according to Sams, hammered some gold from the teeth. Aikens then sold two rings and a set of earrings to defendant. Defendant later denied any knowledge of the robbery upon questioning by the sheriff.

Defendant testified that he had never met or talked with Louis Bollo; that although he was aware that Aikens and Sams had gold teeth and jewelry in their possession when they arrived at his home on the morning of 13 June, he told them to take the loot "and get the hell out . . . ;" that he loaned Aikens $200 with which to pay a court fine; and that he found a ring and a gold tooth on the back porch of his house but flushed both down the toilet. He admitted keeping a red stone from the ring, however. He also admitted withholding information from the sheriff because, he said, he was afraid to speak while Aikens stood next to him at the time of questioning. He denied ever rendering assistance to Aikens, Sams or Bollo.

The trio were charged with conspiracy and six counts of disturbing graves, to which they pled guilty. Sams, who had been convicted previously of auto theft, was sentenced to ten years imprisonment as a committed youthful offender, suspended for a period of five years. Bollo was sentenced to five years for his participation. Aikens was given ten years, to run concurrently with a sentence he was then actively serving. He had numerous previous convictions.

Defendant was tried for being an accessory before the fact and an accessory after the fact to the crimes of disturbing graves in violation of G.S. 14-150, and was convicted of six counts of being an accessory after the fact of disturbing graves. With no prior convictions, he was sentenced to serve two ten-year terms, to run consecutively. He appeals the conviction, bringing forward five assignments of error.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the state.

Snyder, Leonard, Biggers and Dodd, by Keith S. Snyder and William T. Biggers, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant argues, by his first assignment of error, that the court erred by admitting into evidence a television news film and two human skulls. He contends that the evidence was not authenticated, and that it was irrelevant and inflammatory in light of the fact that the disturbance of the graves was stipulated.

The trial judge instructed the jury that the film was "offered and admitted for the sole purpose of illustrating or explaining the testimony of this or other witnesses who may appear before you . . . . It may not be considered by you for any other purpose." Sheriff E. Y. Ponder testified that he went to the cemetery on 19 June. The film was then shown over defense counsel's objection on the grounds of relevancy. When asked if the film accurately portrayed what he found at the cemetery, Sheriff Ponder replied in the affirmative. "Photographs are admissible in this State to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error." *State v. Crowder*, 285 N.C. 42, 49, 203 S.E. 2d 38, 43 (1974). Motion pictures are admissible under the rules applicable to still photographs. *State v. Strickland*, 276 N.C. 253, 173 S.E. 2d 129 (1970). We hold that the sheriff sufficiently authenticated the film as an accurate portrayal of conditions he observed at the scene of the crime, and that it was properly admitted to illustrate the sheriff's testimony. See *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). The sheriff further stated that he found two or three "heads" or skulls to be missing from bodies, and indicated that they were, at the time of trial, in the custody of Dr. Page Hudson, Chief Medical Examiner. Dr. Hudson testified that the skulls were in his possession, Sheriff Ponder having delivered them to him on 6 December. The skulls were then offered into evidence, again over defense counsel's objection. With regard to real evidence, "the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition." *State v. Harbison*, 293 N.C. 474, 484, 238 S.E. 2d 449, 454 (1977). We are not inclined to disturb the judge's ruling of admissibility in the case at bar. We must also reject defendant's contention that the admission of the film and skulls was inflammatory and the evidence irrelevant in light of

the fact that the disturbance of the graves was stipulated. The stipulation that the graves had been disturbed did not preclude the state's introduction of this evidence. *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971).

[2] Defendant argues by his second assignment that the court erred by denying his motion for acquittal on all counts, maintaining that the state failed to meet its burden of proof. It is the court's duty in ruling upon such a motion, to consider all of the evidence in the light most favorable to the state and to determine if there is sufficient evidence to submit the case to the jury. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). The motion is properly denied if there is any substantial evidence of the offense charged. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). Defendant was charged with being an accessory before and after the fact to the crime of disturbing a grave. The testimony of Sams and Aikens that defendant encouraged them to commit the crime; told them he would melt down and dispose of any gold they could thieve; advised them what implements to take to the graveyard; helped Aikens and Sams, at his own home, remove gold from teeth taken from the bodies, and denied to the sheriff knowing anything about the robbery; was clearly sufficient to allow the jury to find that defendant knew of the crime and rendered the principals assistance in escaping detection, arrest, and punishment. We note, in response to defendant's argument that he feared for his life and did not intend to give advantage to the perpetrators, that the jury was charged that if it found that defendant feared for his life if he disclosed information about the crime, and for that reason reasonably failed to divulge the information, that he should be found not guilty.

[3] Defendant next contends that the trial court erred in omitting Louis Bollo's name from a portion of its instructions to the jury. We find any such error to be nonprejudicial. Defendant was charged with being an accessory to a crime committed by three other named men. In its charge, the court named only two of the men identified in the indictments, obviously because there was no evidence linking Bollo and defendant. "If an averment in an indictment is not necessary in charging the offense, it may be disregarded." *State v. Dixon*, 8 N.C. App. 37, 39, 173 S.E. 2d 540, 541 (1970). The evidence otherwise supports the finding that defendant was an accessory to crimes committed by Aikens and

Sams, so Bollo's name may be considered surplusage and its omission from the charge harmless. *Id.*

[4] Defendant alleges that the trial court erred in its instructions to the jury explaining the elements of accessory after the fact. The portion of the charge excepted to is as follows:

> . . . and that thereafter on or about the 13th day of June, 1980, Stanley Lewis knowing Kevin Sams and Luther Aikens to have committed the crime of disturbing a grave, assisted Kevin Sams and Luther Aikens in escaping or attempting to escape detection, arrest or punishment *by accepting part of the proceeds of the crime of disturbing a grave* and *refusing to disclose his knowledge of the crime when asked to do so by law enforcement officers*, it would be your duty to return a verdict of guilty as charged as an accessory after the fact of disturbing a grave. (Emphasis ours.)

Defendant argues that accepting part of the proceeds of a crime does not make one an accessory after the fact; rather, that it constitutes the crime of receiving stolen goods. We agree. However, the court's charge goes further and states that if defendant refused to disclose his knowledge of the crime when asked to do so, it would be the jury's duty to return a verdict of guilty as charged. All the elements necessary for conviction of being an accessory after the fact of disturbing graves were presented to the jury in the instructions, and the error committed by the judge when he added the words "accepting part of the proceeds of the crime" was not prejudicial, as it could only have increased the state's evidentiary burden in the minds of the jury.

[5] Defendant also argues that the language in the charge did not describe defendant's alleged acts as set out in the indictment. The bill of indictment stated:

> This offense occurred in that said Defendant, not being present at the time of the offense but with knowledge that said felony had been committed and that said principals had committed it, rendered assistance to each of said principals in escaping arrest and punishment. *The assistance consisted of assisting in concealing and disposing of things removed from said graves and was in violation of N.C.G.S. 14-50.* (Emphasis ours.)

The indictment must charge all the essential elements of the alleged criminal offense. *State v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166 (1946). The indictment in this case adequately charged the elements of the crime of accessory after the fact. See *State v. Potter*, 221 N.C. 153, 19 S.E. 2d 257 (1942). "The bill is complete without evidentiary matters descriptive of the manner and means by which the offense was committed. A verdict of guilty, or not guilty, is only as to the offense charged, not of surplus or evidential matters alleged." *State v. Muskelly*, 6 N.C. App. 174, 176-77, 169 S.E. 2d 530, 532 (1969). An averment in an indictment or warrant not necessary in charging the offense may be treated as exceeding what is requisite and should be disregarded. *Id.* We find it unnecessary to pass upon the effect of the evidential matters charged, therefore. The evidence corresponded with the allegations of the indictment which were essential and material to charge the offense. The judge in turn did an adequate job of clarifying the issues, and of eliminating extraneous matters, as was his duty. This assignment of error is overruled.

[6] Defendant, by his fifth and final assignment, contends that the court meted out to him an unduly harsh sentence compared to the punishment received by Aikens, Bollo and Sams.

> Trial judges have broad discretion in making a judgment as to the proper punishment for crime. Their judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness.

State v. Wilkins, 297 N.C. 237, 246, 254 S.E. 2d 598, 604 (1979). We have searched the record and find no reason to disturb what we consider to be the trial court's sound exercise of discretion. We find no circumstances which manifest inherent unfairness. The assignment of error is overruled.

In defendant's trial and in the judgment rendered, we find

No error.

Judges CLARK and MARTIN (Harry C.) concur.

State v. Berry

STATE OF NORTH CAROLINA v. RUDOLPH BERRY

No. 815SC1398

(Filed 20 July 1982)

1. **Burglary and Unlawful Breakings § 5.5; Criminal Law § 60.5— breaking and entering—reliance on fingerprint evidence—sufficiency of evidence**

In a prosecution for breaking or entering, where the main evidence upon which the State relied was fingerprint evidence, there was substantial evidence of circumstances from which the jury could find that the fingerprint could have been impressed only at the time the crime was committed where the prosecuting witness testified that she lived alone, that on the day of the crime she left her house at 1:00 p.m. and returned at 5:00 p.m., and that she did not know the defendant and to her knowledge he had never been in her house. The fact that the prosecuting witness testified that her children came home unexpectedly from time to time did not make the fingerprint evidence insufficient since there is no rule that when the sole occupant of a house has testified that he or she does not know the defendant and to his or her knowledge the defendant has never been in his or her home, the State must then put on evidence from every person who might have brought a visitor to the house that he or she has not invited the defendant to the house.

2. **Burglary and Unlawful Breakings § 7— lesser offense of misdemeanor breaking or entering—evidence not supporting**

The trial court did not err in failing to submit to the jury misdemeanor breaking or entering in addition to felonious breaking or entering where all the evidence was to the effect that whoever broke into the prosecuting witness's house intended to take the television set.

Judge WHICHARD dissenting.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 10 June 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 June 1982.

The defendant was tried for felonious breaking or entering and felonious larceny. Cornelia Vanleeuwen Swart testified that she lived alone on Wayne Drive in Wilmington. On 30 October 1979 she left her house at 1:00 p.m. and returned 5:00 p.m. She found her front door open and her television set behind it. She noticed that her back door was also open and the windowpanes had been knocked out. She said the television was in the den and both doors were closed, locked and undamaged when she left at 1:00. She gave no one permission to enter her house. She testified she did not know the defendant and to her knowledge he had

never been in her house. On cross-examination, Mrs. Swart testified that no one did yard work or housework for her; that her children came home unexpectedly from time to time; and that she was not always present when they visited.

Billy Hennessey, a twelve-year-old who was playing at a neighbor's house, testified that on 30 October 1979 he saw a black male come around the side of Mrs. Swart's house. He thought he was a plumber and said he was afraid of a dog that was barking. When he saw Billy, the man ran. He never identified the defendant as the man he saw at Mrs. Swart's house.

Steven Eilinsfeld testified that he worked with the identification section of the Wilmington Police Department on 30 October 1979. He searched the house for fingerprints and found one identifiable latent print on the inside rear kitchen door. Officer J. F. Newber, who was found to be an expert in the field of fingerprint identification, testified that he compared this print with the print of the defendant's right middle finger and that it was his opinion that the latent impression lifted from Mrs. Swart's rear door and the impression on the defendant's fingerprint card were made by one and the same person.

The defendant presented no evidence. The jury found the defendant guilty of felonious breaking or entering and not guilty of larceny.

Attorney General Edmisten, by Assistant Attorney General Reginald L. Watkins, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the denial of his motion to dismiss. He contends the case should have been dismissed because the evidence as to his fingerprint found at Mrs. Swart's house was not sufficient to support a conviction. We agree that without the fingerprint there is not sufficient evidence to convict the defendant in this case. When the State relies on a fingerprint found at the scene of the crime, in order to withstand a motion to dismiss, there must be substantial evidence of circumstances from which the jury can find that the fingerprint could have been impressed only at the time the crime was committed. The defendant

relies on *State v. Bass*, 303 N.C. 267, 278 S.E. 2d 209 (1981), and *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979). In *Bass* our Supreme Court held that fingerprint evidence was not sufficient to support a conviction when the defendant testified he had attempted to break into the residence two weeks prior to the breaking for which he was being tried. An officer verified the attempted break-in admitted by the defendant closely followed in detail the attempted break-in as shown by the police investigation. In *Scott* our Supreme Court held fingerprint evidence was not sufficient to convict the defendant of murder. In that case the niece of the victim lived in the house with him but left home each weekday from 7:00 a.m. until approximately 6:00 p.m. She testified that to her knowledge the defendant had never been in the house. Our Supreme Court held there was not substantial evidence of circumstances from which the jury could find the fingerprints could have been impressed only at the time the crime was committed. The Supreme Court said the niece of the deceased could not say the defendant was not on the premises at some time when she was not present. The Supreme Court in *Scott* distinguished *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951), on the ground that in *Tew* the proprietor of a service station testified that she personally attended the service station and was able to testify of her own knowledge that the defendant had never visited the station. In *Tew* this was held to be substantial evidence from which the jury could find the fingerprints could have been impressed only at the time the crime was committed. We believe we are bound by *Tew*. In this case the prosecuting witness, who was the only person living in the house, testified that she did not know the defendant and to her knowledge he had never been in her house. The defendant contends the fact that the prosecuting witness testified that her children came home unexpectedly from time to time is evidence from which it could be concluded that the defendant could have been to the house when the children were there and Mrs. Swart was not. We do not believe the rule is that when the sole occupant of a house has testified that he or she does not know the defendant and to his or her knowledge the defendant has never been in his or her home, the State must then put on evidence from every person who might have brought a visitor to the house that he or she has not invited the defendant to the house. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends the court should have submitted to the jury misdemeanor breaking or entering in addition to felonious breaking or entering. The defendant relies on *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); and *State v. Biggs*, 3 N.C. App. 589, 165 S.E. 2d 560 (1969). Those cases involved breakings or enterings where nothing was taken or disturbed inside the building and from this it could be inferred the defendants did not intend to take anything. In this case all the evidence showed a television set had been moved from the den to the front door. All the evidence was to the effect that whoever broke into Mrs. Swart's house intended to take the television set. This would make it a felonious breaking or entering. There was no evidence of a misdemeanor breaking or entering.

No error.

Judge CLARK concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

I find *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979), rather than *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951), the controlling authority. In *Scott* the State's key witness worked outside the home where the fingerprint in question was found. She was generally absent from the home from early morning until late afternoon. The Supreme Court noted that she thus was unable to testify from her personal knowledge as to who visited the home during her absence. *Scott*, 296 N.C. at 526, 251 S.E. 2d at 418. It reversed defendant's conviction, stating:

> In the absence of additional evidence, it is not unreasonable to infer that the defendant's fingerprint might have been impressed . . . at some time prior to the homicide. In short, the evidence presented by the State does not substantially exclude the possibility that the defendant might have visited the house for some lawful or unlawful purpose in the weeks preceding the murder.

Id. at 526, 251 S.E. 2d at 418-19.

Here, absent the victim's testimony that her children had access to the house and came home unexpectedly from time to time, I would agree that *State v. Tew, supra,* controls. *See also State v. Dorsett,* 18 N.C. App. 318, 196 S.E. 2d 591 (1973). In my view, however, that testimony places this case within the rationale and holding in *Scott.* Because her children had access to the house and came there unexpectedly at times, and because the victim was generally away from the house during the day, the victim, like the witness in *Scott,* "was simply not in a position to know who came into the house" during her absence. *Scott,* 296 N.C. at 526, 251 S.E. 2d at 419. Absent evidence that the children had not granted defendant access, the evidence presented by the State does not "substantially exclude the possibility" that defendant visited the house at the behest of one or more of the victim's children at a time other than when the breaking occurred. *Id.*

I concurred in the majority opinion in *State v. Strange,* 57 N.C. App. 263, 291 S.E. 2d 320 (1982), because I found it distinguishable from *Scott* in that there was in *Strange,* in addition to the fingerprint evidence, evidence that (1) the defendant had been in the victim's house on the day the victim's truck was discovered to be missing, and (2) an ignition key to the truck "was evidently in the kitchen" when defendant was there. *Strange,* 57 N.C. App. at 266, 291 S.E. 2d at 322. This evidence, *combined with* the fingerprint evidence, created a "logical and permissible inference that defendant's fingerprint could only have been impressed on the truck at the time of the robbery." *Id.*

Further, in *Strange* there was no evidence which suggested a reasonable inference that defendant might have been in the victim's truck for some other purpose at a time other than that of the theft. Here, by contrast, the evidence regarding the victim's children having access to her house and visiting there during her absence precludes the "substantial exclusion" of such a possibility which *Scott* appears to require.

Under the facts here, I find the *Scott* rationale and holding controlling. Because I believe that to uphold denial of the motion to dismiss would be inconsistent with *Scott,* I am compelled to vote to reverse.

JOSEPH DANIEL GAY AND MARILYNN F. GAY v. REESE B. WALTER

No. 818SC126

(Filed 3 November 1981)

1. **Automobiles § 45.6— photographs to illustrate testimony admissible**

In a personal injury action occurring before 1 October 1981, two photographs of the intersection at which an accident occurred were admissible for illustrative purposes even though they were taken at a different time of day and under different lighting conditions than the event they illustrated.

2. **Trial § 14— failure to allow additional evidence after the close of the evidence—not error**

The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence, and the exercise of the trial court's discretion will not be disturbed on appeal absent an abuse of that discretion.

3. **Automobiles § 88.5— instruction on violation of left turn statute proper**

In a personal injury case where defendant's evidence raised the possibility that plaintiff violated G.S. 20-153(b), which required plaintiff to be in the most left-hand lane of the street, it was not error for the trial judge to instruct on that statute as the trial judge has the duty to instruct the jury on the legal issues raised by the evidence.

APPEAL by plaintiff from *Llewellyn, Judge.* Judgment entered 18 September 1980 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 September 1981.

This action involves claims and counterclaims for personal injury and property damages arising out of an automobile collision between plaintiff and defendant. Both parties assert negligence of the other.

Plaintiff's evidence tends to show that at 6:00 p.m. on 1 November 1977 plaintiff was driving south on North Heritage Street, which is a two lane street with a double yellow line separating the lanes. It was cloudy and dark, and plaintiff had her car lights on. Plaintiff intended to make a left turn onto Daniel Street. Approximately 300 feet before the intersection of North Heritage Street and Daniel Street, plaintiff turned on her left turn signal. She stopped adjacent to the yellow line at the entrance of the intersection and waited for several oncoming cars to pass before making her turn. As plaintiff began her turn, her car

was struck in its left side by defendant's automobile, which was also proceeding south on North Heritage Street. Plaintiff has suffered serious back and leg injuries as a result of this accident. Plaintiff seeks personal injury damages, and plaintiff's husband seeks property damages for his car.

Defendant's evidence tends to show that defendant was traveling south on Heritage Street, driving within the speed limit. There were cars parked parallel to the curb on each side of the street. Defendant saw plaintiff's car parked on defendant's right side of North Heritage Street, by the curb near the Daniel Street intersection. Without signaling a left turn, plaintiff suddenly crossed directly in front of defendant's car, almost perpendicular to defendant's path. Defendant braked but was unable to avoid the collision. The accident occurred in the southbound lane of North Heritage Street. Plaintiff's automobile was damaged on the front and the left side, while defendant's car was damaged on the right front fender. Defendant counterclaimed for property damage to his car.

The jury found defendant negligent and plaintiff contributorily negligent, and awarded neither any damages. Plaintiff has appealed from judgment entered on the verdict.

White, Allen, Hooten, Hodges & Hines, P.A., by John M. Martin, for plaintiff-appellant.

Jeffress, Morris, Rochelle & Duke, P.A., by Thomas H. Morris, for defendant-appellee.

WELLS, Judge.

This appeal involves questions of possible error in the admission of photographic evidence, in the exclusion of rebuttal testimony, and errors in the trial court's charge to the jury as it relates to a motorist's duty in signaling and making a proper left-hand turn at an intersection. We find no error in the trial.

[1] Plaintiff first assigns as error the admission into evidence of two photographs of the intersection offered by defendant. Plaintiff contends first, that the photographs differed substantially from the actual scene, since they were taken in daylight though the accident occurred after dark; and second, that they were not actually used to illustrate defendant's testimony. A photograph

may be used to illustrate testimony as long as it portrays a scene with sufficient accuracy, even though it was not made simultaneously with the event to which the testimony relates. 1 Stansbury's N.C. Evidence (Brandis Revision 1973) § 34. Thus, a photograph is admissible for illustrative purposes[1] even if it was taken at a different time of day and under different lighting conditions than the event it illustrates. *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1975), *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1971). While plaintiff contends that the witness did not actually use the photographs to explain his testimony, the record shows that defendant testified as to the configuration of the intersection, the relative positions of his car and plaintiff's, and the positions of their automobiles after the collision. The photographs of the intersection were used to illustrate defendant's testimony. We overrule this assignment.

[2] In her second assignment of error, plaintiff contends that the trial court erred in refusing to allow plaintiff's rebuttal testimony.

When defendant rested, plaintiff offered the testimony of two rebuttal witnesses, Joseph Ray Brochure and Joseph Gay. The trial court sustained defendant's objections to their testimony. Had Brochure been allowed to testify, he would have testified that he was a licensed land surveyor, that he had made a survey of the intersection of North Heritage and Daniel Street and had prepared an exhibit based on his survey showing the width of the two streets and the width of the lanes of travel of the two streets at the intersection. Gay would have testified to corroborate the testimony of Brochure. Plaintiff concedes that the admission of rebuttal testimony is a matter within the discretion of the trial court, but contends that the trial court abused its discretion in this case. The use of the term "rebuttal" may be misleading in such cases as the one before us. The record here discloses that plaintiff testified that her husband, Joseph Gay, a former highway patrolman, had measured the streets at the intersection; and yet, when Mr. Gay testified in plaintiff's behalf, he offered no such testimony. Further, both parties offered photographs to illustrate the intersection, and plaintiff offered testimony generally as to the width of North Heritage Street. It would, therefore, appear

1. This case arose before October 1, 1981, the effective date of N.C. Sess. Laws Chap. 451 (H 149), which allows photographs to be used as substantive evidence.

that the testimony offered by plaintiff after defendant rested was not so much "rebuttal" as it was additional testimony. The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence. 12 Strong's N.C. Index 3d, *Trial*, § 14, page 375, *Castle v. Yates Co.*, 18 N.C. App. 632, 197 S.E. 2d 611 (1973). The exercise of the trial court's discretion in such cases will not be disturbed on appeal absent an abuse of that discretion. *Maness v. Bullins*, 33 N.C. App. 208, 234 S.E. 2d 465 (1977), *disc. rev. denied*, 293 N.C. 160, 236 S.E. 2d 704 (1977). We see no such abuse here, and this assignment is, therefore, overruled.

[3] Plaintiff next assigns error to the inclusion of an instruction on G.S. 20-153(b)[2] in the trial judge's charge to the jury. Plaintiff contends that the statute is inapplicable to this case. We disagree. The trial judge has the duty to instruct the jury on the legal issues raised by the evidence. G.S. 1A-1, Rule 51(a), *Griffin v. Watkins*, 269 N.C. 650, 153 S.E. 2d 356 (1967), 12 Strong's N.C. Index 3d, *Trial*, § 32, page 421. The evidence presented by plaintiff and defendant conflicted with regard to the lane in which plaintiff was traveling when she attempted her left turn. Defendant's evidence tended to show that plaintiff was in the right-hand lane of North Heritage Street, next to the curb. Defendant's evidence raised the possibility that plaintiff violated G.S. 20-153(b), which required plaintiff to be in the most left-hand lane of the street. We find no merit in plaintiff's assertion that *Ferris v. Whitaker*, 123 F. Supp. 356 (E.D.N.C. 1954), limits the application of G.S. 20-153(b) exclusively to cases involving a vehicle entering an intersection from the left of the intersecting road. *Ferris* involved an accident which occurred when plaintiff's car attempted to pass defendant's truck on the left, while defendant was turning left at an intersection. The court in *Ferris* simply stated that though the defendant truck driver "cut the corner"

2. G.S. 20-153(b) Left Turns.—The driver of a vehicle intending to turn left at any intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and, after entering the intersection, the left turn shall be made so as to leave the intersection in a lane lawfully available to traffic moving in such direction upon the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

slightly, and indeed violated G.S. 20-153, this was not the proximate cause of the collision. The statute applies to protect the safety of all who may be affected by a vehicle turning left at an intersection. Since defendant's evidence supplied the factual basis for this instruction, there was no error in this part of the charge. *See Griffin v. Watkins*, supra.

Plaintiff also argues that reversible error occurred when the court instructed the jury on G.S. 20-153(b), and referred to a turn signal requirement. The portion of the charge to which plaintiff excepts is as follows:

> "As to the second contention, the motor vehicle law provides that the driver of a vehicle intending to turn left at an intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, *and after entering the intersection the left-hand turn signal shall be made so as to leave the intersection in a lane lawfully available to traffic moving in such direction upon the roadway being entered.*"

The trial judge inadvertently added the word "signal" to this portion of the charge. He later instructed the jury fully as to the relevant turn signal statute. We are unconvinced that this *lapsus linguae* confused the jury. Jury instructions are to be construed contextually, and there is no error if they were correct on the whole. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1977), *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967), *Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 267 S.E. 2d 409 (1980). This assignment is overruled.

The final assignment which we address is whether the trial judge erred in explaining the turn signal statute to the jury. Plaintiff contends that the instructions could have misled the jury into thinking that failure to give a turn signal, in itself, constitutes contributory negligence per se. Plaintiff excepts to a portion of the charge which reads:

> "[I]f the defendant has proved . . . the plaintiff . . . was negligent in any one or more of the following respects, . . . by turning from a direct line before turning from a direct line (sic) failing to determine that the movement could be made in

safety *or failing to give a plain visible signal of her intention to turn.*"

The jury had previously been instructed that "[I]f the operation of another vehicle may be affected, he [the driver] must give a plainly visible signal. . . . Turning in violation of these duties is not negligence within itself. . . ." Plaintiff admits that this portion of the instruction is correct. Viewing this instruction on the whole, we find no error, and overrule this assignment. *See Griffin v. Watkins,* supra.

No error.

Chief Judge MORRIS and Judge CLARK concur.

SYBIL CROTTS GRAY AND JOHN WILLIAM GRAY, JR. v. BENNY VON CROTTS, LORRAINE CROTTS, ARCHIE LEONARD CROTTS, REBA CROTTS, JEAN CROTTS HIATT AND JOE HIATT

No. 8122SC1143

(Filed 20 July 1982)

1. Partition § 7— partitioning proceeding—tenant in common not given adjoining land—no error

In a partitioning proceeding where three tracts of land were divided into four equal shares and, by lottery, given to the four tenants in common, there was no error in failing to give one of the tenants in common a tract of land which adjoined his homeplace since (1) the fact that one tenant owns land adjoining the land to be partitioned does not mean that the property partitioned *must* be laid off next to his homeplace, (2) the appellant owned tracts of land which adjoined another tract allotted by the Commissioners, (3) the evidence did not support appellant's contention that the parcel next to his homeplace was the only means by which he could get to another parcel of land he owned, and (4) appellant failed to show that a tobacco barn placed on the tract beside his homeplace was in fact an "improvement" on the land equitably entitling him to that tract.

2. Partition § 7— partitioning proceeding—assignment of parcels—done by lottery—no error

The superior court did not err in confirming the report of the Commissioners in a partitioning proceeding because the actual assignment of the parcels was done by lottery since *Dunn v. Dunn,* 37 N.C. App. 159 (1978), specifically approves the assignment of shares to the various tenants in common by the drawing of lots.

Gray v. Crotts

APPEAL by respondents, Archie Leondard Crotts and his wife, Reba Crotts, from *Hairston, Judge.* Order of Confirmation entered 22 May 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 June 1982.

This is a special proceeding for the partition of real property pursuant to Chapter 46 of the North Carolina General Statutes. From an Order confirming the report of three Commissioners who divided three tracts of land into four parcels of equal value and allotted the parcels to the tenants by a lottery, respondents, Archie Leonard Crotts and his wife Reba Crotts, appeal.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for respondent appellants, Archie Leonard Crotts and Reba Crotts.

Smith, Michael & Penry, by Wayne L. Michael, for petitioner appellees, Sybil Crotts Gray and John William Gray, Jr.

Stoner, Bowers & Gray, by Bob W. Bowers, for respondent appellees, Benny Von Crotts and Lorraine Crotts.

BECTON, Judge.

I

PROCEDURAL AND FACTUAL HISTORY

The petitioner, Sybil Crotts Gray, and the respondents, Benny Von Crotts, Archie Leonard Crotts, and Jean Crotts Hiatt, are brothers and sisters, and are the owners, as tenants in common, of undivided interests in three tracts of real estate located in Davidson County. The three tracts consist of approximately sixty acres. Sybil Gray filed a special proceeding seeking the sale of the real estate, or in the alternative, an actual partition. Benny Crotts, in his Answer, sought a sale, or in the alternative, an actual partition. Archie Crotts and Jean Hiatt, in their Answer, asked that the property not be sold, but be partitioned. The question of whether to sell or partition was resolved when the parties consented, on 23 July 1980, to the appointment of Commissioners who were to partition the property.

The Commissioners first appointed by the Clerk of Superior Court divided the real estate and its tobacco allotment among the four brothers and sisters. Archie Crotts, Benny Crotts, and Jean

Hiatt filed objections to the Commissioners' Report, contending that the property was not divided equally according to value. Petitioner Sybil Gray objected to the division of the tobacco allotment. Consequently, the Clerk vacated the Report of those Commissioners and appointed three new Commissioners to divide the land.

The new Commissioners divided the real property and improvements into four parts which they considered equal. The tobacco allotment was also divided into four parts. The Commissioners stated: "We have visited the property and taken into consideration all factors influencing its value." The Commissioners, by drawing names, assigned to each of the four tenants in common one of the four tracts of land. Archie Crotts was the only party to file an objection to the report of the new Commissioners. When the Clerk confirmed the Commissioners' report, Archie Crotts appealed to superior court, contending that he should have been assigned Tract No. 3, which adjoins his homeplace. The superior court made findings that the Commissioners were aware that Archie Crotts owned property adjoining Tract No. 3 and Tract No. 1 when their plat was prepared. The superior court concluded that the division of the real estate among the tenants in common was fair and equal and that the lottery used for determining ownership of shares was a fair method of apportioning the property. From the order of the superior court confirming the report of the Commissioners, Archie Crotts and his wife appealed.

Archie Crotts argues, first, that he is *entitled* to be allotted Tract No. 3 and, second, that the allotment made by lottery was unfair and inequitable. We disagree, and we address the arguments *seriatim.*

II

[1] The superior court, in confirming the report of the Commissioners, made the following findings of fact concerning Tract No. 3:

> 9. Tract No. 3, allotted by the said Commissioners to Benny Von Crotts, adjoins on three sides the home tract of Respondent Archie Leonard Crotts and adjoins on the south side a separate tract of land owned by Respondent Archie Leonard Crotts and adjoins on the east a small strip of land owned by respondent Archie Leonard Crotts.

Archie Crotts contends that he has placed "improvements" (a tobacco barn) on Tract No. 3 and has used Tract No. 3 for many years to reach a "landlocked" parcel which he also owns. Consequently, Archie Crotts argues that Tract No. 3 should be allotted to him based upon these facts, and based upon the generally recognized equitable principle in partitioning proceedings that "[a] tenant in common is entitled, as a matter of right, to a partition of the land to the end that he may have and enjoy his share therein in severalty. . . ." *Seawell v. Seawell*, 233 N.C. 735, 738, 65 S.E. 2d 369 (1951), *Brown v. Boger*, 263 N.C. 248, 256, 139 S.E. 2d 577, 582 (1965). *See also Hyman v. Edwards*, 217 N.C. 342, 344, 7 S.E. 2d 700, 702 (1940), *and Barber v. Barber*, 195 N.C. 711, 712, 143 S.E. 469, 470-71 (1928).

While it is true that courts *may* consider whether one of the tenants in common owns other land adjoining the land to be partitioned, *see Windley v. Barrow*, 55 N.C. 66 (1854), that does not, *ipso facto*, mean that Archie Crotts' share of the property being partitioned *must* be laid off next to his homeplace. Indeed, in *Windley*, despite the fact that the owner of a one-sixth interest also owned adjoining land, an order that the land be sold rather than divided was confirmed. Equally important, in this case, the superior court, in confirming the report of the Commissioners, also found "[t]hat the said Archie Leonard Crotts also owns a tract of land which adjoins Tract No. 1 allotted to Jean Crotts Hiatt by the Commissioners." Archie Crotts, therefore, owned land adjoining *two* of the tracts allotted by the Commissioners. Archie Crotts' land adjoining Tract No. 1 has a common boundary of approximately 1,200 feet with Tract No. 1. Archie Crotts does not contend that he is therefore entitled to have Tract No. 1 allotted to him, too. Simply put, the trial court properly concluded, upon findings supported by the evidence, that Archie Crotts was not equitably entitled to receive Tract No. 3 *solely* on the basis of his ownership of adjoining property.

Moreover, the fact that Archie Crotts has traditionally used a path across Tract No. 3 to get to his "landlocked" tract of land is not a sufficient basis upon which to allot Tract No. 3 to Archie Crotts. First, if Archie Crotts has a legal right of way or easement, or if he is entitled to a cartway or right of way by implication or prescription across Tract No. 3, he could assert his claim notwithstanding the allotment of Tract No. 3 to Benny Von

Crotts. Second, the record reveals that Archie Crotts' "landlocked" parcel is only 140 feet from a public right of way, and the superior court specifically found as a fact "[t]hat there is located on [this] tract of land a mobile home court owned by Archie Leonard Crotts and the residents of said court go across property owned by other parties with the permission of such other parties, to get to and from such mobile home court." Thus, Archie Crotts, and his tenants, have access to the "landlocked" parcel by means other than crossing Tract No. 3.

As a final basis for his claim that he is equitably entitled to have Tract No. 3 assigned to him, Archie Crotts contends that he made or placed improvements on Tract No. 3. We summarily reject this argument. Archie Crotts failed to show that the tobacco barn placed on Tract No. 3 was in fact an "improvement." No evidence was presented relating to the value, if any, of the tobacco barn. At the time the tobacco barn was moved to Tract No. 3, the parties in this case were not tenants in common, as their father was still living and owned the land. Consequently, the principle that "[i]f one tenant in common makes improvements upon the common property he will be entitled, upon actual partition, to have that part of the property which he has improved allotted and assigned to him. . . ," *Jenkins v. Strickland*, 214 N.C. 441, 444, 199 S.E. 612, 614 (1938), has no application to the facts of this case.

Significantly, Archie Crotts now seeks to invoke equity and to have Tract No. 3 assigned to him as his share when, in the original division made by the Commissioners first appointed, Archie Crotts was allotted (1) all of the land referred to as Tract No. 3; (2) an additional tract of 1.899 acres; and (3) one-half (as opposed to one-fourth) of the tobacco allotment. Archie Crotts filed exceptions to this allotment contending, among other things, that the share allotted to him was of grossly inferior value. In view of this, the testimony of Benny Crotts, at the superior court hearing, that "my brother [Archie] said he would keep this property tied up in court until the day he died if he didn't get his way," takes on added significance. He who seeks equity must come into equity with clean hands, or stated differently, "[p]artition is always subject to the principle that he who seeks it by coming into equity for relief must do equity." *Properties, Inc. v. Cox*, 268 N.C. 14, 20, 149 S.E. 2d 553, 557 (1966).

III

[2] In his second assignment of error, Archie Crotts contends that the superior court erred in confirming the report of the Commissioners because the actual assignment of the parcels was done by lottery. When there is no question that parcels have been equally divided in terms of value, this court has specifically approved the drawing of lots as a method of assigning the shares to tenants in common. *See Dunn v. Dunn*, 37 N.C. App. 159, 245 S.E. 2d 580 (1978). The *Dunn* Court said:

> The procedure for the partitioning of real property is governed by the provisions of Article I of Chapter 46 of our General Statutes. No section in that Article makes provision for a drawing to determine by lot or chance the manner in which the separate parcels of partitioned real property should be allotted among the several owners. Nevertheless, "in this state partition proceedings have been consistently held to be equitable in nature," and "[t]he statutes are not a strict limitation upon the authority of the court." *Allen v. Allen*, 263 N.C. 496, 498, 139 S.E. 2d 585, 587 (1965). Therefore, there can be no question, and none has been raised, as to the validity of the direction contained in Judge Braswell's order of 18 February 1976 that "the commissioners" meet in the office of the clerk and there conduct a lottery at which the interested parties should "draw for one of the two respective parcels."

Id. at 162, 245 S.E. 2d at 582.

In this case, Archie Crotts complains of the result of the lottery; he does not contend that the lottery was improperly or unfairly conducted. Moreover, Archie Crotts concedes in his brief that "all of the evidence shows, and all of the parties contend and agree that the parcels were equally divided in point of value." Although the "lottery" in this case was not court-ordered, as was the case in *Dunn*, we nevertheless believe the *Dunn* case, which specifically approves the assignment of shares to the various tenants in common by the drawing of lots, is applicable to this case. Consequently, the trial court did not err in confirming the Commissioners' report.

The trial court's order confirming the report of the Commissioners is affirmed, and the cost of this appeal is taxed against the appellant.

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

B. W. JAMES AND WIFE, JOYCE E. JAMES; JOYCE E. JAMES, EXECUTRIX OF THE ESTATE OF B. W. JAMES; MABLE JAMES BECK AND HUSBAND, HAROLD BECK, PETITIONERS v. PAULINE W. JAMES; ANNETTE JAMES PILGREEN AND HUSBAND, JOE PILGREEN; R. E. JAMES, JR. AND WIFE, GRACE E. JAMES; AND PAULINE W. JAMES AND R. E. JAMES, JR., EXECUTRIX AND EXECUTOR OF THE ESTATE OF R. E. JAMES, DECEASED, RESPONDENTS, AND IRVIN JAMES, GLADYS K. JAMES, IRVIN E. JAMES AND BARBARA R. JAMES, INTERVENORS-RESPONDENTS

No. 813SC1109

(Filed 20 July 1982)

1. **Tenants in Common § 3— distribution of rental proceeds—modification of consent order**

The clerk of superior court and the trial court had authority to modify a consent order providing for the distribution of proceeds from the rental of land among tenants in common to reflect a change in the interests of the tenants after the order was entered but before the rent was tendered.

2. **Executors and Administrators § 13— sale of realty under power in will—grounds for sale**

Where a will gave the co-executors the authority to sell testator's property in their "absolute discretion" but further provided that the power of sale could be exercised by them "if in their judgment such a procedure will facilitate the settling of [the] estate," the co-executors could only sell land to facilitate the settling of the estate, and a sale by the co-executors for the reason that it would facilitate the settlement of a special proceeding for the partition of land was not a valid exercise of the power of sale.

APPEAL by petitioners from *Reid, Judge.* Order entered 12 June 1981 in Superior Court, PITT County. Heard in the Court of Appeals 28 May 1982.

This case began when petitioners on 31 July 1980 filed a special proceeding to partition two tracts of land devised to them

and respondents as tenants in common. Respondents answered that the Will of R. E. James, who died on 3 March 1979, gave his executors, Pauline W. James and R. E. James, Jr. (his widow and son), the authority in their discretion to sell the land; alleged that the land could not be partitioned without injury to the parties; and asked that the land be sold and the proceeds divided among the tenants in common according to their proportionate shares.

A consent order was entered into on 16 February 1981 appointing two commissioners for the purpose of leasing the two tracts of land for the year 1981. The commissioners were ordered to disburse the rental proceeds to the parties in their proportionate shares.

On 27 February 1981 intervenor-respondents received a deed which conveyed to them the estate's interest in the two tracts of land. The deed had been executed by the co-executors and the other respondents. Public rental of the two tracts was also conducted on 27 February 1981. On 6 March 1981 intervenor-respondents filed a motion to intervene to protect their claim to the rental proceeds, alleging that they had acquired all of the interest of the co-executors in the estate of R. E. James in the two tracts, and attaching a copy of a deed from the co-executors to them dated 23 February 1981. They also asked the court to modify the 16 February consent order in regard to disbursement of the rental proceeds in order to reflect their newly-acquired interest in the land. On 17 March 1981 the Clerk of Superior Court entered an order modifying the distribution of rental proceeds as provided for in the earlier consent order. The effect of this modification reduced each petitioner's share from an 11/48 interest in the James homeplace to a 2/16 interest and from a 1/6 interest in the Whitehurst farm to none at all. Petitioners objected and excepted to the findings, conclusions and order. The clerk's order was adopted by Judge Reid, who recommitted the proceeding to the clerk to appoint commissioners and enter orders to partition the James homeplace. Petitioners appealed. They also moved for a new trial, but Judge Reid deemed that he had no authority to either grant or deny the motion.

Underwood & Leech by David A. Leech for petitioner appellants.

Everett & Cheatham by C. W. Everett, Sr. for respondent appellees; James, Hite, Cavendish & Blount by E. Cordell Avery for intervenor-respondent-appellees.

CLARK, Judge.

[1] We reject the argument of the petitioners that the Clerk of the Superior Court and the trial court had no authority to modify the distributive provisions of the 16 February 1981 Consent Order. The distribution provisions were based on the interests owned by the heirs on that date. The rents were tendered on 27 February 1981 after the delivery of the deed dated 23 February 1981. It is established that accrued rents are incorporeal hereditaments and are incident to and connected with an estate in land. *Bank v. Sawyer*, 218 N.C. 142, 10 S.E. 2d 656 (1940); *Mercer v. Bullock*, 191 N.C. 216, 131 S.E. 580 (1926); *Wilcoxon v. Donelly*, 90 N.C. 245 (1884).

The Consent Order provides for disbursement of the rents to the parties "as their interests appear" and then lists the heirs and their interests as they appeared at that time. But the interests were changed by the 23 February 1981 deed, and the distribution provisions were properly modified by the Clerk of the Superior Court and the trial court to provide for distribution of the net rental proceeds in proportion to their ownership interests.

[2] However, there arises on appeal the question of whether the clerk and trial court erred in determining these ownership interests. The 17 March 1981 order of the clerk, approved and adopted by the trial court, held that the executors had the authority to exercise their power of sale conferred by Item Three of the Will of R. E. James. We find that the executors did not have such authority and that their private sale of the lands in their official capacity as executors to the intervenors by deed dated 23 February 1981 was invalid.

The Will of R. E. James reads, in pertinent part, as follows:

"ITEM TWO

I direct that all the rest and residue of my property, both real and personal, shall pass under and by virtue of the Intestate Succession Act, . . .

ITEM THREE

I make, constitute, and appoint my wife, Pauline W. James, and my son, Robert E. James, Jr., the Executors of this my Last Will and Testament and vest in them the full power and authority to sell in such manner as they in their sole and absolute discretion may determine to be proper any and all property described in the second item of my will and to convey good title to the purchaser or purchasers. This authority shall not be obligatory upon my executors but can be exercised by them if in their judgment such a procedure will facilitate the settling of my estate."

Subject to the power of sale of the Executors in Item Three, the title to the land vested at decedent's death pursuant to G.S. 28A-15-2(b) in his widow, Pauline W. James, his three children by his first marriage, and his one child from his second marriage. The respondent executors contend that Item Three gave them authority to sell the real property in their absolute discretion. The first sentence contains the words "their sole and absolute discretion." But the second sentence of Item Three cannot be ignored. It is established that in construing a will the intent of the testator is to be determined from the entire instrument so as to harmonize, if possible, inconsistent provisions. *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970).

The power of the executors to sell the land in their "absolute discretion" as provided by the first sentence of Item Three is subject to and limited by the provision in the second sentence that the power of sale "can be exercised by them if in their judgment such a procedure will facilitate the settling of [the] estate." There is nothing in the record on appeal to indicate that the reason for the sale by the executors was to facilitate the settlement of the estate. The deed of 23 February 1981 to the intervenors from the executors recites that they are exercising their power of sale in their "absolute discretion," but there is no provision in the deed

that the executors had determined that the sale of the land was made to facilitate the settling of the estate.

The executors had the right under G.S. 28A-15-1(c) to sell the realty to obtain money for the payment of debts or other claims against the estate. The exercise of this right would "facilitate the settling of [the] estate" under the second sentence of Item Three, and there could be other valid reasons for facilitating the settlement of the estate by the sale of the land. But neither the original respondents nor the intervenor-respondents claim that the sale was made to facilitate settlement.

The petitioners filed their petition for partition under G.S. 46-1, which provides for a special proceeding over which the Clerk of Superior Court has jurisdiction, about 18 months after decedent's death. In doing so petitioners recognized the authority of the court to partition the land. The original respondents filed their answer in which they alleged the actual partition would be inequitable and sought a partition sale, and they further alleged that the executors had the power of sale in their absolute discretion. Under these circumstances the following issue was raised: whether the executors had the power under the will to sell the land in their absolute discretion and thus divest the jurisdiction of the Superior Court over the special proceeding for partition. This issue was not resolved by the court before the executors conveyed the land to intervenors by deed dated 23 February 1981. In doing so the executors did not determine, or move the court to determine, whether the sale would facilitate the settlement of the estate.

Since the title to the land vested in the heirs upon the death of R. E. James under G.S. 28A-15-2(b), it was not a part of the estate, and the title of the heirs to the land could not be involuntarily divested except by law [*i.e.*, sale to create assets to pay debts under G.S. 28A-15-1(c)] or by the executors under the power of sale as provided by Item Three of the will. The land not being a part of the estate, a sale by the executors for the reason that it would facilitate the settlement of the special proceeding for partition was not a valid exercise of the power of sale under Item Three of the will.

The purported conveyance from the executors to the intervenor-respondents by the deed dated 23 February 1981 is in-

valid and did not divest the petitioners of their interests in the land as devised in Item Two of the will. This determination of invalidity relates only to the purported conveyance by the executors in their official capacity. The validity of the conveyance by the original respondents of their interests in the land as individuals is not an issue on appeal. The trial court erred in its order modifying the distribution of rental proceeds, and that part of the order is vacated and the cause remanded for proceedings consistent with this opinion.

Vacated and remanded.

Judges WEBB and WHICHARD concur.

PEARL NORRIS, EMPLOYEE-PLAINTIFF v. KIVETTCO, INC., EMPLOYER AND UNITED STATES FIDELITY & GUARANTY INSURANCE, CARRIER, DEFENDANT

No. 8110IC809

(Filed 20 July 1982)

Master and Servant §§ 55.3, 56— workers' compensation—back injury—no accident—no proof of causation

Plaintiff did not suffer a back injury by accident when her ankle, for some unexplained reason, "gave way" as she lifted a bundle of jeans and she felt a stinging sensation in her back since her injury was caused by an idiopathic condition unconnected with her employment. Furthermore, even if there was an accident, plaintiff failed to prove that the accident could or might have resulted in the injury to her back.

APPEAL by plaintiff from order of the North Carolina Industrial Commission filed 3 March 1981. Heard in the Court of Appeals 31 March 1982.

Plaintiff was employed between February 1979 and January 1980, at Kivettco, Inc., in High Point, where she side-seamed or hemmed blue jeans on a sewing machine. She normally worked from 7:00 a.m. to 3:30 p.m. About every hour and a half, plaintiff walked approximately five feet from her sewing machine to a hand truck, where she picked up a bundle of around 35 or 40 pairs of jeans, returned to her machine, sewed the jeans, then placed

them on a truck and pushed the truck to a "hemmer". The bundles were of fairly uniform size and weight.

Between 1:30 and 2:30 p.m. on Friday, 24 August 1979, plaintiff picked up a bundle of jeans. As she did so, her left foot "gave way", then she felt a stinging sensation in her back. She did not slip, trip, or fall, and her foot did not move. Plaintiff returned to her machine and worked until 3:30, when her shift ended. She testified that she had severe back pain upon her return home between 3:30 and 4:00 p.m., and that she treated herself with over-the-counter medicinal rubs. However, she also told an adjuster employed by United States Fidelity and Guaranty that she did not feel anything that day, having first experienced pain when she arose the following morning.

Plaintiff returned to work on Monday, 27 August and worked until 9:00 a.m., but experienced such pain that she went to a physician who gave her pain pills and relaxants. She suffered severe back pain again on Friday, 31 August and was taken to the High Point Memorial Hospital emergency room. Doctor Michael B. Hussey attended plaintiff, diagnosed her as suffering from acute lumbosacral strain, and hospitalized her for eleven days. She returned to work at Kivettco on 29 October 1979.

Deputy Commissioner Angela R. Bryant found as fact in an opinion and award that

> On Friday, August 24, 1979, plaintiff got up from her machine, walked four feet to her left, bent over and picked up a bundle of blue jeans (35 to 40 pair) and her left ankle gave away (felt weak). Plaintiff felt a sting in her back as if something had pulled loose. Plaintiff almost fell, kept balance with her right foot, and stood for a minute holding on to the bundle. Plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant-employer.

Her first conclusion of law based on the facts found was that "plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant-employer." Plaintiff was awarded benefits, and defendants appealed. The Full Commission adopted the deputy commissioner's findings, but concluded that plaintiff had not suffered an injury by accident and that there

was no competent medical authority to indicate that plaintiff's injury caused the back difficulty for which she was hospitalized. Plaintiff appeals the denial of her claim.

Charles L. Cromer for plaintiff appellant.

Wyatt, Early, Harris, Wheeler and Hauser, by William E. Wheeler, for defendant appellee.

MORRIS, Chief Judge.

Plaintiff, by her first assignment of error, alleges that the Full Commission erred in concluding that plaintiff's injury was not the result of an accident. She contends that the evidence of her foot giving way before she felt the sensation in her back shows an interruption of the usual work routine and the introduction of a new circumstance not a part of that routine.

"A back injury . . . suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way." (Citations omitted.) *Pardue v. Blackburn Brothers Oil and Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963). "Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unpredicted consequences." *Harding v. Thomas and Howard Co.*, 256 N.C. 427, 429, 124 S.E. 2d 109, 111 (1962). That is to say, in the absence of some fortuitous event, injury of an employee while performing his regular duties in the ordinary way is not compensable under the North Carolina Workers' Compensation Act.

> An accident, as the term is used in the Act, is "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas and Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109. While there need be no appreciable separation in time between the accident and the resulting injury, *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342, there must be some unforeseen or unusual event other than the bodily injury itself.

Rhinehart v. Roberts Super Market, Inc., 271 N.C. 586, 588, 157 S.E. 2d 1, 3 (1967). Plaintiff's ankle, for some unexplained reason,

"gave way" as she lifted a bundle of jeans, but before she felt the sensation in her back. We think that *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963), is factually quite similar and controls here. In *Cole,* plaintiff, a juror, who was 74 years of age, fell on the cement porch of the courthouse as she was leaving the building during the noon recess. She said that there was no foreign matter on the floor and that the door did not hit her. "My leg just gave way and I fell." The Commission concluded that she suffered an injury by accident arising out of her employment. In reversing, the Court, through Sharp, J. (later C.J.) said:

> Mrs. Cole's fall was idiopathic—that is, one due to the mental or physical condition of the particular employee. 99 C.J.S., Workmen's Compensation, § 257(1). The liability of an employer for such injuries was considered by this Court in *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173. In that case an employee subject to epileptic seizures, while driving his employer's truck, felt one approaching. He stopped the truck, opened the door, and laid down in the seat with his feet hanging out. During the seizure he fell and was injured. In reversing the Commission's award of compensation, this Court held that the seizure was the sole cause of the injury which was unrelated to the employment. The Court said:
>
> > "(T)he better considered decisions adhere to the rule that where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. *But not so where the idiopathic condition is the sole cause of the injury.*" (Italics ours.)
>
> The opinion in *Vause* referred to 5 Schneider's Workmen's Compensation Text (Permanent Ed.), § 1376, where the author states: "(T)he question that usually determines whether the injury is compensable is, did the employee's working conditions contribute to the fall and consequent injury or was the accident solely due to the employee's idiopathic condition which might have caused him to fall in his home with the same injurious results? If it is the latter the employer is not liable, if the former he is liable." Quite clearly Mrs. Cole's fall was in the latter category. The claim-

ant's fall in *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97, and in *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476, were in the former. See 40 N.C. Law Rev. 488.

Id. at 728, 131 S.E. 2d at 311-12. It seems clear that plaintiff's injury in the case before us was also in the latter category. The Commission correctly vacated the deputy commissioner's conclusions of law and award.

Additionally, there is a total lack of proof of causation. Plaintiff contends by her second assignment of error that the Commission committed error in concluding that there had been no showing by competent medical authority that her injury caused the difficulty for which she was hospitalized. We disagree.

The evidence of the onset of pain is conflicting. Plaintiff testified before the deputy commissioner that she experienced pain upon returning home from work on 24 August, but told a representative of United States Fidelity and Guaranty in a recorded statement that she first suffered pain when she got out of bed the following morning. She testified that she did not report an injury to her employer on the 24th, and did not seek medical attention until 27 August. The only medical evidence was Dr. Hussey's bill for services rendered on which appeared the words "Diagnosis: Acute lumbosacral strain." There was no medical evidence indicating how the strain might have been sustained. Even if we should assume that there was an accident, without the guidance of expert opinion as to whether the accident could or might have resulted in her injury, there is no proper foundation for a finding by the Commission regarding the origin of plaintiff's back injury. *Click v. Pilot Freight Carriers, Inc.*, 41 N.C. App. 458, 255 S.E. 2d 192 (1979), *rev'd*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965).

Accordingly, the denial of award by the Full Commission is

Affirmed.

Judges HEDRICK and VAUGHN concur.

Carpenter v. Cooke and Carpenter v. Cooke

ROBERT T. CARPENTER v. GEORGE H. COOKE, ADMINISTRATOR CTA OF THE ESTATE OF JUAN C. COOKE, DECEASED; EDITH ANN CARPENTER v. GEORGE H. COOKE, ADMINISTRATOR CTA OF THE ESTATE OF JUAN C. COOKE, DECEASED

No. 8114SC1036

(Filed 20 July 1982)

Rules of Civil Procedure § 37— failure to make discovery—dismissal of actions—proper

The trial court did not err in dismissing plaintiffs' actions against the administrator of an estate for failure to comply with its order to compel discovery since (1) under G.S. 1A-1, Rules 37 and 41(b) the trial court had the authority to dismiss plaintiffs' claims for noncompliance with its order compelling discovery, and (2) plaintiffs' evasive and incomplete answers to interrogatories could not be justified since nowhere did they attempt to argue that the disputed questions were not relevant or material to the resolution of a key issue in the case and they did not offer any justifiable excuse for failure to comply with the discovery order.

APPEAL by plaintiffs from *Braswell, Judge.* Judgment entered 15 June 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 May 1982.

Juan C. Cooke died testate in October, 1976, and George H. Cooke duly qualified as her administrator CTA. On 1 August 1977, plaintiffs filed these actions against the administrator CTA seeking recovery for personal services allegedly performed for decedent since 1954. A copy of a "claim notice" was attached to each of the original complaints, the claim of Robert T. Carpenter purporting to itemize by date, nature and amounts the various elements of his alleged cause of action. Defendant counterclaimed against the plaintiff Robert T. Carpenter, and default judgment was rendered on the counterclaims for failure of a reply, which default judgment later was vacated.

By permission of the Court, each plaintiff filed an amended complaint, to which no "claim notice" or other itemization was attached. In the case of Robert T. Carpenter, the "claim notice" attached to his original complaint had itemized claims subtotalling $7,200.00, $7,386.60 and $976.60, for a total of $15,563.20, but his original complaint alleges that he had filed a claim for $8,363.20, and prayed for judgment of $15,863.20; while his amended complaint, without itemization or claim notice, prayed for judgment of $15,000.00. In the case of Edith Ann Carpenter, her "claim notice"

and original complaint claimed $7,200.00, while her amended complaint without itemization or claim notice, prayed for judgment of $15,000.00. Defendant answered each of the amended complaints denying the material allegations and raising affirmative defenses including payment, statutes of limitation and the statute of frauds. Counterclaims were filed against the plaintiff Robert T. Carpenter.

Defendant served interrogatories on each plaintiff, and thereafter each plaintiff served interrogatories on the defendant. Defendant in apt time answered all of the interrogatories of both plaintiffs. Plaintiffs failed to answer any of defendant's interrogatories within the time allowed. An order compelling discovery was entered by D. B. Herring, Jr., Judge Presiding, which found the plaintiffs' failure unjustified and ordered plaintiffs' actions to be dismissed unless the interrogatories were answered by 28 April 1981. On 28 April 1981 plaintiffs served some answers to interrogatories. On 8 May 1981, defendant served a motion to dismiss, to compel discovery and for expenses of motion; and on 19 May 1981, plaintiffs served some supplemental answers to defendant's interrogatories. Defendant's motions to dismiss, to compel discovery and for expenses of motion were calendared for hearing by request of defendant's counsel dated and served on 8 May 1981, and came on for hearing before E. Maurice Braswell, Judge Presiding, at the regular call of the calendar on 2 June 1981.

Judge Braswell, making findings of fact and conclusions of law, entered an order dismissing plaintiffs' actions for failure to comply with the discovery order. From this judgment, plaintiffs appealed.

Richard N. Weintraub for the plaintiff-appellants.

Roger S. Upchurch for the defendant-appellee.

MARTIN (Robert M.), Judge.

The determinative issue on appeal is whether the trial court properly dismissed plaintiffs' action for failure to comply with its order to compel discovery. We uphold the decision of the trial court.

Rule 37, N.C. Rules of Civ. Proc., provides for sanctions for failure to make discovery. Rule 37(a)(3) states that "[f]or the pur-

poses of this subdivision an evasive or incomplete answer is to be treated as a failure to answer." Rule 37(b) provides as follows:

> (b) Failure to comply with order.—
>
> (1) * * *
>
> (2) Sanctions by Court in Which Action is Pending.—If a party . . . fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> A. * * *
>
> B. * * *
>
> C. An order . . . dismissing the action or proceeding or any part thereof, ...;
>
> (c) * * *
>
> (d) . . . If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33 after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

Rule 41(b), N.C. Rules of Civ. Proc., states that for "failure of the plaintiff . . . to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." Clearly the trial court had the authority to dismiss plaintiffs' claims for noncompliance with its order compelling discovery. *See Laing v. Loan Co.*, 46 N.C. App. 67, 264 S.E. 2d 381, *disc. rev. denied*, 300 N.C. 557 (1980).

The next question is whether the facts found by Judge Braswell support the judgment dismissing plaintiffs' complaint pursuant to Rule 37(b), N.C. Rules of Civ. Proc. Judge Braswell

considered both the original answers and the supplemental answers filed by plaintiffs in determining that the answers to numbers 8 and 11(a) were "unresponsive, incomplete and evasive and are deemed to be no answer under Rule 37(a)(3), N.C. Rules of Civil Procedure." These interrogatories were needed to establish the applicability of various statutes of limitations by ascertaining whether plaintiffs were bringing their actions on the claim filed with decedent's administrator CTA, or whether that claim was repudiated by omission from the amended complaint which did not seek the same relief. Interrogatories numbers 8 and 11(a) sought to elicit an itemization by dates, nature and amounts of the actions alleged by plaintiffs, and to determine if those dates and amounts correspond to the itemization of the "claim notice" referred to by plaintiffs. These answers were crucial to the defense's preparation in identifying claims that could be barred by the applicable statute of limitations. From plaintiffs' answers it was impossible to determine on which claim they were bringing their action.

One of the primary purposes of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 2 L.Ed. 2d 1077 (1958); *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 451 (1947); 4 Moore's Federal Practice ¶ 26.02[1] (2d Ed. 1982); 8 Wright & Miller, Federal Practice and Procedure: Civil § 2001 (1970). "Emphasis in the new rules is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Power Co.*, 291 N.C. 19, 34, 229 S.E. 2d 191, 200 (1976).

When viewed in light of the purposes of discovery, plaintiffs' evasive and incomplete answers cannot be justified. Plaintiffs nowhere attempt to argue that the disputed questions were not relevant or material to the resolution of a key issue in this case. Nor do they offer any justifiable excuse for failure to comply with the discovery order. *See, Telegraph Co. v. Griffin*, 39 N.C. App. 721, 251 S.E. 2d 885, *disc. rev. denied*, 297 N.C. 304 (1979).

Our courts have held that "the discovery rules 'should be construed liberally' so as to substantially accomplish their purposes." *Telegraph Co.* supra at 727, 251 S.E. 2d 888. See also *Willis, supra.* The administration of these rules lies necessarily within the province of the trial courts; Rule 37 allowing the trial court to impose sanctions is flexible, and " 'broad discretion must be given to the trial judge with regard to sanctions.' 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2284 at 765 (1970). *See also* 4A Moore's Federal Practice, ¶ 37.03 [2.7] (2d Ed. 1978)." *Telegraph Co. v. Griffin, supra.*

We find that the sanctions imposed by the trial court were proper. The judgment of the trial court is

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DARRELL MACKEY

No. 8112SC1397

(Filed 20 July 1982)

1. **Constitutional Law § 68— right to present witnesses—intimidation of alibi witness to change testimony**

Defendant's constitutional right to present witnesses to establish his defense was violated by the prosecution's intimidation of defendant's alibi witness which resulted in the witness returning to the stand and repudiating his earlier testimony exculpating defendant where a police officer threatened to prosecute the witness for perjury and the prosecutor assured the witness that he would not be prosecuted if he would take the stand again and tell the truth.

2. **Constitutional Law § 35— intimidation of alibi witness—no waiver of objection**

Defendant's failure to make an objection at trial did not constitute a waiver of his right to object to the prosecution's intimidation of a defense witness to repudiate his earlier testimony where defense counsel had no notice that the witness would testify as the state's rebuttal witness or that the witness intended to repudiate his earlier testimony until the witness actually testified on rebuttal, since an objection and motion to strike would have been ineffective to wipe out the prejudicial effect of the witness intimidation after the jury had already heard the repudiation.

3. Criminal Law § 75.10— admissibility of incriminating statement

The trial court properly admitted defendant's incriminating statement made during police interrogation where the court found that the statement was made voluntarily in the presence of several officers after defendant had been advised of his constitutional rights and had signed a waiver of his rights and a consent to be questioned form, and the several interpretations which could be given to the statement were for jury determination.

APPEAL by defendant from *Lane, Judge.* Judgment entered 30 July 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 June 1982.

Defendant was convicted as charged of armed robbery and sentenced to ten to twenty-five years' imprisonment.

STATE'S EVIDENCE

At trial the State presented the testimony of Calvin Miller, an employee of a gas station in Cumberland County. At 9:45 p.m. on 14 February 1981, Miller was robbed of $218 by two men, one of whom had a handkerchief over his face and carried a shotgun. On the following day Miller picked Willie White out of a lineup as the man involved in the robbery whose face was uncovered. Although defendant was also in the lineup, Miller did not identify him. Miller testified that the man whose face was covered was taller than he was; defendant was shorter than Miller.

Fayetteville police officers stated that they stopped White's car at approximately 6:45 a.m. on 15 February 1981. The defendant was also in the car. The officers found a shotgun, similar to the one used in the robbery and belonging to defendant, on the floorboard.

Willie White testified as a State's witness that he and defendant robbed the gas station.

DEFENDANT'S EVIDENCE

Defendant testified that he had a cookout at his house on 14 February 1981 and remained there from early afternoon until midnight, at which time he left with White. Defendant had given White his shotgun to keep in White's trunk and the two planned to pawn it. Defendant's wife and Gregory Moore, a guest at the cookout, corroborated defendant's account of the events of 14 February.

After the defense had rested, the State called Gregory Moore as a rebuttal witness. Moore changed his earlier testimony, testifying that he had not seen defendant on the day of the crime and that defendant had asked Moore to testify that he was with defendant that day.

Attorney General Edmisten by Assistant Attorney General Lemuel W. Hinton for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender James H. Gold for defendant appellant.

CLARK, Judge.

[1] Defendant argues that he was denied his due process rights under the Sixth and Fourteenth Amendments to the United States Constitution by the State's intimidation of witness Gregory Moore. Moore stated on rebuttal that after he had testified as a defense witness in support of defendant's version of his activities on the day of the crime, he was approached outside the courtroom by Police Detective Phillips. Phillips told Moore that he knew Moore's testimony was false and that Moore could be prosecuted for perjury. Phillips then read Moore his rights and told him to come forth and tell the truth. Moore talked to the District Attorney and was assured he would not be prosecuted if he would take the stand again and tell the truth. Moore then testified that his earlier testimony was false, that he did not see defendant at all on 14 February, and that defendant had asked him to say that he was with defendant that day.

Under the Sixth Amendment a defendant has the right

> "to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense. Both rights are fundamental elements of due process of law, and a violation of either could hamper the free presentation of legitimate testimony. The following statement from Annot., 127 A.L.R. 1385, 1390, is pertinent: 'Any statement by a trial court to a witness which is so severe as to put him or other witnesses present in fear of the consequences of testifying freely constitutes reversible error.' "

State v. Rhodes, 290 N.C. 16, 24, 224 S.E. 2d 631, 636 (1976). Substantial government interference with the voluntariness of a

witness's choice of whether or not to testify and with the content of that testimony infringes on a defendant's constitutional right to present witnesses to establish his defense. *Webb v. Texas*, 409 U.S. 95, 34 L.Ed. 2d 330, 93 S.Ct. 351 (1972); *United States v. Hammond*, 598 F. 2d 1008 (5th Cir. 1979); *Bray v. Peyton*, 429 F. 2d 500 (4th Cir. 1970).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Washington v. Texas, 388 U.S. 14, 19, 18 L.Ed. 2d 1019, 1023, 87 S.Ct. 1920, 1923 (1967).

We hold that defendant in this case was denied his due process rights by the prosecution's intimidation of Gregory Moore which resulted in Moore's returning to the stand and repudiating his earlier testimony that had been exculpatory to defendant. There can be little doubt that the confrontation by Detective Phillips with the threats of prosecution for perjury was responsible for Moore's subsequent course of action. Although the witness was not intimidated by the judge as was the case in *State v. Rhodes, supra*, we find that Moore's intimidation by a police detective and the offer of immunity by the District Attorney, who are symbols of the government's power to prosecute offenders, likewise deprived defendant of due process of law. *See, United States v. Morrison*, 535 F. 2d 223 (3d Cir. 1976). A criminal defendant has the right to present his own version of the facts and to present his own witnesses without unwarranted judicial or prosecutorial interference. *Id.* The intimidation of the witness Moore infringed on defendant's constitutional right to have Moore's freely-given testimony.

[2] The State argues that the defendant waived his right to object to the witness intimidation by his failure to make an objection at trial. The courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *State v.*

Stokes, 274 N.C. 409, 163 S.E. 2d 770 (1968); *State v. Brooks*, 38 N.C. App. 445, 248 S.E. 2d 369 (1978). However, a defendant may waive the benefit of statutory or constitutional provisions by "express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E. 2d 778, 781 (1970). Under the particular circumstances presented by this case, we hold that defendant did not waive his due process rights. It appears from the record that defense counsel had no notice that Moore would testify as State's rebuttal witness. He also did not know that Moore intended to repudiate his earlier testimony until Moore actually testified on rebuttal. At that point in the trial, after the jury had already heard Moore's repudiation, an objection and motion to strike would have been ineffective to wipe out the prejudicial effect of the witness intimidation. An objection would not have dispelled the witness intimidation once it had occurred. We also believe that defense counsel's failure to move for mistrial did not constitute a waiver. The presumption against waiver of fundamental rights has not been rebutted or overcome by the facts here presented.

By this decision, we do not express an opinion as to Moore's veracity at the two times he testified. On retrial, his credibility must be determined by the jury after it observes him and weighs his testimony.

[3] We discuss one other assignment of error made by defendant since it might recur as an issue upon retrial. We find no merit to defendant's argument that the court erred in admitting into evidence his incriminating statement made during police interrogation. It appears from the record that the findings made by the court on *voir dire* were fully supported by the evidence. The court found that the statement was made voluntarily in the presence of several officers after defendant had been advised of his constitutional rights and had signed the waiver of his rights and consent to be questioned form. Under the totality of the circumstances, we hold that defendant's statement was properly admitted and that the several interpretations which could be given to the statement were for jury determination. *See State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977). We overrule this assignment of error.

We do not discuss the defendant's other assignments of error since the questions they raise may not recur at a new trial.

In conclusion, it appears from the record that the intimidation of Moore violated defendant's constitutional right to present his own witnesses to establish his defense. Because of this reversible error, there must be a

New trial.

Judges WEBB and WHICHARD concur.

JAMES D. JOHNSON v. VELMA Q. SMITH, INDIVIDUALLY, AND SMITH-LOWRY ASSOCIATES, INC.; JOHN LEE HUFF v. VELMA Q. SMITH, INDIVIDUALLY, AND SMITH-LOWRY ASSOCIATES, INC.

No. 8126SC720

(Filed 20 July 1982)

Insurance § 2.3— automobile accident—default judgments against tort-feasor—liability of agent for failure to procure automobile liability insurance

In actions arising from an automobile accident whereby plaintiffs obtained default judgments against the tort-feasor and they sought to enforce the judgment against the tort-feasor's insurance agent for failure to procure automobile liability insurance, the trial court erred in dismissing both of the plaintiffs' actions. Although plaintiffs did not notify defendants of the suits prior to obtaining entries of default and default judgments against the tort-feasor, plaintiffs' rights against the tort-feasor could be adjudicated without necessarily affecting defendants since the default judgment was only evidence of their possible liability over to plaintiffs, and defendants are free to assert independent defenses to the action against them and to attack the default judgment laterally. G.S. 20-279.21(f)(1), pertaining to the need to notify an insurer of an action against an insured, was not relevant since there was no insurer involved.

APPEAL by plaintiffs from *Lewis, Judge.* Judgment entered 29 April 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1982.

Plaintiffs appeal from the dismissal of two consolidated civil actions. Plaintiffs were injured in an automobile accident and obtained default judgments against the tort-feasor, John Bradley

Glenn. They sought to enforce the judgments against Glenn's insurance agent for failure to procure automobile liability insurance.

The superior court found as fact that Glenn paid defendants for six months liability insurance coverage on a 1965 Oldsmobile. Defendants attempted to acquire coverage for Glenn's automobile with Lumbermen's Mutual Casualty Company pursuant to the North Carolina Reinsurance Facility, but the policy was never issued and defendants never notified Glenn or returned his premium.

Glenn had an automobile accident on 3 March 1978 in which plaintiffs Huff and Johnson, passengers in Glenn's vehicle, were injured. Glenn notified defendants of the accident within three days. Johnson and Huff filed suits against Glenn in April and July of 1979, respectively. Glenn did not forward the suit papers to anyone, nor did plaintiffs notify defendants of the suits prior to obtaining entries of default and default judgments of $15,000 for Johnson and $12,000 for Huff. Plaintiffs, alleging breach of contract, brought individual actions to recover from defendants on their judgments against Glenn. Defendants answered. The two cases were consolidated for trial without a jury.

The court concluded as a matter of law that defendants breached their contractual obligation to procure liability insurance for Glenn, but that plaintiffs had failed to comply with the notice requirement of G.S. 20-279.21(f)(1). Citing "constitutional restraints of due process," the trial judge refused to enforce plaintiffs' award against defendants and dismissed both actions on 29 April 1981. Plaintiffs appealed.

Paul J. Williams for plaintiff appellants.

Marnite Shuford for defendant appellees.

MORRIS, Chief Judge.

Plaintiffs argue that they should be allowed to collect from defendants their judgments against Glenn, because defendants breached their contract to procure liability insurance for Glenn, even though defendants had no formal notice of the prior suit. We hold that the default judgments are evidence of a loss for which

defendants may have been liable and that the trial judge committed error in dismissing the action.

In North Carolina, "if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so." (Citations omitted.) *Mayo v. American Fire and Casualty Co.*, 282 N.C. 346, 353, 192 S.E. 2d 828, 832 (1972). The agent may be held liable within the amount of the proposed insurance. *Meiselman v. Wicker*, 224 N.C. 417, 30 S.E. 2d 317 (1944). Plaintiffs had the option of suing either for breach of contract or for negligent default in the performance of a duty imposed by contract. *Id.* Their complaint, which alleged an oral contract between Glenn and defendants to procure insurance and defendants' failure to perform, clearly sounded in contract.

It has been held that a public liability policy applicant's judgment creditors, third party beneficiaries of a contract to procure automobile insurance, may sue a breaching agent directly. *Gothberg v. Nemerovski*, 58 Ill. App. 2d 372, 208 N.E. 2d 12 (1965).

Plaintiffs' loss, which amounted to an inability to collect on their judgments for lack of an insurance company ultimately liable, was proximately caused by defendants' failure to procure the desired coverage. The liability that plaintiffs sought to satisfy was well within the amount of coverage required by the North Carolina Motor Vehicle Safety and Financial Responsibility Act and hence necessarily within the coverage contemplated by the parties.

The trial court's order dismissing the case included the following conclusions of law:

> 3. Had Lumbermen's Mutual issued a Policy to Glenn through the North Carolina Motor Vehicle Reinsurance facility, as was requested, these Plaintiffs could not have used the Default Judgment "as a basis for obtaining Judgment against the Insuror" because Plaintiffs failed to comply with G.S. 20-279.21(f)1;

> 4. In the absence of any formal notice of suit, entry of Default, or Notice of Hearing on inquiry for damages, this Court cannot within the Constitutional restraints of due process, visit the damages awarded Huff and Johnson in earlier judgments on these defendants.

Finding of fact No. 3 is an accurate observation, but it is irrelevant since the present suit was brought against an insurance agent, not the insurer, and because no insurance was ever issued. The second sentence of G.S. 20-279.21(f)(1) reads:

> As to policies *issued* to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an *insured* shall not be used as a basis for obtaining judgment *against the insurer* unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action.

(Emphasis added.) The court's duty, in interpreting statutes, "is to ascertain and effectuate the intent of the Legislature." *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E. 2d 566, 570 (1977). Earlier absence in G.S. 20-279.21 of a notice requirement despite the absolute liability imposed on insurers by the statute, case law from that period, and the wording of the statute indicate that "a manifest purpose of G.S. 20-279.21(f)(1) is to require the plaintiff to give the insurer of assigned risk or Reinsurance Facility individuals notice of actions brought against such persons so that the insurer may protect its interests." *Love v. Nationwide Insurance Co. and Nationwide Insurance Co. v. Moore*, 45 N.C. App. 444, 448, 263 S.E. 2d 337, 339-40, *cert. denied*, 300 N.C. 198, 269 S.E. 2d 617 (1980). It was not within the contemplation of the Legislature that the statute would protect brokers or agents in breach of contract. Plaintiffs would have been in a position to recover for the injuries suffered had defendants performed their contract to procure insurance. It is merely speculative whether plaintiffs would have notified the insurer pursuant to G.S. 20-279.21 had insurance actually been issued.

Nor was there a denial of due process, to either defendants or a would-be insurer, for lack of notice that plaintiffs were seeking a default judgment against the tort-feasor. The question is only pertinent as to defendants, of course, there being no insurer in this case. It has been said that

> "[t]he question how far a judgment or decree is conclusive against a surety of a defendant, *or against one who is liable over to defendant*, and who was not a party to the action, is involved in the greatest confusion. Between the intimate relations which exist between such a person and the defendant in the suit, on the one side, and the fundamental principle that no one ought to be bound by proceedings to which he was a stranger, on the other, the courts have found it difficult to steer."

(Emphasis added.) *Dixie Fire Insurance Co. v. American Bonding Co.*, 162 N.C. 384, 391, 78 S.E. 430, 433 (1913). The North Carolina Supreme Court in *Dixie Fire*, a case arising in the context of principal and surety, said that "such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense." *Id.* at 392. We note, moreover, that a party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached. *Pickelsimer v. Pickelsimer*, 255 N.C. 408, 121 S.E. 2d 586 (1961). See *Gothberg v. Nemerovski*, supra.

We hold, based on the above, that the default judgments against the tort-feasor, Glenn, are proof of the plaintiffs' loss, that defendants were merely proper parties whose interests might be affected by the default judgment, and that plaintiffs' rights against Glenn could be adjudicated without necessarily affecting defendants since the default judgment is only evidence of their possible liability over to plaintiffs. Defendants are free to assert independent defenses to the action against them and to attack the default judgment collaterally.

We reverse the superior court's dismissal and remand for further proceedings.

Reversed and remanded.

Judges HEDRICK and VAUGHN concur.

W. E. CANIPE, J. W. GRIMES, C. L. OWENS, EUGENE RUSHING, M. F. BARNES AND E. O. BROOKS v. B. C. ABERCROMBIE, CHIEF OF POLICE OF MECKLENBURG COUNTY; LAWRENCE W. HEWITT, CHAIRMAN, AND W. L. NAHRGANG AND B. B. DELAINE, MEMBERS OF THE CIVIL SERVICE BOARD OF MECKLENBURG COUNTY; D. G. LUTRICK AND B. M. JOHNSTON

No. 8126SC1128

(Filed 20 July 1982)

Municipal Corporations § 9.1; Public Officers § 2— selection of assistant chief of police—competitive examination not required

Civil service statutes and regulations did not require a competitive examination for promotions to the position of assistant chief of the Mecklenburg County Police Department.

APPEAL by defendants from *Burroughs, Judge.* Judgment entered 21 July 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 June 1982.

This case involves the validity of civil service promotions made without the benefit of contemporaneous competitive examination.

The facts of the present action are not in dispute. In 1973, the Mecklenburg County Police Department was reorganized to include the ranks of chief, assistant chief, captain, lieutenant and sergeant. In June of 1980, the Civil Service Board appointed B. C. Abercrombie as chief. There existed two vacancies at the level of assistant chief. The Civil Service Board decided to fill the vacancies from among the eight captains then in the Mecklenburg County Police Department. Plaintiffs were among those considered.

On 8 September 1980, Abercrombie, as instructed by the Board, recommended the two men who he believed to be best qualified for the position. The Board approved his recommendations. Plaintiffs were not selected.

Plaintiffs allege that the promotional process utilized by Abercrombie and the Civil Service Board violated established procedures governing promotions within the Mecklenburg County Police Department. They allege that those procedures required a selection based on competitive examination. In their complaint, plaintiffs sought an order vacating the promotions of Lutrick and Johnston to the rank of assistant chief and an injunction enjoining defendants from further promotions except consequent to a competitive testing procedure.

Both parties moved for summary judgment. After a consideration of the pleadings, exhibits and affidavits, the court concluded that plaintiffs were entitled to judgment as a matter of law, and granted the relief sought in the complaint.

Charles E. Knox and John S. Freeman, for plaintiff appellees.

James O. Cobb and Francis W. Sturges, for defendant appellants.

VAUGHN, Judge.

Since the parties are in agreement as to the facts, the issue on appeal is whether plaintiffs were entitled to judgment as a matter of law. *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981). Plaintiffs contend that both statute and regulation require that promotions to the position of assistant chief be filled pursuant to competitive examination. We disagree.

We first examine Chapter 398 of the 1973 North Carolina Public Session Laws, which governs the relationship between the Civil Service Board of Mecklenburg County and the Mecklenburg County Police Department. Section 5 of the chapter provides that all applicants for positions on the police force must take an examination given by the Civil Service Board: "Said examination shall relate to those matters which will fairly test the relative ability of the person examined to discharge in a proper fashion the duties of the position to which he seeks to be appointed, and shall include tests of physical, mental and moral qualifications. . . ." Any qualified voter of Mecklenburg County who has a high school level education and is at least 21 years of age is eligible to apply for a position. Civil Service Rules and Regulations, ch. 1.

The parties to the present action agree that section 5 applies only to persons seeking original entry into the police department. Their conclusion is supported by language in the Civil Service Rules and Regulations which refers to newly appointed applicants as "recruits." *Id.*

The statute which plaintiffs argue, and the court concluded, requires competitive examination of persons seeking promotion is section 7 of Chapter 398. The statute provides the following:

> "The Civil Service Board shall prepare and keep a register of persons successfully passing examinations given by the Board for appointments and promotions, such persons to be graded according to their respective showing upon said examination. The Chief of Police shall recommend to the Civil Service Board who shall approve appointments to vacancies and promotions which occur in the department on a basis of the written, oral, moral, and physical examinations so given. . . ."

We disagree with the construction given by plaintiffs and the court. There is no language in section 7 which mandates a competitive examination—in any situation. Section 7 merely states the responsibility of the Civil Service Board should such examinations be given.

As stated earlier, section 5 of Chapter 398 does mandate physical, mental and moral examination of all applicants for appointment. In the construction of legislation, parts of the same statute dealing with the same subject must be interpreted as a whole. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978). We conclude, therefore, that when section 7 refers to "written, oral, moral, and physical examinations" given for appointments, it is referring to the entry examinations of section 5. The Civil Service must keep an eligibility register of persons who have successfully passed those examinations and must base any appointments to positions in the police department on the examination ratings.

We find no section of Chapter 398, however, which requires competitive examination for promotion. Therefore, when section 7 refers to examinations in that situation, it is addressing examinations which the Civil Service Board, in its discretion, has mandated through its rules and regulations.

Chapter III of the Civil Service Rules and Regulations is entitled "Promotion" and provides the following:

> "A. Promotions will be recommended by the Chief of Police through an approved process for each rank within the department for approval by the Civil Service Board.
>
> B. The procedures for promotion will be outlined in the departmental personnel policies."

Again, there is no requirement for competitive examinations. The only mandate in the Civil Service rules is that promotion be based on "an approved process."

The "approved process" for promotion to sergeant and captain is outlined in the Mecklenburg County Police Department's personnel policies. Only officers with three years of experience are eligible for consideration. Promotion is based on the candidate's resume, score on a written examination, promotional potential rating and oral interview.

There is no procedure outlined in the department's personnel policies concerning promotions to assistant chief. According to an affidavit submitted by Abercrombie, however, the department does not administer written examinations in connection with these promotions: "[I]t was felt that the Chief should have considerable discretion in recommending people for these positions because of the immediate professional relationship involved."

The Civil Service Board evidently approved of this unwritten promotion policy as early as 1973. In that year, the positions of assistant chiefs were created, and defendant Abercrombie was promoted by the Board to one of the vacancies. No written examination in connection with the promotion was administered. More recently, the Civil Service Board approved the promotions of Lutrick and Johnston without the benefit of a competitive examination.

Courts allow civil service boards wide discretion in the performance of their duties. In the exercise of that discretion, the Civil Service Board of Mecklenburg County has chosen to approve department policies which require written examination for promotions to sergeant and captain but do not require examination for promotion to assistant chief.

There is no evidence of abuse in the Board's decision. The omission of a competitive examination for promotion to assistant chief violates neither statute nor regulation. Furthermore, promotions to assistant chief are not arbitrary. In the instant case, due consideration was given to the eligible officers' education, training, and performance. Since defendants Lutrick and Johnston were promoted according to valid "approved process," the court's order entering summary judgment in favor of plaintiffs is reversed.

Reversed.

Judges MARTIN (Harry C.) and HILL concur.

JOHN THOMAS RAWLS, III v. SADRON CLYDE LAMPERT

No. 811SC1157

(Filed 20 July 1982)

Contracts § 16.1— oral loan—time for repayment—summary judgment for defendant improper

In an action in which plaintiff alleged he loaned defendant $5,000 pursuant to a verbal agreement in 1971 and another $5,000 pursuant to a verbal agreement in 1973; that it was understood that the loans would be repaid within a reasonable time; and that demand was made in 1981 and defendant failed to repay the loan, the trial judge erred in dismissing plaintiff's complaint as being barred by the statute of limitations since the statute of limitations does not begin to run until the contract is breached and it was a jury question to determine what constituted a reasonable time for repayment of the loans, so as to begin the running of the statute of limitations, based upon the attendant facts and circumstances.

APPEAL by plaintiff from *Small, Judge.* Judgment entered 11 September 1981 in Superior Court, DARE County. Heard in the Court of Appeals 10 June 1982.

Plaintiff filed complaint on 23 July 1981 alleging that on 5 August 1971 he loaned the defendant, his half-brother, $5,000 pursuant to a verbal agreement; that on 6 April 1973 he loaned the defendant a second $5,000 pursuant to a verbal agreement; that no time or terms were fixed for repayment of the loans but it was

understood that they would be repaid within a reasonable time; and that demand was made in early July 1981 and the defendant failed to repay the loans. Plaintiff sought to recover $10,000 plus interest. Defendant moved to dismiss the complaint for failure to state a claim. More specifically, defendant alleged that recovery on the loans was barred by the statute of limitations. A hearing was held and the motion to dismiss was allowed. Plaintiff appeals.

Shearin, Gaw & Archbell, by Roy A. Archbell, Jr., for plaintiff appellant.

Kellogg, White, Evans, Sharp and Michael, by Steven D. Michael, and Henderson & Shuford, by Robert E. Henderson, for defendant appellee.

ARNOLD, Judge.

In *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980), we find the following statement of the standard applicable to a dismissal pursuant to G.S. 1A-1, Rule 12(b)(6):

> " 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or a fact sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E. 2d 161, 166 (1970), *quoting* Moore, Federal Practice, § 12.08 (1968). (Emphasis original.)

Id. at 208-09, 266 S.E. 2d at 597. In ruling on such a motion, the allegations of the complaint must be viewed as admitted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979).

In general, the statute of limitations for a breach of contract is three years. G.S. 1-52(1); *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147 (1967). However, the statute of limitations does not begin to run until the contract is breached. *Reidsville v. Burton; Silver v. Board of Transportation*, 47 N.C. App. 261, 267 S.E. 2d 49 (1980). Thus, in the present case the statute of limitations did

not begin to run until a reasonable time for repayment had passed. This Court recently had occasion to address the issue of what constitutes a reasonable time for repayment of a loan.

In *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E. 2d 516 (1981), we dealt with a loan of $14,000 pursuant to an oral agreement fixing no time or manner of repayment. The plaintiff demanded full payment of the loan 13 months after advancement, and the trial court allowed summary judgment in favor of the plaintiff. We held that the loan was repayable within a reasonable time and that summary judgment had been improperly entered. We wrote as follows:

> Our Court recently affirmed the rule, that contractual performance must be within a reasonable time when none is stated, in *Rodin v. Merritt*, 48 N.C. App. 64, 268 S.E. 2d 539 (1980). In *Rodin*, the Court further held that the determination of what constitutes a reasonable time for performance required "taking into account the purposes the parties intended to accomplish." *Id.* at 72, 268 S.E. 2d at 544. Such a determination involves a mixed question of law and fact, "[a]nd, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision." *Holden v. Royall*, 169 N.C. 676, 678, 86 S.E. 583, 584 (1915); *Claus v. Lee*, 140 N.C. 552, 53 S.E. 433 (1906); *Blalock v. Clark*, 137 N.C. 140, 49 S.E. 88 (1904).
>
> . . . .
>
> In conclusion, we summarize our reasons for reversing the entry of summary judgment: . . . (3) what constitutes a "reasonable time" is a material issue of fact to be answered by the jury after due consideration of all the attendant facts and circumstances of the transaction.

Id. at 56-57, 275 S.E. 2d at 519-20.

In the present case it was for the jury to determine what constituted a reasonable time for repayment of the loans, so as to begin the running of the statute of limitations, based upon the attendant facts and circumstances. No "want of merit" appears on the face of the complaint, and the trial judge erred in ruling that the complaint fails to state a claim for relief.

Reversed and remanded.

Judges HEDRICK and WELLS concur.

HAZEL WHITE, BEATRICE McCOY, ARTIS CHADWICK, LINWOOD CHADWICK, AND MARY H. WHITE v. DOROTHY PATE, CLERK OF SUPERIOR COURT OF CRAVEN COUNTY; AND S. W. McCOY, FLETCHER McCOY, AND CARLTON WARD, COMMISSIONERS OF THE CORE CREEK DRAINAGE DISTRICT

No. 813SC1140

(Filed 20 July 1982)

Drainage § 4— appointment of drainage commissioners—discretion of clerk—constitutionality of statutes

Provisions of G.S. 156-81(a) and (i) giving clerks of court the discretion to appoint drainage commissioners in lieu of the election thereof are constitutional, and plaintiffs' equal protection rights were not violated by the clerk's appointment of commissioners for their district while commissioners in adjoining districts were chosen by election.

APPEAL by plaintiffs from *Brown, Judge.* Order entered 17 June 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 June 1982.

This is an appeal from a Rule 12 dismissal of an action challenging the appointment of drainage district commissioners by the Clerk of Court.

In their complaint plaintiffs alleged that they owned land within the Core Creek Drainage District; that defendants were the Clerk of Court and Commissioners of the Drainage District; that the Commissioners owned small amounts of land within the District and large amounts outside the District which were benefited by the drainage activities of the District; that landowners inside the District were assessed for drainage works while those outside the District who benefit from the drainage projects were not so assessed; that plaintiffs have repeatedly requested that the District be enlarged but the Commissioners have refused to act; that the District has undertaken work which primarily benefited land outside the District without following the statutory procedure for approving such work; and that the Commissioners have not filed annual reports. Plaintiffs further al-

leged that they have been denied due process and equal protection under the law by the appointment of commissioners by the Clerk of Court rather than election by residents in the District as is done in some adjoining counties. Plaintiffs prayed for a permanent injunction restraining the appointment of commissioners and an order that commissioners be elected to their positions.

Defendants filed motions to dismiss. On 7 June 1981 the court dismissed the complaint on the grounds of lack of subject matter jurisdiction since the Clerk of Court has original jurisdiction over the matter; failure to state a claim upon which relief can be granted in that G.S. 156-81 provides for appointment of commissioners by the Clerk of Court; and failure to join as necessary parties all other landowners in the Drainage District. Plaintiffs appeal from the entry of the order of dismissal.

Attorney General Edmisten by Deputy Attorney General Millard R. Rich, Jr., for defendant appellee Dorothy Pate, Clerk of Superior Court, Craven County.

Smith, Patterson, Follin, Curtis, James and Harkavy by Norman B. Smith for plaintiff appellants.

Ward and Smith by William Joseph Austin, Jr., for defendant appellees, the Commissioners of the Core Creek Drainage District.

CLARK, Judge.

We elect to proceed directly to the constitutional question without considering whether the trial court erred in the rulings relating to collateral attack and to joinder of necessary parties. Plaintiffs here contend that G.S. 156-81, which provides for election of drainage commissioners, or their appointment by the Clerk of Superior Court is unconstitutional in that it deprives them of voting rights given landowners in other districts of the State where the commissioners are elected. We disagree.

As a general rule, our courts give deference to the legislature and indulge every presumption in favor of the constitutionality of statutes. *Marks v. Thompson*, 282 N.C. 174, 192 S.E. 2d 311 (1972). The provisions of G.S. 156-81(a) and (i) which give the Clerk of Superior Court the discretionary authority to appoint drainage commissioners apply statewide. *Nesbit v. Kafer*,

222 N.C. 48, 21 S.E. 2d 903 (1942). Every Clerk of Court in a county in which a drainage district is located has the same authority. Therefore, the law applies uniformly to all eligible counties in this State. *See Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). The result would be different if the statute mandated election of commissioners in some districts and appointment in other districts, since all counties would not be treated the same.

We, therefore, hold that G.S. 156-81(a) and (i) which provide for the appointment of drainage commissioners by the clerk are constitutional and do not violate plaintiffs' equal protection rights under the United States and North Carolina Constitutions. We find that the Clerk of Craven County properly exercised her discretionary authority to appoint the drainage district commissioners. Neither mandamus nor a mandatory injunction may be issued to control the manner of a public official's exercise of a discretionary duty. *Electric Co. v. Turner*, 275 N.C. 493, 168 S.E. 2d 385 (1969). It follows that plaintiffs' complaint states a defective claim in that it requested relief—that the clerk be enjoined from appointing commissioners and that the defendants be enjoined from accepting appointment—which the court was powerless to grant regardless of what facts could be proved. *See Forrester v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 117, 184 S.E. 2d 858 (1971).

The order of dismissal is

Affirmed.

Judges WEBB and WHICHARD concur.

DON FRANKLIN REECE v. SARAH S. REECE

No. 8119DC532

(Filed 20 July 1982)

1. Trials § 3— motion for continuance properly denied

The trial court properly denied plaintiff's motion for a continuance which was made on the grounds that his attorney was ill since the plaintiff was represented by his attorney's associate, the hearing involved only the brief

testimony of the plaintiff and defendant, and since there was evidence that it had taken over seven years to get the plaintiff in court.

2. Divorce and Alimony § 24.11— child support—civil contempt action—finding of means to comply with support order

In a civil contempt action arising from plaintiff's failure to pay child support, findings that the plaintiff had resources upon which to pay at least a portion of his arrearage and had not done so, and that the plaintiff was earning from $11,000 to $24,000 a year since 1974 were findings which constituted a determination that the plaintiff had the present means to comply with the order of the court.

APPEAL by plaintiff from *Hammond, Judge.* Order entered 20 January 1981 in District Court, RANDOLPH County. Heard in the Court of Appeals 14 January 1982.

The plaintiff and defendant were divorced in Randolph County and on 14 February 1973, plaintiff was ordered to pay the defendant $40.00 a week for the support of their child. On 23 December 1980 the defendant moved the court for an order adjudging the plaintiff in contempt of court. The plaintiff moved for a continuance on the grounds that his attorney was ill and the attorney's associate had no prior experience with this case. The defendant opposed the motion on the grounds that she had tried unsuccessfully to locate the plaintiff in North Carolina, Florida, and Texas since 1973; that on one occasion she successfully served the plaintiff in North Carolina but he left the state and did not appear in court; and that the plaintiff was finally present in court. The court denied the motion for a continuance.

At trial, the defendant testified that the plaintiff was delinquent in child support payments in the amount of $14,292.20; that she attempted to collect the arrearage in the past; that she finally located him in Texas; that a Texas court ordered him to pay the defendant $25.00 per week; and that since that order, he has paid $25.00 per week to the defendant. The plaintiff testified that he lived in a rented trailer with his second wife in Texas; that they own no real property; and that his wife owns a Cadillac. He said his yearly earnings were $16,000.00 in 1972; none in 1973 or 1974; $11,000.00 in 1975, 1977, 1978 and 1979; $18,000.00 in 1976; and $24,000.00 in 1980. He testified that he was injured in 1973 and out of work for over a year; that he has worked continuously since 1974; and that he had made no child support payments from

the date of his accident until September 1980 when so ordered by the Texas court.

The court found the plaintiff had resources upon which to call to pay at least a portion of his arrearage and has without excuse failed to do so. The court adjudged that the plaintiff was in willful contempt of court and ordered that he be confined to the county jail until he purged himself of contempt by paying $14,292.20 to be applied to his child support arrearage. The plaintiff appealed.

Bell and Browne, by Charles T. Browne and W. Edward Bunch, for plaintiff appellant.

Beck and O'Briant, by Lillian B. O'Briant, for defendant appellee.

WEBB, Judge.

The plaintiff makes two assignments of error to the court's order; first, that the court erred by denying his motion for a continuance; and second, that the court could not properly confine him in jail for contempt without making a finding of fact that he had the present means to comply with the order. For the reasons stated herein, we affirm the order of the trial judge.

[1] "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. . . . a motion to continue is addressed to the sound discretion of the trial judge, who should determine it 'as the rights of the parties require under the circumstances.'" *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E. 2d 380, 386 (1976). In the case sub judice, the plaintiff was represented by his attorney's associate. Although the associate was unfamiliar with the case, the hearing involved only the brief testimony of the plaintiff and defendant. There was evidence that it had taken over seven years to get the plaintiff in court. He had already failed to appear in court once after being properly served, having left the state. We believe that under these circumstances, the judge properly denied the plaintiff's motion for a continuance. The plaintiff's first assignment of error is overruled.

[2] A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant

is capable of complying with the order of the court. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). In the instant case, the trial judge found "The plaintiff had resources upon which to call to pay at least a portion of his arrearage and he has not done so." The court also found that the plaintiff was earning from $11,000.00 to $24,000.00 a year since 1974. These findings were supported by the evidence. We believe this constitutes a determination that the plaintiff has the present means to comply with the order of the court. The plaintiff's second assignment of error is overruled.

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. CLINTON BROOKS

No. 811SC1366

(Filed 20 July 1982)

1. **Criminal Law §§ 165, 170— remarks by trial court—absence of objection—curative instructions**

No question as to error in the trial court's preliminary remarks to the jury was presented where defendant failed to object or except to the remarks. Furthermore, any error in the preliminary remarks was cured by the court's curative instructions.

2. **Arson § 4.1— burning of uninhabited dwelling—sufficiency of evidence**

The State's circumstantial evidence was sufficient for the jury in a prosecution for the burning of an uninhabited dwelling.

3. **Criminal Law § 116— failure of defendant to testify—absence of instruction**

The trial court did not err in failing to instruct the jury regarding defendant's failure to testify absent a special request for such an instruction.

APPEAL by defendant from *Small, Judge.* Judgment entered 1 September 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 7 June 1982.

Defendant appeals his conviction under N.C.G.S. 14-62, the burning of an uninhabited dwelling.

At trial, defendant's stepmother testified that her stepson told her he was going to burn down a house located near their home. The house in question was situated on forty acres of land belonging to the Carolina-Virginia Amusement Corporation. It was in poor condition and had been uninhabited for approximately a year.

Verlivia Lee testified that on 3 March 1981, while looking out her kitchen window, she had occasion to see the defendant walking across the field toward the vacant house. She had known the defendant all his life. She called out to him and asked him where he was going. He responded "over here" and continued toward the house. He was carrying a rifle. Defendant disappeared behind the house for a short time and then reappeared "running real fast" toward his own home. Midway across the field he stopped running and looked back, and at this point Ms. Lee noticed flames coming from the house. She called and reported the fire.

An officer from the Elizabeth City Fire Department testified that upon investigation, it was his opinion that the fire had been deliberately started in the kitchen by igniting a pile of debris.

Attorney General Edmisten by Assistant Attorney General David Gordon, for the State.

William T. Davis, for the defendant.

MARTIN (Robert M.), Judge.

Defendant first contends that the trial court committed prejudicial error in "making preliminary remarks to the prospective jurors." The assignment of error is based on the following dialogue.

> COURT: Members of the Jury, in this case the State is the plaintiff, and Clinton Brooks is the defendant. Clinton Brooks sit over here at the counsel table on your left, in the blue shirt. He is represented in this case by Mr. William T. Davis, a member of the Pasquotank County Bar, some people may know him as Tim Davis. The State is represented by Mr. Michael Johnson, a member of the staff of the District Attorney. There are two charges against the defendant, they have been consolidated for trial as a matter of convenience—

MR. JOHNSON: Your Honor, we do not intend to consolidate the two charges, we are just calling the burning case.

COURT: Oh, I'm sorry, I was given two files, and I didn't know. There is one charge against the defendant, disregard my statement to you that there was a second charge, that should have no bearing on your decision in this case.

[1] No objection or exception was taken to the "remarks." Assignments of error must be based upon exceptions duly noted in the record in order for the issue to be preserved for consideration on appeal. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). In addition to this procedural deficiency, we find that the trial judge's curative instructions fully protected the defendant against any consideration the jury might have given to the remarks. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). Defendant has failed to show that the effect of the remarks affected the outcome of his trial. *State v. Young*, 302 N.C. 385, 275 S.E. 2d 429 (1981).

[2] At the close of the State's evidence, defendant moved for a dismissal. Defendant assigns as error the denial of this motion, arguing that there was no direct evidence that he was responsible for setting the fire. "Circumstantial evidence, or evidence of facts from which other matters may be fairly and sensibly deduced, is competent evidence, and is properly considered in passing on a motion for nonsuit." *State v. Snead*, 295 N.C. 615, 618, 247 S.E. 2d 893, 895 (1978). We find the evidence, albeit circumstantial, was sufficient to take the case to the jury. *Id.*

[3] Finally, defendant argues that the court erred in failing to instruct on defendant's failure to testify. Defendant did not request the instruction and absent a special request, the court is not required to so instruct. *State v. Warren*, 292 N.C. 235, 232 S.E. 2d 419 (1977).

No error.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. DANNY NICHOLSON

No. 812SC1173

(Filed 20 July 1982)

Searches and Seizures § 15— standing to object to search—remand for determination

Cause is remanded for a determination as to whether defendant had a sufficient interest in searched premises to attack the constitutionality of the search.

APPEAL by the state from *Peel, Judge.* Order dated 23 September 1981 in Superior Court, MARTIN County. Heard in the Court of Appeals 7 April 1982.

Defendant was convicted in Martin County District Court of the larceny from Jimmy Spruill of several items of personal property having a total value of $238. He appealed to the Superior Court.

The evidence tended to show that on 7 April 1981, at approximately 7:30 in the evening, Mr. Spruill secured his fishing boat adjacent to the Roanoke River. He discovered, upon returning to the boat the next afternoon, that several items—including gasoline cans, life vests, a battery, a rain suit, a gas hose, and an anchor—were missing from the boat. Mr. Spruill reported the theft to the Martin County Sheriff's Department. On 1 May, Mr. Spruill told the authorities that he had information with respect to the location of the missing items. He and an officer from Martin County went to Bertie County and obtained a search warrant. They and two officers from Bertie County then went to a storage shed beside a trailer in Cherry's Trailer Park on Republican Road, where Spruill found and identified the stolen items. The property was seized and defendant was arrested.

Defendant raised an objection at trial to the introduction of the evidence seized, contending that it was obtained as a result of an illegal search. The state denied that the evidence it would offer was obtained pursuant to the warrant but contended that the evidence would be adduced from Mr. Spruill's testimony as a citizen. A voir dire hearing was held. Judge Peel found that the search warrant was inadequate for failure of the affidavit to show that the informant who gave the information upon which the

search warrant was based was reliable. He concluded that Mr. Spruill's presence among the searching officers was not in the capacity of an ordinary citizen, but as an agent of the authorities. An order was entered suppressing all evidence obtained pursuant to the search. The state appeals.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelly, for the State.

Gurganus and Bowen, by J. Melvin Bowen, for defendant appellee.

MORRIS, Chief Judge.

The state appeals on the question whether the trial court erred in suppressing the evidence, despite the fact that the state expressly stated it was offering no evidence obtained under the authority of the search warrant. This is the only issue addressed in the briefs. We are unable to reach it, however.

Standing to claim the protection of the Fourth Amendment of freedom from unreasonable searches and seizures is based upon the "legitimate expectations of privacy" of the individual asserting that right in the place which has allegedly been unreasonably invaded. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), *rehearing denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed. 2d 83 (1979), *citing Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). In this case, the record does not contain facts necessary to determine whether defendant had a sufficient interest in the searched premises to attack the constitutionality of the search.

We therefore remand the case to the Superior Court for determination of whether defendant had standing to object and for the entry of an order containing findings of fact and conclusions as to whether defendant had, for Fourth Amendment purposes, a protected interest in the searched premises, *State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682, *disc. rev. den.* 297 N.C. 179, 254 S.E. 2d 38 (1979). The order shall be certified to this Court. Defendant may, should he be so advised, file exceptions and assignments of error to the order, and if, upon a determination that he had no standing, he should file exceptions and

assignments of error. The parties may file with this Court additional briefs upon those assignments of error.

Error and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 JULY 1982

DEPT. OF TRANS. v. TWIN CITY CHEVROLET No. 8123SC1176	Ashe (78CVS56)	Affirmed
McGALLIARD v. OGLESBY No. 8125SC921	Burke (80CVS563) (80CVS564)	No Error
MENDLOVITZ V. MENDLOVITZ No. 8118DC1092	Guilford (80CVD5841)	Affirmed in Part; Vacated in Part; Modified
STATE v. DORSEY No. 8126SC1409	Mecklenburg (80CRS102213)	No Error
STATE v. DOUB No. 8121SC1250	Forsyth (81CRS8369)	No Error
STATE v. JACKMAN No. 8125SC816	Catawba (80CRS14872)	No Error
STATE v. PRICE No. 8110SC1262	Wake (81CRS12555) (81CRS12557)	No Error
STATE v. PROCTOR No. 8118SC1081	Guilford (80CRS56896) (80CRS56897) (80CRS58385) (80CRS58386)	No Error
STATE v. WILKIE No. 8111SC822	Lee (80CRS5362)	No Error

Cameron v. New Hanover Memorial Hospital

DONALD J. CAMERON, D.P.M., N. F. COSTIN, D.P.M., AND PODIATRY ASSOCIATES OF WILMINGTON, P.A. v. NEW HANOVER MEMORIAL HOSPITAL, INC., PETER J. WATKINS, WALTER CRAVEN, BRUCE B. CAMERON, MRS. CARONELL C. CHESTNUT, SAMUEL WARSHAUER, M.D., SIGMOND A. BEAR, M.D., WILLIAM KINGOFF, ALMA RYDER, THOMAS JERVAY, ELLEN C. WILLIAMS, F. P. FENSELL, IRVING FOGLER, SEYMORE L. ALPER, R. E. KIZER, JR., FRANK REYNOLDS, M.D., INDIVIDUALLY AND AS TRUSTEES OF NEW HANOVER MEMORIAL HOSPITAL, INC., W. F. MORRISON, JR., J. R. DINEEN, M.D. AND DAVID P. THOMAS, M.D.

No. 815SC1135

(Filed 3 August 1982)

1. **Evidence §§ 29.2, 29.3— minutes of medical staff meeting—admissible under "business records" exception**

Minutes of medical staff meetings which are made in the regular course of a hospital's business are admissible under the "business records" exception.

2. **Evidence §§ 29.2, 29.3— medical staff meetings—"business records"—laying proper foundation for introduction**

In an action by two podiatrists against a hospital, among others, the trial court properly excluded minutes of medical staff meetings where the custodians of the records did not adequately authenticate the documents they identified, they did not show the mode of preparation, that the minutes were recorded at or near the time of the meetings, that the minutes were made by someone having knowledge of the data set forth, and they did not show that the minutes were made *ante litem motam.* However, minutes of a 1963 medical staff meeting and a 1964 medical staff meeting were properly authenticated and should have been admissible under the "business records" exception to the hearsay rule, and the trial judge erred in totally excluding a portion of the minutes for the 1964 meeting.

3. **Evidence § 29.3— minutes of hospital staff meetings—qualified privilege applying**

The trial judge correctly denied plaintiffs' request to review the minutes of hospital meetings which recorded good faith communications of the hospital committees in which those present had a corresponding interest in the administration of the hospital since the common law qualified privilege applied to the minutes. The policy enunciated by G.S. 131-170, which was enacted subsequent to the filing of this action and which deals with the privilege attached to proceedings, records and materials of a provider of professional health services, is grounded in our common law.

4. **Conspiracy § 2.1— civil conspiracy—sufficiency of evidence**

In an action by two podiatrists stemming from the denial of hospital privileges, there was insufficient evidence beyond mere suspicion or conjecture, either direct or circumstantial, for the jury to infer that two orthopedists agreed to boycott the hospitals from which the podiatrists' privileges were

denied, joined by the hospitals and their related defendants, causing plaintiffs' privileges therein to be terminated and thereby creating a civil action for conspiracy.

5. **Contracts § 34— wrongful interference with business relations—sufficiency of evidence**

In an action by two podiatrists against two orthopedists, among others, plaintiffs failed to prove that the orthopedists' actions relating to the podiatrists losing their hospital privileges constituted a wrongful interference with their business relations, contractual rights, and prospective advantage. Although plaintiffs presented evidence to indicate a competition between their practice and that of the orthopedists, the evidence was insufficient to infer any cause and effect relationship between that competition and the denial of staff privileges at the hospital or with any prospective advantage with the hospital.

6. **Unfair Competition § 1— granting hospital staff privileges—rendering of "professional services"—exclusion from G.S. 75-1.1**

In an action which stemmed from the denial of hospital privileges for two podiatrists, the trial court properly directed a verdict against plaintiffs' claims that defendants engaged in a restraint of trade and in unfair methods of competition and practice in violation of G.S. 75-1 and 75-1.1 since (1) plaintiff failed to present sufficient evidence to show the concerted action required for a claim under G.S. 75-1, and (2) defendants were not "sellers" whose acts were forbidden by former G.S. 75-1.1. Even if the current version of G.S. 75-1.1 were applied retroactively to this case, the consideration of whom to grant hospital staff privileges is a necessary assurance of good health care and constitutes the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.

7. **Privacy § 1— invasion of privacy—insufficient evidence of damages**

In an action stemming from the denial of hospital privileges to two podiatrists, the trial court correctly granted defendants' motions for a directed verdict upon the issue of invasion of privacy where plaintiffs failed to produce any evidence that statements and letters attributed to one of the defendants proximately resulted in damages to "their persons, property and profession."

8. **Hospitals § 6— granting hospital staff privileges—standards established by hospital—reasonably related to operation of hospital**

Standards established by a hospital were not arbitrary or capricious where they required podiatrists to complete a year of residency, be board eligible pursuant to certification from the American Board of Podiatric Surgery, and be Fellows in the American College of Foot Surgeons since the standards were reasonably related to the operation of the hospital and since plaintiffs' competency had been adequately reviewed. G.S. 131-126.11A and G.S. 131-126.11B.

9. **Hospitals § 6— hospital not required to grant surgical privileges to podiatrists by statute**

G.S. 90-202.12 which states that patients have the freedom to choose a qualified "provider of care or service which are within the scope of practice of

a duly licensed podiatrist or duly licensed physician" does not require a hospital to grant staff privileges regardless of the standards set by its Board of Trustees which are reasonably related to the operation of the hospital.

APPEAL by plaintiffs from *Rouse, Judge.* Judgment entered 26 February 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 June 1982.

This is an action by two podiatrists, duly licensed to practice podiatry in this State, against a public hospital [hereinafter referred to as New Hanover][1], its individual trustees, its administrator, and two medical doctors on its staff [hereinafter referred to as Dineen and Thomas] alleging a wrongful denial of hospital staff privileges to the podiatrists caused by alleged conspiratorial conduct of Dineen and Thomas which was joined by the other named defendants.

In their complaint, filed 13 October 1978, the podiatrists, plaintiffs Cameron and Costin, alleged twelve claims for relief: (1) that defendants discriminated against plaintiffs solely because they are podiatrists and conspired, among other things, to interfere and did interfere with their civil rights in violation of 42 U.S.C.A. § 1985(3); (2) that defendants had the power to prevent "the wrongs conspired to be done" in the first claim, but failed to exercise that power, and that the wrongs were committed in violation of 42 U.S.C.A. § 1986; (3) that defendants' actions "in refusing to amend the medical-dental staff by-laws so as to permit plaintiffs' application for hospital privileges to be considered on its own merits constitutes a denial of procedural and substantive due process of law," and is in violation of 42 U.S.C.A. § 1983; (4) that defendants conspired to restrain trade by conspiring and agreeing to deny and by denying hospital privileges to plaintiffs, and by agreeing to participate in and participating in a "group boycott" of plaintiffs, anticompetitive in purpose and effect, in violation of G.S. 75-1; (5) that defendants engaged in and continue to engage in "unfair methods of competition and unfair practices," anticompetitive in purpose and effect, in violation of G.S. 75-1.1;

1. This action originally also named as defendants Cape Fear Memorial Hospital, Inc., its individual trustees and administrator. However, on 17 February 1981, the parties stipulated that "a controversy between the plaintiffs and the Cape Fear Defendants no longer exists," and entered a voluntary dismissal of the claims against those defendants with prejudice.

(6) that the allegations in claims four and five also constitute violations of the provisions of the common law; (7) that "[d]efendants intentional acts of exclusion of plaintiffs from hospital privileges is a violation of defendants' common-law duty to deal fairly and equitably with plaintiffs"; (8) that defendants intentionally conspired to interfere and destroy and did interfere with plaintiffs' business; (9) that defendants intentionally conspired to interfere and did interfere with plaintiffs' contractual rights with defendant hospitals, with plaintiffs' relationship with their patients, and with plaintiffs' prospective advantage; (10) that "[d]efendant Dineen and others have defamed, slandered and libeled plaintiffs" which has been encouraged by other named defendants; (11) that defendants violated plaintiffs' rights of privacy by making false statements which cast them "in a ridiculous light," and by intentionally placing them "in the position of second-class citizens"; and (12) that defendants' actions violate G.S. 90-202.12.

Plaintiffs prayed for preliminary and permanent injunctions to prohibit defendants from refusing to amend hospital bylaws "to permit consideration of podiatrists for hospital privileges on their individual merits," and to prohibit defendants from the continuance of the wrongful actions alleged in plaintiffs' several claims for relief. Plaintiffs further prayed for actual damages of "at least $250,000.00 per plaintiff," for treble damages under their fourth and fifth claims for relief, and for $1,000,000.00 in punitive damages.

Dineen and Thomas generally denied plaintiffs' allegations and pleaded the statute of limitations as a bar to any claim asserted by plaintiffs. New Hanover and its related defendants similarly answered plaintiffs' complaint.

On 20 February 1980, plaintiffs moved for summary judgment. However, on 16 May 1980, Judge Tillery entered an order in part denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' first, second, and third claims for relief pursuant to motions to dismiss pleaded in defendants' answers. Such motions to dismiss plaintiffs' fourth through twelfth claims were denied. Dineen and Thomas also filed motions for summary judgment on 29 December 1980. On the same date, New Hanover and its related defendants moved for partial summary judgment

and to dismiss plaintiffs' fourth, sixth, eighth, ninth, tenth, and eleventh claims for relief on the ground that those claims are barred by the statute of limitations. The trial judge entered an order on 10 February 1981 in part severing plaintiffs' tenth claim for relief from the trial of the remaining claims, and denying defendants' motions for summary judgment, with the exception of such motions as they relate to the tenth claim for relief; summary judgment upon that claim was allowed as to all defendants except Dineen, whose motion for summary judgment upon the tenth claim was denied.

Subsequent to the filing of their complaint, Judge James heard plaintiffs' motion for a preliminary injunction to prohibit defendants from refusing to amend hospital bylaws to permit consideration of podiatrists for staff privileges. On 29 December 1978, an order was entered which provided, in part, as follows:

> Each of the defendant hospitals shall act on Drs. Cameron and Costin's pending requests for amendments to the by-laws to permit the granting of hospital privileges to licensed podiatrists and their pending requests for hospital privileges and shall grant Drs. Cameron and Costin evidentiary hearings before the medical-dental staff of the hospital, or a duly designated committee of said staff, and before the board of trustees in support of those requests.
>
> Each hearing shall be conducted in accordance with the following procedural due process requirements mandated by the Fifth and Fourteenth Amendments to the United States Constitution: right to notice of the hearing; right to representation of counsel at the hearing; right to call witnesses, who shall testify under oath; right to cross-examine witnesses; right to have the hearing conducted on the record before a court reporter agreed upon by the parties; right to a copy of the record; right to a written decision following each hearing, which writing shall contain a statement of the reasons for any determinations made.

Pursuant to this order, a hearing was held on 12 February 1979 by a special committee of the New Hanover medical staff, at which plaintiffs and their counsel were present and offered evidence. Upon receipt of the committee's recommendations, plaintiffs requested a hearing before New Hanover's Board of

Trustees. Following the hearing on 27 March 1979, at which plaintiffs and their counsel were present and offered evidence, the board issued its decision on 8 May 1979 granting to plaintiffs "Type 1 podiatric privileges." Such privileges were defined in recommended amendments to the New Hanover medical staff bylaws as follows:

> . . . Type 1 podiatric privileges allow a podiatrist to treat the foot by mechanical, medical and surgical means in a manner that does not cause bleeding or require an anesthetic, except in the case of the removal of toenails, either partial or complete, with or without excision of the nail matrix, in which case bleeding and the use of a local anesthetic is acceptable.

In reaching this decision, the board established and applied to plaintiffs certain standards for the provision of hospital staff privileges for podiatrists. The decision stated, in part, as follows:

> It is the opinion of the Board that the formulation and adoption of amendments to the medical staff bylaws so as to permit podiatrists to apply for privileges at New Hanover Memorial Hospital should be undertaken without regard for the particular applications now pending from Dr. Cameron and Dr. Costin. The new bylaws should apply to any and all podiatrists who might apply for privileges at New Hanover Memorial Hospital, and should establish standards that are not only fair to the applicant, but which, at the same time, provide the Credentials Committee, the Executive Committee and the Board of Trustees with meaningful and responsible guidelines to maintain the Hospital's highly competent surgical staff.
>
> With respect to podiatric surgical procedures, it is the position of this Board that the practitioner, whether he be a physician or a podiatrist, shall be highly competent to perform the surgical privileges which are granted to him.
>
> . . . .
>
> In short, the Board has a duty to formulate clear standards to be met by any podiatrist seeking privileges at New Hanover Memorial Hospital.
>
> [T]he traditional and accepted standards that have been applied to physicians seeking surgical privileges at New

Hanover Memorial Hospital include the consideration of whether such physicians are members of their respective medical colleges and whether such physicians have been classified as Board eligible or Board certified by their respective specialty boards. It seems reasonable to apply comparable standards to podiatrists seeking surgical privileges at New Hanover Memorial Hospital.

. . . .

Therefore, it is the opinion of the Board that membership in the American College of Foot Surgeons is still a reasonable and relevant consideration to be considered in evaluating the competence of a podiatrist seeking surgical privileges at New Hanover Memorial Hospital.

. . . .

Since a podiatrist can be classified as Board eligible without having completed a residency, and since residency training is a basic factor to be considered in evaluating the competency of applicants seeking surgical privileges at New Hanover Memorial Hospital, it is the opinion of the Board of Trustees that the residency requirements set forth in the proposed bylaw amendment is a reasonable standard to be satisfied by applicants seeking Type 2 podiatric privileges.[2]

. . . .

[I]t is the opinion of the Board that recognition as being either Board eligible or Board certified by the American Board of Podiatric Surgery is a reasonable and relevant consideration to be considered in evaluating the competence of a podiatrist seeking surgical privileges at New Hanover Memorial Hospital.

The Board perceives its duty in formulating the requested bylaw amendment as being two-fold. The amendment should set forth a framework for evaluating the competency of any applying podiatrist in a fair and reasonable manner.

2. Type 2 podiatric privileges "allow a podiatrist to treat the foot by mechanical, medical and surgical means as permitted by the North Carolina General Statutes, limited only by the scope of the specific privileges granted to said podiatrist."

> At the same time, the standards of evaluation set forth in any bylaw must also reflect the responsible exercise of the Board's duty to the public to assure a highly competent medical staff. It is the opinion of the Board that the best efforts of the special committee, the medical staff and this Board have been devoted to accomplishing that two-fold purpose.

Thus, the board concluded, "Sound academic training and continued postgraduate training under the supervision of specialists in the respective medical fields are, in the opinion of this Board, basic factors to be considered in evaluating the competency of any applicant seeking surgical privileges at New Hanover Memorial Hospital."

In his order of 16 May 1980, Judge Tillery reviewed Judge James' order, the records of the hearings held pursuant to that order, and the recommendations made, and found that Judge James' order "has been complied with by the defendant hospitals, the individual plaintiffs have been given due process hearings on their requests for bylaw amendments and hospital privileges, and the actions of the respective hospital boards of trustees on said requests were not arbitrary or capricious."

Upon the completion of plaintiffs' evidence at trial, the trial judge granted defendants' motions for directed verdict upon all issues. Plaintiffs appeal from the judgment entered thereon.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd, Frank J. Sizemore III, and Alan W. Duncan, for plaintiff-appellants.

Ward & Smith, by Thomas E. Harris and Robert H. Shaw III; and Marshall, Williams, Gorham & Brawley, by A. Dumay Gorham, Jr., for defendant-appellee New Hanover Memorial Hospital, Inc. and its related defendant-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John H. Anderson, Samuel G. Thompson, and Robin K. Vinson, for defendant-appellees J. R. Dineen, M.D. and David P. Thomas, M.D.

HILL, Judge.

Plaintiffs' evidence at trial tends to show that plaintiff Cameron graduated from the Ohio College of Podiatric Medicine with the degree of doctor of podiatric medicine. While in school, Cameron performed or assisted in performing surgeries on the human foot. He received his North Carolina license to practice podiatry in 1952. Along with other professional affiliations, Cameron is an affiliate of the American College of Foot Surgeons Associates and an associate of the American College of Foot Surgeons. He is past president of the North Carolina Podiatry Society. Plaintiff Costin graduated from the Temple University School of Chiropody, later known as the Pennsylvania College of Podiatric Medicine, in 1954. He received the degree of doctor of surgical chiropody, later exchanged for the degree of doctor of podiatric medicine. Costin testified that the exchange of degrees "was done only for those whose curriculum was comparable to the curriculum at the time the exchange was made." Costin had no training in surgical procedures under general anesthesia. He began the practice of podiatry in Wilmington in 1956. At the time of trial, Costin served on the North Carolina Board of Podiatry Examiners.

In 1960 or 1961, Cameron applied for and received hospital privileges at Cape Fear Memorial Hospital, Inc. [hereinafter referred to as Cape Fear]. From approximately 1961 to 1964, Cameron performed 75 to 125 surgeries under general anesthesia at Cape Fear. Costin joined Cameron's practice of podiatry in 1962 and also performed surgeries at Cape Fear until 1964.

Cameron testified that he was present at a meeting of the Cape Fear medical staff on 22 April 1964. He described the meeting as follows:

> I did hear Dr. David Thomas make some statements at that meeting. To the best of my recollection, Dr. Thomas stated to the staff that he felt that it would downgrade the profession of orthopedics if podiatrists continued to do surgery on an in-patient. He felt, he and Dr. Dineen, that it would jeopardize them and their status with the American Orthopedic Association, and they could no longer do surgery in Cape Fear Hospital if podiatrists were performing on an in-patient basis as we had been.

A portion of the minutes of the meeting was later admitted into evidence against Dineen and Thomas, but not against New Hanover, and a portion was excluded totally by the trial judge.[3] The admitted minutes stated, in part, as follows:

> Dr. Thomas informed the staff that he and his associate Dr. Dineen were opposed to the practice of podiatry on in-patients in the hospital. He said that this was the opinion of the Orthopedic Academy and that to practice in a hospital . . . where podiatry was permitted might jeopardize his status with the Am. Board of Orthopedic Surg. In particular Dr. Thomas objected to the technical performance of surgery in the operating room suite and to the . . . performance of surgery with the patient under general anesthesia. Dr. Thomas said that he had no objection to podiatrists working on out-patients under local anesthesia and that there was nothing personal concerning Drs. Cameron and Coston [sic] to which his opposition had reference.
>
> When queried by Dr. Mebane as to why he held these views, Dr. Thomas said that he considered the practice of podiatric surgery in the operating room and when under general anesthesia to represent an infringement on the field of orthopedic surgery and to downgrade, (to lower the status of) orthopedic surgery. Dr. Thomas also said that he did not see how he could continue to work in a hospital which had podiatrists (working in the operating rooms and under general anesthesia).
>
> Dr. Thomas said he could not speak for the other orthopedists in town (Drs. Dorman, Boyes and T. Craven) who are associated in practice.

Following the 22 April meeting, Cameron continued to exercise non-surgical staff privileges at Cape Fear; however, all staff

3. The trial judge did not allow the following portion of the minutes of the 22 April 1964 meeting into evidence, which immediately follows that which was admitted and quoted above:

> It is, however, common information to the staff that the views of Drs. Dorman and Boyes do not greatly differ from that of Drs. Thomas and Dineen. Dr. Craven has only been in town a short while and his views are not definitely known (although it is presumed that he will act in concert with his two associates in this matter).

privileges at Cape Fear subsequently were terminated. In 1973 and 1974, plaintiffs constructed operating room facilities in their office. Surgeries performed in that office facility were under local anesthesia. Cameron testified that "[t]he number of surgical procedures performed by me and Dr. Costin in our own privately constructed operating room has remained fairly constant over the years from 1973 to date—at about 20 to 30 a month."

Since their staff privileges were terminated, plaintiffs from time to time made applications to Cape Fear and New Hanover[4] "for clinical privileges." On 30 July 1973, plaintiffs wrote a letter to the chairman of the Board of Trustees at Cape Fear which was read to the jury as follows:

> "On July 6, 1973, we received correspondence from Mr. R. J. McLeod that 'at a meeting of the Board of Trustees, held on July 3, 1973, it was decided that it would not be advantageous for the hospital to have a podiatry staff at the present time.' For four years we had full privileges including the operating room. In April 1964 our privileges were greatly restricted; however, the podiatry staff still remained a part of the hospital bylaws. We feel that the deletion of podiatric staff privileges by the recent revision of hospital bylaws constitutes a violation of our rights according to Standard VII of the 1970 Accreditation Manual for Hospitals by the Joint Commission on Accreditation of Hospitals, page 43:
>
> > 'Provide an appeal mechanism relative to medical staff recommendations for denial of staff appointments and reappointments, as well as for denial, curtailment, suspension or revocation of clinical privileges. This mechanism shall provide for review of decisions, including the right to be heard at each step of the process when requested by the practitioner. The final decision must be rendered by the governing body within a fixed period of time.'
>
> "In accordance with the above paragraph, we are requesting a review of this decision and would like to be heard at each step of the process as outlined above."

4. New Hanover was incorporated on 26 May 1967.

On 9 September 1975, plaintiffs sent an "informational letter" to the Cape Fear medical staff concluding that "we do hereby formally request that the medical staff of Cape Fear Memorial Hospital approve amending the bylaws to provide for the establishment of a podiatry staff at this institution." Again on 24 January 1978, plaintiffs requested "that the Board of Trustees of Cape Fear Memorial Hospital consider an amendment to the bylaws of the hospital which would allow for the inclusion of podiatry in accordance with the Accreditation Manual for Hospitals . . . ." A similar letter was written to the Chairman of the Board of Trustees at New Hanover on 9 February 1978. Following the acknowledgment of receipt of both letters at Cape Fear and New Hanover, plaintiffs heard nothing further on their requests.

Dr. Heber Johnson, a general surgeon at Cape Fear, testified that he knew Cameron and, by observing Cameron's performance in surgery, determined that his surgery was "excellent." Johnson further testified that during a medical staff meeting at Cape Fear in October 1973, Dineen presented a case he thought was treated unnecessarily and overcharged by plaintiffs. Johnson stated that "Dr. Dineen said that he did not want to lie down with skunks. I presumed that from the tenor of the conversation, his conversation, that the appellation 'skunks' was applied to the podiatrists who had applied for hospital privileges." Although he testified that he knew why plaintiffs' hospital privileges were restricted in 1964, Johnson stated, "I have no personal recollection of the events that occurred in 1964 except from the minutes of the meetings of the staff which I personally extracted to review two years ago for the deposition which I had." However, when shown a copy of the minutes of the Cape Fear medical staff meeting on 27 April 1964, Johnson testified on *voir dire* that it "does not refresh my recollection as to why the privileges were restricted."[5]

5. The minutes of the 27 April 1964 Cape Fear medical staff meeting which were examined by Johnson stated, in part, as follows:

> . . . A motion was made by Dr. Sinclair and seconded by Dr. Johnson to the effect that the Podiatrist service be discontinued on in-patients as of July 1, 1964. This action was taken because they had been informed that the Orthopedic surgeons would not continue to operate in our hospital so long as a Podiatrist is present in the hospital on in-patient surgery.

This and certain other exhibits offered by plaintiffs into evidence were later excluded by the trial judge.

Robert J. McLeod was the administrator of Cape Fear from 1959 to 1980. He testified that he did not recall discussing plaintiffs' competency to use the hospital's operating room with Dineen or Thomas. McLeod did recall that at one meeting, "Dr. Dineen said if the podiatrists [plaintiffs] were admitted to the staff that they would not patronize the hospital and they would talk to the other orthopedic surgeons and ask them not to patronize the hospital." However, McLeod further testified, "I do not know if the withdrawal of privileges at Cape Fear Hospital was directly responsive to the demands of the orthopedics [sic] on the staff."

Defendant William F. Morrison, administrator of New Hanover since 1969, testified that the process by which clinical privileges are granted to "health practitioners" is as follows:

> I am fairly well acquainted with the process at New Hanover by which clinical privileges are granted to health practitioners. A practitioner that wishes privileges at our institution normally inquires as to what the process is. We inform them that there is an application which we supply them with. The application is filled out by the inquirer or applicant, returned to my office along with recommendation letters. We then see that the application is complete, turn the application over to the designated committee of the Medical Staff to begin processing. If it is determined from the application that the applicant does not have a license to practice in the State of North Carolina, it stops at that point. If he does have a license to practice his profession, it goes to a committee of the medical staff. Our office turns the application over to the chairman of the Credential Committee, an appointed chairman of that committee . . . . The committee is generally responsible for establishing that the applicant has the required credentials for the position on the staff which is being applied for. . . . The process of the credential granting privileges is entirely that of the Medical Staff of New Hanover Hospital and the Board of Trustees. . . . The Credential Committee reports to the Executive Committee of the Medical Staff. The Executive Committee hears the comments and report of the Credential Committee and acts upon a recommendation of the committee concerning the applicant.

Morrison further testified that he did not believe this process would apply to a podiatrist who applied for staff privileges in

1973 and 1977. He stated, "If I had received an application for clinical privileges at New Hanover by a podiatrist in the year 1973, I don't know what I would have done with it. I have no provision for processing."

Morrison identified numerous minutes of New Hanover Executive Committee and medical staff meetings which were read to the jury that described, in part, the process of considering plaintiffs' requests to change the staff's bylaws to include privileges for podiatrists at New Hanover. This evidence was admitted against New Hanover but not against Dineen and Thomas.

At the 11 June 1973 meeting of the Executive Committee, plaintiffs were present and presented their request to amend the bylaws " 'to include granting of hospital privileges to qualified podiatrists.' " The matter was referred to the Department of Surgery for consideration. On 9 July, Thomas, reporting for the Department of Surgery, stated that the department recommended that privileges not be granted to podiatrists. The Executive Committee adopted the department's recommendation " 'on the basis primarily that the extra work and supervision by the medical or surgical staff members would tend to overburden their already heavy patient load.' "

The 13 August 1973 minutes of the Executive Committee reveal that plaintiffs were granted permission to appear before the committee and present further evidence on behalf of their request for staff privileges. However, at the 7 September meeting of the surgical staff, it was unanimously recommended that the Executive Committee be advised that " 'surgical staff saw no medical reason to change the bylaws at this time . . . .' " The Executive Committee voted to seek legal advice on the question at the 10 September 1973 meeting; the medical staff likewise voted to seek legal advice at its 11 September meeting. Upon receipt and consideration of the legal advice, the medical staff " 'overwhelmingly' " voted to deny plaintiffs' request on 11 December 1973. The Board of Trustees was informed of this action at its 18 December 1973 meeting.

The New Hanover Executive Committee again considered plaintiffs' request to amend the medical staff's bylaws to include staff privileges for podiatrists on 13 March 1978. The matter then was referred to the Credentials Committee; this action was

reported to the Board of Trustees at its 25 April 1978 meeting. On 13 November 1978, one month after plaintiffs filed their complaint in the present case, the Executive Committee heard the report of the Credentials Committee. The minutes of that meeting were read to the jury, in part, as follows:

> "At the present time our bylaws do not provide for [podiatrists to become members of the medical staff]. The committee recommended that the bylaws be amended so that applications for qualified podiatrists could be considered. They further recommended that surgical or nonsurgical privileges be granted depending upon individual qualifications. Their work on the staff would be subject to the restrictions defined in the JCAH [Joint Commission on the Accreditation of Hospitals] standards similar to the restrictions of dentists."

Ellen Carraway Williams, a member of the New Hanover County Board of Commissioners and a member of New Hanover's Board of Trustees in 1978, then considered in her official capacity the question of whether podiatrists should have clinical privileges at Wilmington hospitals. She testified that although the patient was the "major concern," she relied upon the hospital committees to inform her "as a Trustee what surgeons are or are not competent to practice in the hospital . . . ." Williams further testified as follows:

> My feeling is that the hospital must determine who is qualified to serve in that hospital whether it is podiatrists or any other M.D., surgeon or what have you; that the hospital must determine whether they are going to be allowed to practice in that hospital and if they are not allowed to practice in that hospital, then they have to make the choice. As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard.

Williams thought that she told the local media that she "did not feel these two plaintiffs were qualified to practice in the hospital." However, she stated that she has not agreed with anyone to destroy plaintiffs' professional practice.

The deposition testimony of Dineen was admitted into evidence concerning his objections to Costin as a speaker for the Cape Fear Diabetes Association on the subject of the diabetic foot. He wrote two letters to the members of the New Hanover Department of Orthopedic Surgery decrying the choice of the speaker. Dineen testified, "Inasmuch as there were eleven orthopedists practicing in Wilmington at that time, I felt that a chiropodist, now called podiatrist, was a poor choice of speaker on the subject of the diabetic foot, or the care of the diabetic foot, which is a condition that is not just limited to the foot."

Bruce Canady, a pharmacist employed by the Area Health Education Center, testified that he spoke with Dineen concerning speakers for the diabetes association. Canady rejected Dineen's idea of taping Costin's speech, and Dineen "at that time said that he was of the impression that it was not up to me and I disagreed with that. He then said that he would take the matter further as, I believe he said, 'It was time to put on the gloves.' "

Dineen also was called as an adverse witness for plaintiffs. He testified that in late 1964, he told McLeod, "I was not going to continue to practice at the Cape Fear Hospital if podiatrists were allowed to operate in the operating room unsupervised, as I had learned had happened prior to my arrival." Dineen denied that he ever made such a statement to anyone associated with New Hanover. Dineen variously described plaintiffs as follows:

> I was dealing with two chiropodists who did not have hospital training, did not have any post-graduate training, had limited premedical training and very limited training in the four years referred to in their graduate program.
>
> . . . .
>
> The plaintiffs are not now and never have been podiatrists. They are what I call chiropodists. Under my definition of that term, it is a lower status than that of podiatry.
>
> . . . .
>
> I am certain that these plaintiffs qualified under that law [licensing of podiatrists] or they wouldn't be practicing. But in my own mind, the way I define the term podiatry, they do not qualify.

. . . .

> As to whether I have ever made an investigation to determine whether or not these doctors are competent surgeons in their field, I am sure they are competent in chiropody, obviously, but not in podiatry. I don't recall sharing that opinion with my colleagues on the staff at the hospitals from time to time through the years. This is my own personal opinion from my own personal experience with podiatrists.

He further testified that "[a]t no time after 1964 did I join with Dr. Thomas in opposing the practice of podiatry surgery in the hospitals in Wilmington."

Dr. James Alan Gray, a surgeon at Cape Fear and New Hanover, testified by deposition, in part, as follows:

> . . . I felt in 1964 that I would be subject to criticism, as a member of the American Academy of Orthopaedic Surgeons, if I operated in a hospital that permitted podiatrists to operate on patients under general anesthesia without medical supervision. . . . I think it would have, in my opinion, adversely affected my reputation by practicing with podiatrists in the hospital.
>
> . . . .
>
> Concerning the nature of my position, my objection was that they were not qualified to do the surgical procedures that they applied for. These procedures were open operations on the foot, meaning procedures that could draw blood. I considered them unqualified to perform those procedures . . . [because of] . . . the knowledge that we had of their background and training.

Nevertheless, Gray stated that he and Dineen had no discussion about their opposition to plaintiffs other than "passing remarks" which indicated that they shared the same opinion.

I

By their Assignment of Error Nos. 7 and 8, plaintiffs argue that substantial evidence was improperly excluded by the trial judge that further demonstrated the sufficiency of the evidence

to withstand defendants' motions for directed verdict. Specifically, plaintiffs contend that the judge improperly excluded certain minutes of medical staff meetings and other hospital documents "under the guise of the hearsay rule" and that the judge erred in denying to plaintiffs access to all the minutes of the New Hanover medical staff meetings and other documents in New Hanover's possession on the ground of an asserted privilege. Because our disposition of these assignments of error necessarily affect our consideration of the propriety of the directed verdict entered for defendants, we address these questions at the outset of this opinion.

A

> "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." . . . Expressed differently, whenever the assertion of any person, other than that of the witness himself in his present testimony, [footnote omitted] is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. [Footnote omitted.] If offered for any other purpose, it is not hearsay.

1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 138, pp. 458-60 [hereinafter referred to as Stansbury]. *Accord Wilson v. Hartford Accident & Indemnity Co.*, 272 N.C. 183, 158 S.E. 2d 1 (1967). Hearsay evidence is inadmissible unless it falls within one of the recognized exceptions to the hearsay rule.

The modern "business records" exception to the hearsay rule was enunciated by our Supreme Court in the landmark case of *Firemen's Insurance Co. v. Seaboard Air Line Railway*, 138 N.C. 42, 50 S.E. 452 (1905). The requisites of this exception to admit hearsay evidence have been summarized adequately: "If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they are made, they are admissible." 1 Stansbury § 155, p. 523.

[1] In the present case, minutes of medical staff meetings and other hospital documents are clearly hearsay for they were offered to prove the truth of the matters asserted therein.

However, defendants argue that "[m]inutes of medical staff meetings do not constitute business records or hospital records" because only records used in the provision of health care are admissible under the "business records" exception. "It is a matter of common knowledge, we think, that modern hospitals are staffed by medical, surgical and technological experts who serve as members of a team in the diagnosis and treatment of human ills and injuries." *Sims v. Charlotte Liberty Mutual Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962). An essential part of the "teamwork" required of modern hospital staffs is the staff meeting where, as the evidence in the present case clearly shows, important decisions are made concerning the provision of health care in the hospital.[6] The need for accuracy in these records is as important as that required of hospital patient records. *Cf. Sims v. Charlotte Liberty Mutual Insurance Co., supra.* Therefore, to accept defendants' contentions that the minutes of medical staff meetings are not "business records" is to deny the reality of modern hospital administration. There is no question, then, that the minutes of medical staff meetings were made in the regular course of the hospital's business.

[2] Of course, a proper foundation must be laid for the introduction of these "business records" in light of the requisites of the hearsay exception stated above.

> The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.*

Sims v. Charlotte Liberty Mutual Insurance Co., supra at 35, 125 S.E. 2d at 329. Here, plaintiffs apparently sought to lay a foundation for the admission of the minutes of medical staff meetings and other hospital documents by eliciting the testimony of Dr.

6. The *Accreditation Manual for Hospitals* (1979 ed.), p. 81, states the following "principle" concerning the medical staff: "There shall be a single organized medical staff that has the overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members, as well as for accounting therefor to the governing body."

Albert David Warshauer, McLeod, Morrison, and Joseph L. Soto, who replaced McLeod as Cape Fear's administrator.

On *voir dire*, Warshauer testified that he recorded the minutes of certain Cape Fear medical staff meetings. He stated that he would take "little notes" during the meeting and "go to another office where there was a typewriter and type the minutes" after the meeting or on the next day. Warshauer further testified that the minutes were kept in a book and that he considered them to be a part of the official records of the hospital. McLeod testified that as Cape Fear's administrator, he was responsible for the hospital's records, which were locked in his office, including the records of the medical staff. He stated that certain minutes of medical staff meetings which he identified were "business records." Morrison also testified that as New Hanover's administrator, he is responsible for the minutes of the Board of Trustees. He stated, "It is part of my duties at New Hanover Memorial Hospital to serve as custodian of the minutes of the Board of Trustees and their various committees, and of the Medical Staff and its various committees." Soto merely testified that he is "custodian of the minutes of the Medical Staff and the Board of Trustees" at Cape Fear.

We conclude that the testimony of McLeod, Morrison and Soto did not lay a proper foundation under the criteria set out in *Sims*. Although they were custodians of the records, McLeod, Morrison, and Soto did not adequately authenticate the documents they identified; they did not show the mode of preparation, that the minutes were recorded at or near the time of the meetings, that the minutes were made by someone having knowledge of the data set forth, and they did not show that the minutes were made *ante litem motam*. *See Sims v. Charlotte Liberty Mutual Insurance Co., supra*. However, these deficiencies which are fatal to the admission of the documents identified by McLeod, Morrison, and Soto are present in the *voir dire* examination of Warshauer summarized above. Thus, only those minutes authenticated by Warshauer are admissible under the "business records" exception to the hearsay rule since the remaining requisites of that exception have been met through Warshauer's *voir dire* testimony.

Our review of the record on appeal reveals that the minutes of only two Cape Fear medical staff meetings properly authenti-

cated by Warshauer were identified and offered into evidence: the 22 April 1964 minutes and the 24 April 1963 minutes.[7] Both documents were read, in part, to the jury and admitted by the trial judge against Dineen and Thomas but not against New Hanover and its related defendants. It is of no consequence that the proper foundation was laid subsequent to the first introduction of the minutes of the 22 April 1964 meeting which Warshauer recorded. *See State v. Franks*, 262 N.C. 94, 136 S.E. 2d 623 (1964).

Although we sustain plaintiffs' assignments of error as described above, we find no error in the admission of the minutes of these Cape Fear medical staff meetings against Dineen and Thomas, but not against New Hanover and its related defendants. However, we conclude that the trial judge erred in totally excluding a portion of the minutes for the 22 April 1964 meeting. *See* footnote 3, *supra.*

As noted above, the minutes were offered to prove the truth of the matters asserted therein. Warshauer's *voir dire* testimony regarding this portion of the 22 April 1964 minutes indicates that he is not certain of the source of the comments excluded by the trial judge. However, Warshauer testified that the excluded portion of the minutes was "true to the best of my knowledge at the time I wrote it." Under these circumstances, the "business records" exception to the hearsay rule equally applies to the excluded portion.[8] It also should have been admitted against Dineen and Thomas, but not against New Hanover and its related defendants.

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7. The minutes of the 24 April 1963 meeting of the Cape Fear medical staff describe a program given to the staff by plaintiffs concerning the practice of podiatry in the United States. The program was "enjoyed by all."

8. The rationale of the "business records" exception, as recently stated by this Court, further supports the admission of the excluded portion of the 22 April 1964 minutes. In *State v. Young*, 58 N.C. App. 83, 88, --- S.E. 2d ---, --- (1982), Judge Hedrick wrote as follows:

> The admissibility of entries made in the regular course of business derives from circumstances which furnish a guaranty of the trustworthiness of such entries, notwithstanding the fact that the person making the entry is unavailable for cross-examination; the guaranty of trustworthiness derives from the desire of the person making the entry to provide accurate information to the business for which the records are intended.

B

[3] Prior to the presentation of evidence, counsel for New Hanover objected to plaintiffs' request to review certain documents which the trial judge had ordered to be brought to trial. Defendants' objection was grounded as follows: "First, the privilege as to the nature of the discussions that were the subjects of the meetings, which are reflected by the minutes. Second, the fact that some of the minutes reflected meetings of the trustees, committees where counsel was present." The judge sustained the objections based upon the assertion of attorney-client privilege and sealed the documents he had ordered to be brought to trial.

We are constrained to note that subsequent to the filing of this action, G.S. 131-170 was codified as follows:

> The proceedings of, records and materials produced by, and the materials considered by a committee are not subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by the committee, and no person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee nor should any person who testifies before the committee or who is a member of the committee be prevented from testifying as to matters within his knowledge, but the witness cannot be asked about his testimony before the committee or opinions formed by him as a result of the committee hearings.

Thus, under present law, plaintiffs would not be entitled to introduce any of the minutes of medical staff meetings they offered into evidence unless a witness to the meetings testified as to

"matters within his knowledge . . . ."[9] *Id.* In effect, the legislature has created a qualified privilege for the communications described above.

While construing a statute similar to G.S. 131-170, the California Court of Appeal noted that Cal. Evid. Code (West) § 1157 "was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. . . . Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence." *Matchett v. Superior Court for County of Yuba*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320-21 (1974).

Our Supreme Court has long embraced this philosophy as the basis for the doctrine of privileged communications: " 'The great underlying principle of the doctrine of privileged communications rests in public policy.' *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360. The basis of privilege is the public interest in the free expression and communication of ideas." *R. H. Bouligny, Inc. v. United Steelworkers of America*, 270 N.C. 160, 170, 154 S.E. 2d 344, 354 (1967). Where this interest is sufficient to outweigh the State's interest in protecting a plaintiff, the law does not allow recovery of damages occasioned by the communication. *Id.* Thus, the defense of qualified privilege arises in circumstances where

> (1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.*

Presnell v. Pell, 298 N.C. 715, 720, 260 S.E. 2d 611, 614 (1979) (emphasis original). *Accord Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971). *See also* Prosser, *Law of Torts* (4th ed. 1971) § 115, p. 785 [hereinafter referred to as Prosser].

9. Our holding that the minutes of the medical staff meetings on 22 April 1964 and 24 April 1963 should have been admitted against Dineen and Thomas, but not against New Hanover and its related defendants, under the "business records" exception to the hearsay rule does no damage to the policy of the State as stated in G.S. 131-170. Warshauer, who properly authenticated those minutes, was a witness to those meetings.

In the present case, the minutes of the meetings sought to be protected by the asserted privilege recorded good faith communications of the hospital committees in which those present had a corresponding interest in the administration of the hospital. The rationale of the common law qualified privilege therefore applies. Thus, although the law in this State was uncertain concerning the subject of privileged communications in the context of hospital committee records at the time of the present case, the policy enunciated by G.S. 131-170 is grounded in our common law. We hold that the trial judge correctly excluded and sealed the documents based upon New Hanover's general assertion of privilege; however, we do not endorse defendants' objection based upon their assertion of attorney-client privilege. *See generally* 1 Stansbury § 62, p. 196.

II

Plaintiffs' Assignment of Error No. 1 alleges that the trial judge erred in granting defendants' motions for a directed verdict upon all issues at the end of plaintiffs' evidence. The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing upon such a motion, the trial judge must consider the evidence in the light most favorable to the non-movant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn of America, Inc., supra; Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). We now examine the causes of action stated in plaintiffs' complaint which they believe should have gone to the jury to determine the propriety of the trial judge's ruling.

A

[4] "A conspiracy has been defined as 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.' " *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E. 2d 325, 337 (1981), *quoting State v. Dalton*, 168 N.C. 204, 205,

83 S.E. 693, 694 (1914). Thus, to create a civil action for conspiracy, " 'a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object.' " *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E. 2d 783, 785 (1951), *quoting Holt v. Holt*, 232 N.C. 497, 500, 61 S.E. 2d 448, 451 (1950).

> The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage —not the conspiracy or the combination.

Reid v. Holden, 242 N.C. 408, 414, 88 S.E. 2d 125, 130 (1955), *quoted in Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E. 2d 771, 774 (1966). "Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens v. Puryear*, *supra* at 456, 276 S.E. 2d at 337.

In their brief, plaintiffs herein state that the evidence is sufficient to show that (1) "plaintiffs' surgical privileges at Cape Fear were terminated *as a direct result* of the threatened group boycott by the orthopedic surgeons in Wilmington, and in particular, by Dr. Thomas and Dr. Dineen"; and (2) "[b]ecause of the economic coercion imposed by the orthopedists' threatened boycott, New Hanover acquiesced in and embraced the conspiracy"—conduct dubbed by plaintiffs as "anticompetitive in nature." Considering the evidence offered at trial by plaintiffs as recounted above, including the portion of the minutes of the 22 April 1964 meeting which should have been admitted by the trial judge, we conclude that such evidence is insufficient to support the statements made by plaintiffs in their brief. In sum, there is no sufficient evidence beyond mere suspicion or conjecture, either direct or circumstantial, for the jury to infer that Dineen and Thomas agreed to boycott the two hospitals, joined by New Hanover and its related defendants, causing plaintiffs' privileges therein to be terminated.

Plaintiffs, of course, point to the statements attributed to Dineen and Thomas in the minutes of Cape Fear medical staff meetings in 1964 and 1973 quoted above. However, we construe that evidence as individual expressions of like personal opinion that do not rise to the level of proof of an agreement to perpetrate the "anticompetitive" conduct alleged by plaintiffs. More importantly, there is no evidence of an overt act, or acts, by defendants that is indicative of an agreement which resulted in damage to plaintiffs. Had plaintiffs established a *prima facie* conspiracy independently of the statements attributed to Dineen and Thomas, those statements would have been admissible as declarations of the conspirators. *See Greer v. Skyway Broadcasting Co.*, 256 N.C. 382, 124 S.E. 2d 98 (1962); 2 Stansbury § 173, p. 24; *see also State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969).

Therefore, since the evidence is insufficient as a matter of law to justify a verdict for plaintiffs on their claim of civil conspiracy, the trial judge properly granted defendants' motions for a directed verdict upon this issue.

B

[5] In their eighth and ninth claims for relief, plaintiffs allege that defendants' actions constitute a wrongful interference with their business relations, contractual rights, and prospective advantage. Generally, a defendant's motive or purpose is the determining factor as to liability in actions for interference with economic relations, "and sometimes it is said that bad motive is the gist of the action." Prosser § 129, pp. 927-28. Thus, to maintain an action for interference with business relations in North Carolina, plaintiffs must show that defendants "acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of [defendants]." *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E. 2d 282, 296 (1976). Our Supreme Court has stated the essential elements of wrongful interference with contractual rights as follows:

> . . . First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. [Citations omitted.] *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. [Citations omitted.] *Third*, that the outsider intentionally induced the third per-

son not to perform his contract with the plaintiff. [Citations omitted.] *Fourth*, that in so doing the outsider acted without justification. [Citations omitted.] *Fifth*, that the outsider's act caused the plaintiff actual damages.

Childress v. Abeles, 240 N.C. 667, 674, 84 S.E. 2d 176, 181-82 (1954). Where the claim is based upon wrongful interference with prospective advantage, plaintiffs must show lack of justification for inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference. *Spartan Equipment Co. v. Air Placement Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3 (1965).

A thread running through each of these actions is the requirement that plaintiffs must show a malicious, unjustifiable action by defendants resulting in the interference of plaintiffs' economic relations. Plaintiffs' strongest allegation in the present case is that such interference was defendants' combined, malicious, unjustifiable "anticompetitive" conduct as characterized above.

" 'As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats, or intimidation from trading with, working for, or continuing him in their employment is unlawful.' " *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E. 2d 647, 656 (1945), *quoting Kirby v. Reynolds*, 212 N.C. 271, 281, 193 S.E. 412, 418 (1937). Nevertheless, our prior conclusion that plaintiffs' evidence is insufficient to support their allegation of defendants' "anticompetitive" conduct also must cause this claim to fail. Although plaintiffs have presented evidence to indicate a competition between their practice and that of Dineen and Thomas, the evidence properly before the jury is also insufficient to infer any cause and effect relationship between that competition and the denial of staff privileges at New Hanover which, plaintiffs contend, interferes with their business relations and contractual rights with their patients.[10]

10. The portion of the minutes of the 27 April 1964 Cape Fear medical staff meeting quoted in footnote 5, *supra*, which tends to show a connection between the orthopedic surgeons and the denial of staff privileges to plaintiffs, was correctly not before the jury because it was not properly authenticated.

As it relates to plaintiffs' claim of wrongful interference with prospective advantage, competition is a privilege, the "life of trade."

> So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means.
>
> . . . .
>
> [S]ince all the members of a group may be free to do what any one of them may do, the addition of the element of combination or agreement of a number of defendants to carry out such policies adds nothing in itself, and will not result in liability. [Footnote omitted.] In such cases of group action, however, the possibilities of unprivileged coercion, intimidation, and a monopolistic restraint of trade are vastly increased, and the defendants frequently have been held liable on this basis.

Prosser § 130, pp. 954-55.

Again, in the present case, the evidence recounted above shows no "anticompetitive" conduct, or "group action," spurred by "unprivileged coercion, [or] intimidation . . . ." *Id.* To the extent that the evidence indicates a competition between plaintiffs' practice and that of Dineen and Thomas, we find that based upon the principles quoted above, plaintiffs' claim for wrongful interference with prospective advantage also must fail. For these reasons, plaintiffs have failed to prove the requisite interference. The trial judge therefore correctly granted defendants' motions for a directed verdict upon these issues.

C

[6] As indicated by our above discussion, the issues of civil conspiracy and wrongful interference with economic relations by alleged "anticompetitive" conduct have similar underpinnings; the same is true where such "group action" is alleged to show a "monopolistic restraint of trade." Prosser § 130, p. 955. Thus, we now consider plaintiffs' claims that defendants engaged in a restraint of trade and in unfair methods of competition and practice in violation of G.S. 75-1 & 75-1.1.

At the time of the trial of the present case,[11] G.S. 75-1 stated, in part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor . . . .

This statute is based upon section one of the Sherman Act, 15 U.S.C.A. § 1, "[a]nd, the body of law applying the Sherman Act, although not binding upon this Court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E. 2d 521, 530 (1973).

The plain language of G.S. 75-1 requires that some concerted action in restraint of trade must be proven; unilateral action cannot violate the statute. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F. 2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), and the cases cited therein. *See generally State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936). "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme." *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963), *quoted in Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3d Cir. 1963). *Accord Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., supra; Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981).

> Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence . . . . Nevertheless, [plaintiff has] the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation.

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., supra at 111. *See also The Venzie Corp. v. United States Mineral Products Co.*, 521

11. In 1981, G.S. 75-1 was amended to provide that a violation of its provisions would be a "Class H felony."

F. 2d 1309 (3d Cir. 1975). We further note that in the federal jurisdiction, uniform business behavior is admissible circumstantial evidence from which an agreement may be inferred. However, such evidence alone does not make out a violation of the Sherman Act. *Coughlin v. Capitol Cement Co.*, 571 F. 2d 290 (5th Cir. 1978). Thus, it is clear that North Carolina's substantive law of civil conspiracy, outlined above, also applies in the context of G.S. 75-1.

For the same reasons that plaintiffs' evidence is insufficient to support their claims of civil conspiracy and interference with economic relations, we now must conclude that plaintiffs have not presented sufficient evidence to show the concerted action required as a threshold to their claim under G.S. 75-1. Defendants' motions for a directed verdict upon this issue were properly granted.

When plaintiffs' action accrued,[12] G.S. 75-1.1 provided, in part, as follows:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are hereby declared unlawful.
>
> (b) The purpose of this section is to declare and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between *buyers and sellers* at all levels of *commerce* be had in this State.

(Emphasis added.) Since the language of G.S. 75-1.1(a) is strikingly similar to that of a section of the Federal Trade Commission Act,

12. In 1977, G.S. 75-1.1 was revised, in part, as follows:

> (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.

We decline to give retroactive effect to this version of the statute. Our conclusion is based upon the principles of *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970), as applied in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), *cert. denied*, --- U.S. --- (1981).

15 U.S.C.A. § 45(a)(1), our courts have held that federal decisions construing that Act are instructive upon the meaning of G.S. 75-1.1. *State of North Carolina ex rel. Rufus L. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

In *Penney*, our Supreme Court stated as follows:

> "Commerce" under federal decisions "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms. . . ." *Welton v. Missouri*, 91 U.S. 275, 280, 23 L.Ed. 347, 349 (1876); *accord, Adair v. United States*, 208 U.S. 161, 177, 52 L.Ed. 436, 443, 28 S.Ct. 277, 281 (1908); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23, 68 (1824). The federal courts have properly assigned the broadest possible definition to the word "commerce," since in defining the word, they define the limits of federal power to regulate activities under the commerce clause. U.S. Const. art. 1, § 8, cl. 3.
>
> . . . .
>
> By inserting the word "trade" in G.S. 75-1.1, which has a narrower meaning than the word "commerce," we believe the legislature signaled its intent to limit the otherwise broad definition of "commerce" obtained under federal decisions . . . . The use of the word "trade" interchangeably with the word "commerce" indicates that a narrower definition of commerce which comprehends *an exchange* of some type was intended.
>
> Just as in one sense the word "trade" has a limiting effect on the word "commerce," in another sense the word "commerce" enlarges the meaning of the word "trade." The two words, when used in conjunction, "include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter." Black's Law Dictionary (4th Ed. 1968). Thus, a host of occupations would be covered by G.S. 75-1.1 that would not be subject to a statute which relied exclusively on the word "trade." . . .
>
> We believe the unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain,

> sale, barter, exchange or traffic. We are reinforced in this view by G.S. 75-1.1(b), a declaration of legislative intent having no counterpart in the federal act. . . .
>
> The General Assembly, thus, is concerned with openness and fairness in those activities which characterize a party as a "seller."

Id. at 315-17, 233 S.E. 2d at 898-99. *See also Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). *But see United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979). *See generally* Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 Wake Forest Intra. L. Rev. 1 (1969).

In the context of the Uniform Commercial Code, this Court has held that medical professionals do not engage in the sale of "goods" when they either issue a prescription for a drug, *Batiste v. American Home Products Corp.*, 32 N.C. App. 1, 231 S.E. 2d 269, *disc. rev. denied*, 292 N.C. 466, 233 S.E. 2d 921 (1977), or prepare and fit dentures, *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E. 2d 780, *disc. rev. denied*, 304 N.C. 392, 285 S.E. 2d 833 (1981). *See* G.S. 25-2-105.

> Inherent in the legislation is the recognition that the essence of the transaction between the retail seller and the consumer relates to the article sold, and that the seller is in the business of supplying the product to the consumer. It is the product and that alone for which he is paid. *The physician offers his professional services and skill. It is his professional services and his skill for which he is paid, and they are the essence of the relationship between him and his patient.*

Batiste v. American Home Products Corp., supra at 6, 231 S.E. 2d at 272, *quoted in Preston v. Thompson, supra* at 295, 280 S.E. 2d at 784 (emphasis added). Moreover, "[l]earned professions 'are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministration.'" *Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E. 2d 478, 481 (1939), *quoting McMurdo v. Getter*, 298 Mass. 363, 367, 10 N.E. 2d 139, 142 (1937).

Thus, in light of this authority, we do not consider defendants to be the "sellers" whose unfair and deceptive acts and practices our Supreme Court says are forbidden by the former G.S. 75-1.1. Defendants' alleged "anticompetitive" conduct is not that "involved in the bargain, sale, barter, exchange or traffic." *State of North Carolina ex rel. Rufus L. Edmisten v. J. C. Penney Co., supra* at 316-17, 233 S.E. 2d at 899. We therefore conclude that G.S. 75-1.1, as it was written when plaintiffs' action accrued, does not apply to the circumstances of the present case.

We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. *See* footnote 12, *supra.* Plaintiffs contend that the so-called "learned profession" exception in the current G.S. 75-1.1(b) does not exclude defendants' alleged "anticompetitive" conduct because that conduct involves "commercial" activity, not the rendering of "professional services." We do not agree for the following reasons.

At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."

This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. Wadlington, *Cases & Materials on Law & Medicine* (1980), p. 209. As one court described it, the hospital's obligation is "to exact professional competence and the

ethical spirit of Hippocrates as conditions precedent to . . . staff privileges." *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F. 2d 173, 174 (5th Cir. 1971). We conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.[13] In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants' motions for a directed verdict upon this issue also were properly granted.

D

[7] Plaintiffs' eleventh claim for relief states, in part, as follows:

> . . . Defendants have violated plaintiffs rights of privacy by making and permitting the making of false statements and statements calculated to cause and which have caused plaintiffs great embarrassment, which statements have cast them in a ridiculous light and wrongfully, maliciously and intentionally placed them in the position of second-class citizens and which had no relation or relevance to plaintiffs' petitions for hospital privileges.

Plaintiffs allege damage to "their persons, property and profession by these unlawful acts of defendants"; in their brief, plaintiffs contend that such acts are Dineen's alleged statement in a 1973 Cape Fear medical staff meeting " 'that he did not want to lie down with skunks,' " and his statements in letters to the New Hanover Department of Orthopedic Surgery regarding Costin's speech for the diabetes association.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

13. It is purely incidental that Dineen and Thomas' opinions, and those of New Hanover and its related defendants, indicate that plaintiffs' qualifications do not meet the standards set for the provision of staff privileges there.

> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E, p. 394. Although a plaintiff need not plead and prove special damages, *Flake v. The Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938), it is elementary that a compensable injury must result from the "false light" published by a defendant. *See generally* Prosser § 1, p. 4.

In the present case, plaintiffs have failed to produce any evidence that the statement and letters attributed to Dineen proximately resulted in damages to "their persons, property and profession" as they allege in their complaint. With the essential element of damages missing from plaintiffs' proof, the trial judge correctly granted defendants' motions for a directed verdict upon this issue.

III

Plaintiffs' Assignment of Error Nos. 1, 3, and 4 make a broadside attack upon the 8 May 1979 decision of the New Hanover Board of Trustees in which the board adopted certain standards for the provision of hospital staff privileges for podiatrists and applied those standards to plaintiffs. In general, plaintiffs contend that "defendants' continued denial of clinical privileges is arbitrary, capricious and discriminatory." Specifically, plaintiffs contend that

> New Hanover arbitrarily adopted and seeks to enforce by-law provisions that require these plaintiffs to complete a year of residency, be board eligible pursuant to certification from the American Board of Podiatric Surgery, and be Fellows in the American College of Foot Surgeons before they will qualify for *consideration* of the surgical privileges requested.

(Emphasis original.) They state that "the sole relevant consideration raised by their application," competency to perform surgical procedures in a hospital, has never been reviewed by New Hanover. We do not agree with plaintiffs' contentions for the following reasons.

A

[8] Our scope of review of these issues was best stated in the case of *Sosa v. Board of Managers of the Val Verde Memorial Hospital, supra,* as follows:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. *The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.* In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility and unencumbered with irrelevant considerations, a court should not interfere.

Id. at 177 (emphasis added). *Accord Laje v. R. E. Thomason General Hospital,* 564 F. 2d 1159 (5th Cir. 1977), *cert. denied,* 437 U.S. 905 (1978); *Khan v. Suburban Community Hospital,* 45 Ohio St. 2d 39, 340 N.E. 2d 398 (1976). We therefore first must determine whether the qualifications stated in the 8 May 1979 decision of the New Hanover Board of Trustees are reasonably related to the operation of the hospital.

"Training is one of those relevant professional qualifications 'which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital.' " *Shaw v. The Hospital Authority of Cobb County,* 614 F. 2d 946, 952 (5th Cir. 1980), *cert. denied,* 449 U.S. 955 (1981), *quoting Foster v. Mobile County Hospital Board,* 398 F. 2d 227, 230 (5th Cir. 1968). The *Accreditation Manual for Hospitals* (1979 ed.), p. 84, prepared by the Joint Commission on the Accreditation of Hospitals, specifically suggests that specialty board certification

or eligibility "is an excellent benchmark to serve as a basis for privilege delineation . . . ."[14]

Nevertheless, in *Armstrong v. Board of Directors of Fayette County General Hospital*, 553 S.W. 2d 77, 79 (Tenn. App. 1976), which plaintiffs cite, the Tennessee Court of Appeals held that "a requirement of certification by any particular society as a mandatory prerequisite for the right of a duly licensed physician to practice his profession in a public hospital is illegal, arbitrary, capricious and beyond the jurisdiction of the governing body of the hospital" where the governing body fails to consider the competency of the candidate once the absence of the acceptable certification is established. The court did, however, endorse such a certification as a standard to be used by the hospital governing body to grant hospital staff privileges. *Id.*

In the present case, plaintiffs' evidence and the 8 May 1979 decision of the New Hanover Board of Trustees do not support plaintiffs' contention that their competency to perform surgical procedures in a hospital was never reviewed. Rather, the board's decision made an extensive review of plaintiffs' qualifications and applied that evidence to the standards established for the consideration of hospital staff privileges for podiatrists.[15] Type 1 privileges thereupon were granted. We therefore do not read *Armstrong* as supportive of plaintiffs' claim.

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14. In fact, this suggestion was taken to heart by the New Hanover Board of Trustees in establishing the standards quoted from its 8 May 1979 decision.

15. The Board of Trustees evaluated plaintiffs' qualifications, in part, as follows:

> Dr. Costin and Dr. Cameron are not recent graduates of a college of podiatry medicine. They each attended and graduated from podiatry school in the early 1950's. According to their testimony, neither received an undergraduate degree prior to entering podiatry school, and neither participated in any internship upon graduation. Neither has participated in any formal residency training. Neither has received any formal training in surgery under general anesthesia. Their postgraduate education has been primarily limited to short seminars. Neither has operated in a hospital operating room and neither has performed surgery under general anesthesia since 1964.
>
> Although the American College of Foot Surgeons has been in existence and has been recognized by the American Podiatry Association for some years, offering associate and fellow membership status, Dr. Costin is not a member of the College. Dr. Cameron is an associate member of the College.

Other courts have gone further and held that a candidate's "personal qualities" are reasonably related to the operation of the hospital. *See Robbins v. Ong*, 452 F. Supp. 110 (S.D. Ga. 1978); *Schlein v. The Milford Hospital*, 423 F. Supp. 541 (D. Conn. 1976). In *Schlein*, the court stated, "A doctor's ability to work well with others, for instance, is a factor that could significantly influence the standard of care his patients received. *Due process does not limit the hospital's consideration to technical medical skills.*" *Id.* at 544 (emphasis added).

Since the filing of this action, G.S. 131-126.11A has been codified as follows:

> The granting or denial of privileges to practice in hospitals to licensed physicians and other practitioners licensed by the State of North Carolina to practice surgery on human beings, and the scope and conditions of such privileges, shall be determined by the governing body of the hospital based upon the applicant's education, training, experience, demonstrated competence and ability, judgment, character and the reasonable objectives and regulations of the hospital in which such privileges are sought. Nothing in this Article shall be deemed to mandate hospitals to grant or deny to any parties privileges to practice in said hospitals.

G.S. 131-126.11B, also codified since the filing of this action, provides, in part, that "[a]ll practitioners must comply with all applicable medical staff bylaws, rules and regulations, including the procedures governing qualification methods of selection and the delineation of privileges."

These statutes reflect that the current policy of this State is in accord with the authorities discussed above. Therefore, we find that the standards established by the New Hanover Board of Trustees—membership in the American College of Foot Sur-

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Neither Dr. Cameron nor Dr. Costin are Board eligible or Board certified by the American Board of Podiatric Surgery.

Dr. Cameron and Dr. Costin commenced office practices immediately upon graduation from their respective podiatry schools, and, while their office experience is extensive, it is the opinion of the Board that it lacks the academic depth, the intensive training and the skilled supervision that is characteristic of the medical residency programs as well as the residency programs that are now available to podiatrists.

geons, board eligible or board certified by the American Board of Podiatric Surgery, and the residency requirement for Type 2 privileges—are considerations that are reasonably related to the operation of the hospital. It is not arbitrary, capricious, and discriminatory to exclude plaintiffs from performing the surgical procedures they requested when they have been unable to comply with the standards properly established by the New Hanover Board of Trustees. *See Khan v. Suburban Community Hospital, supra.*

Plaintiffs do not specifically challenge the procedure by which the New Hanover Board of Trustees reached its conclusions and recommendations. Their sole argument in this vein is that procedural due process cannot be afforded to plaintiffs unless their competency to perform the surgical procedures they requested is reviewed by a hospital committee. Clearly, as we have noted, plaintiffs' competency has been adequately reviewed. Nevertheless, upon a review of the hearings ordered by Judge James on 29 December 1978, we find that the procedure then outlined was followed in every respect; Judge Tillery's findings to this effect are supported by our review. Judge James' guidelines for the procedure quoted above are sufficient to afford to plaintiffs procedural due process in hearings of this type. *See generally Silver v. Castle Memorial Hospital,* 53 Hawaii 475, 497 P. 2d 564, *cert. denied,* 409 U.S. 1048 (1972).

B

[9] G.S. 90-202.12 states as follows:

> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose the provider of care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician as defined in this Chapter.

Plaintiffs contend that they are entitled to practice podiatry at New Hanover under the terms of this statute. They argue that the trial judge "erred in failing to enforce the terms of this statute by requiring New Hanover to grant surgical privileges to the plaintiffs."

As indicated by our above discussion, the right to enjoy hospital staff privileges is not absolute; it is subject to the standards set by the hospital's governing body. We agree with New Hanover that this is implicit in the language of G.S. 90-202.12, especially in view of the policy of this State as currently stated by G.S. 131-126.11A, quoted above. Therefore, we do not read G.S. 90-202.12 to *require* New Hanover to grant staff privileges regardless of the standards set by its Board of Trustees which are reasonably related to the operation of the hospital. Generally, the protection offered by the statute is for patients to have the freedom to choose a qualified "provider of care or service." Our holding is not inconsistent with this purpose.

IV

We have carefully reviewed plaintiffs' and defendants' remaining arguments and find them to be without merit, not warranting further discussion in this opinion.

For all the reasons set forth above, the judgment below is

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY (APPLICANT), AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. v. THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION AND STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, CAROLINA POWER & LIGHT COMPANY (APPLICANT), KUDZU ALLIANCE, AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. v. THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION

Nos. 8110UC812, 8110UC865

(Filed 3 August 1982)

Utilities Commission § 24— fuel adjustment proceedings—inability to consider cost of purchased power or interchange power

The Utilities Commission was and is without authority to include or consider the cost of any portion of purchased power or interchange power in determining a fuel adjustment clause proceeding pursuant to G.S. 62-134(e).

Judge MARTIN (Robert M.) dissenting.

State ex rel. Utilities Commission v. Public Staff

APPEAL by the Public Staff of the North Carolina Utilities Commission from orders of the North Carolina Utilities Commission entered 27 February 1981. Heard in the Court of Appeals 1 April 1982.

On 26 January 1981, Carolina Power & Light Company (CP&L) filed an application with the North Carolina Utilities Commission pursuant to N.C.G.S. 62-134(e) and the Commission's Rule R1-36, requesting that the Commission issue an order approving an adjustment in basic rates by increasing the amount included for fuel expenses by $0.00196 cents per KWH effective for bills rendered on and after 1 April 1981. CP&L alleged that the requested adjustment was based solely on the change in cost of fuel for the four-month period ending December 1980.

On 29 January 1981, Virginia Electric and Power Company (Vepco) filed an application with the North Carolina Utilities Commission pursuant to N.C.G.S. 62-134(e) to adjust its rates and charges based solely upon the cost of fuel used in the generation of electric power for the four-month period ending 31 December 1980, by decreasing the amount included for fuel expenses in the base retail schedules by 0.402 cents per KWH for bills rendered on and after 1 April 1981.

These applications were heard by the Commission on 16 and 17 February 1981. In the CP&L application the Commission declined to remove the allowed fuel costs of purchased and interchange power from the fuel cost adjustment formula and ordered that "effective for bills rendered on and after April 1, 1981, and for service rendered on and after the effective date of this Order, CP&L shall adjust its base retail rates by the addition of an amount equal to $.00196 per kilowatt-hour and shall roll this amount into each kilowatt-hour block of each rate schedule."

In the Vepco application the Commission declined to remove the allowed fuel costs of purchased and interchange power from the fuel cost adjustment formula and ordered that "effective for bills rendered on and after April 1, 1981, and for service rendered on and after the date of this Order, Vepco shall adjust its base retail rates by the reduction of an amount equal to $0.00402 per kilowatt-hour and shall roll this amount into each kilowatt-hour block of each rate schedule."

In each proceeding the Public Staff timely filed its notice of appeal and exceptions to the entry of the Commission's order.

Robert F. Page, Chief Counsel, and Karen E. Long, for the Public Staff, North Carolina Utilities Commission, appellant.

Hunton & Williams, by Edgar M. Roach, Jr., for Virginia Electric and Power Company and Bode, Bode & Call, by John T. Bode, for Carolina Power & Light Company, appellees.

MARTIN (Harry C.), Judge.

Whether purchased power or interchange power is properly to be considered in a fuel adjustment clause proceeding appears to be a question of first impression in North Carolina.

In the CP&L application, counsel for the Public Staff argued that as a matter of law CP&L should not be permitted to recover its purchase power expenses in this proceeding and that an increase in the base fuel cost of only 0.134 cents per KWH, including gross receipt taxes, should be approved. Counsel for CP&L argued that purchased power is a properly includable expense in a N.C.G.S. 62-134(e) proceeding and that the full base fuel cost adjustment it had applied for, 0.196 cents per KWH, should be approved. The same principles are argued in the Vepco proceeding.

The Public Staff contends that the Commission is no longer basing the approved fuel clause rate on charges based solely on the increased or decreased cost of fuel, but rather is basing the rate on the total power production costs expressed in cents per KWH. It is argued that under the present Commission practice, the fuel clause rate can increase due to changes in heat rate, plant availability and capacity factors, even though the cost of fuel has remained constant or even decreased.[1]

1. The Public Staff argues that under the current fuel clause procedure employed by the Commission, which tracks total power production costs (as opposed to solely increases in the cost of fuel), there is no incentive on the utilities to operate their plants in an efficient or proper manner. There is, it contends, no requirement of justness or reasonableness which is evident in the ratemaking provisions of the Public Utilities Act, N.C.G.S. 62-130 to -133. Instead, the test employed by the Commission is essentially as follows: Any dollars actually spent for fuel by the utility, regardless of how poorly or efficiently, may be tracked through the fuel

We review briefly the two major cases interpreting N.C.G.S. 62-134(e). In *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977), the Court first construed the statute and discussed its impact upon the Commission's previous practices and procedures regarding fuel adjustment clauses. The Court held that the use of a historical test period to calculate fuel clause amounts is not to guarantee the utility an actual dollar-for-dollar recovery of prior expenses. To do so would be retroactive ratemaking. Instead, the use of prior actual operating experience in the context of a fuel clause proceeding is exactly like the ordinary use of a test period in a general rate case, i.e., recent actual operating experience is the best guide for what costs will be in the future period for which rates are to be set.

In *Utilities Comm. v. Power Co.*, 48 N.C. App. 453, 269 S.E. 2d 657, *disc. rev. denied*, 301 N.C. 531 (1980), this Court reviewed the action of the Commission in fuel adjustment proceedings such as those at issue here. The Commission had heard evidence as to a wide range of management activities which had allegedly affected generating plant efficiency. It found that "Vepco's fuel expenses are excessive and should be adjusted in these and future proceedings to remove unreasonable costs associated with poor system fossil-fired heat rate and low availability" of certain of its generating plants. *Id.* at 456, 269 S.E. 2d at 659. Based on findings of mismanagement, the Commission disallowed portions of the fuel adjustments requested.

These matters, in the Court's opinion, properly belonged in a general rate proceeding under N.C.G.S. 62-133 and not in an expedited N.C.G.S. 62-134(e) proceeding. This Court, through Judge Parker, held:

> Insofar as the Commission in the present cases considered and passed upon the cost of fuel used by Vepco in the generation of electric power during the periods in question by considering the reasonableness of the prices paid by Vepco for such fuel, it acted within the scope of the statutorily prescribed procedure. Insofar as the Commission considered

clause under N.C.G.S. 62-134(e). Thus, the fuel clause operates in virtually an automatic fashion and the role of the Public Staff and other intervenors is reduced to simply determining whether the dollars alleged to have been spent by the utilities for fuel were in fact spent.

and based its determination upon such factors as Vepco's heat rate and plant availability in these proceedings, it went beyond the scope of the procedure authorized by G.S. 62-134(e).

. . . .

Overall system efficiency ultimately depends upon management decisions made over a long period of time. These involve such questions as when and how often to replace expensive equipment, the number of maintenance employees to be kept on the payroll and the training to be given them, the amount and frequency of planned "down time" to be devoted to preventive maintenance, and the amount and cost of standby equipment required for such planned maintenance "down time." In making these decisions management must also take into account such factors as the cost of capital and the availability of funds required to implement them and must balance the need for achieving maximum plant efficiency against the financial costs of achieving that goal.

Review of such management decisions by the Utilities Commission *in a general rate case* is not only entirely appropriate but even necessary, for poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present "fair value" rate base of the utility's properties as required by G.S. 62-133 . . . and serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. . . .

We do not question that the efficiency with which a particular electrical utility company converts its fuel into electricity has a direct and significant bearing upon that company's fuel cost. Obviously it does. Nor do we question the necessity for the Utilities Commission to take into account the efficiency of the company's operations in fixing its rates in a general rate case as provided in G.S. 62-133.

> Obviously it should. We hold only that plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e). After all, the legislature enacted that section, not as a substitute for a general rate case, but to provide an expedited procedure by which the extremely volatile and uncontrollable prices of fossil-fuels could be quickly taken into account in a utility's rates and charges.

48 N.C. App. at 460-62, 269 S.E. 2d at 661-62 (citations omitted).

A fuel adjustment clause, once authorized by the Commission as a part of the utility's rate structure, allows the utility to pass on to the consumer any increase (or decrease) in the cost of fuel without any need for further consideration of compensatory decreases (or increases) in other operating expenses. As such, it is a radical departure from the usual practice of approval or disapproval of filed rates, in the context of a general rate case.

As stated in *Power Co.*, the statute in clear and express terms provides a procedure by which a public utility may apply to the Commission for authority to increase its rate and charges based "solely upon the increased cost of fuel used in the generation of electric power." *Id.* at 460, 269 S.E. 2d at 661 (emphasis omitted); N.C. Gen. Stat. § 62-134(e) (Cum. Supp. 1981). The Commission has interpreted the statute to include as cost of fuel, the "cost of equivalent energy purchased." Being a plain and unambiguous statute, agency interpretation is not required. *Utilities Comm. v. Edmisten, Atty. General, supra.* By so interpreting the statute, the Commission has in effect amended the substantive law by adding an additional factor to be considered in determining fuel adjustment proceedings. This it cannot do. *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511 (1940); *Carolinas-Virginias Assoc. v. Ingram, Comr. of Insurance,* 39 N.C. App. 688, 251 S.E. 2d 910, *disc. rev. denied,* 297 N.C. 299 (1979). Had the legislature intended that the cost of purchased power be recoverable in a fuel adjustment proceeding, it should and would have so stated.

Although the interpretation by an agency responsible for the administration of a legislative act may be helpful to a court when called upon to construe legislative language and will be given due consideration by the courts, it is not controlling. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961). The courts are

the final interpreters of legislation. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed. 2d 136 (1971); *Campbell v. Currie, Commissioner of Revenue*, 251 N.C. 329, 111 S.E. 2d 319 (1959). The courts cannot discharge their duty to construe administrative statutes by the expedient of deferring to interpretations by the agency.

Even a casual reading of the statute discloses that proceedings thereunder are limited solely to increases and decreases in the cost of fuel. Fuel is entirely different from purchased or interchange power. Fuel is a necessary component required for the production of electric power. Electric power itself is the finished product of a utility, after fuel has been used in its production. If it were possible to extrapolate the cost of fuel from the cost of purchased or interchange power, the Commission would be required to rely upon the cost analysis and management decisions of the selling utility without the ability to test their accuracy and reasonableness. This is not a result intended by the legislature. Management decisions of petitioners (e.g., whether to use purchased power or the utilities' own stockpile of fuel), efficiency of operation, plant availability and like matters, have no place in the consideration of a fuel adjustment proceeding. *Utilities Comm. v. Power Co., supra.* These matters are proper for consideration in a general rate proceeding. *Id.* Consideration of purchased power in a fuel adjustment proceeding would inextricably involve questions of management, motivation, efficiency of plant operations, plant heat rate and plant availability. This Court has ruled that these considerations are not permitted in a fuel adjustment proceeding. *Id.*

N.C.G.S. 62-134(e) was properly adopted in 1975 by the General Assembly to allow then hard pressed utilities to compensate for rapidly increasing fuel prices. It was never intended to allow utilities to pass on to consumers the cost of power purchased from other utilities. The Commission states that it has allowed utilities to pass on to the consuming public the cost of purchased power in "nearly forty individual proceedings" under the cost of fuel adjustment statute—all apparently without express court approval regarding this issue. It is time for the Court to place its interpretation upon the statute. A question of law is never settled until it is settled correctly.

We now hold that the Commission was and is without authority to include or consider the cost of any portion of purchased power or interchange power in determining a fuel adjustment clause proceeding pursuant to N.C.G.S. 62-134(e). By doing so in these proceedings, the Commission committed error.

The orders of the Commission are vacated and the causes are remanded to the Commission for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I respectfully dissent from the majority opinion. In my opinion the holding by the majority that the Commission was and is without authority to include or consider the cost of any portion of purchased power or interchange power in determining a fuel adjustment clause proceeding pursuant to G.S. 62-134(e) is clearly erroneous.

In purchase and interchange power transactions there are two components of price paid by the purchasing utility for such purchased and interchange power. One component is the capacity cost, which reflects generating plant, transmission and distribution costs and other fixed costs of the selling utility. This component is not included by the Commission in setting rates pursuant to G.S. 62-134(e).[1] The other component is the energy cost, which is the cost of fuel utilized to generate the electricity produced. This component is required by the Commission's Rule R1-36 to be included in establishing rates pursuant to G.S. 62-134(e).

The Commission has no authority except that given to it by statute. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.

1. Capacity factor is simply a means of measuring plant operating efficiency. In *Utilities Comm. v. Power Co.*, 48 N.C. App. 453, 269 S.E. 2d 657, *disc. rev. denied*, 301 N.C. 531, 273 S.E. 2d 462 (1980), this Court held that ". . . plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e)." *Id.* at 462, 269 S.E. 2d at 662.

2d 705 (1972). The legislative mandate under G.S. 62-134(e) provides "[n]otwithstanding the provisions of this Article, upon application by any public utility for permission and authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation or production of electric power, the Commission shall . . ." and the declaration that a proceeding under the subsection "shall not be considered a general rate case" is clear and unambiguous. It therefore must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction. *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973); *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663 (1969).

Neither the language of G.S. 62-134(e) nor this Court's opinion in the Vepco Case limit recoverable fuel costs under the fuel adjustment clause or statute to the utility that generates electricity. When a generating utility sells electricity to another utility, as here, the purchasing utility must bear the energy component as part of the purchase price. Normally under the fuel adjustment clause, these costs would be passed directly to serviced customers as an expense of the utility which generates the electricity.

In *Consumers' Counsel v. Public Utilities Commission*, 56 Ohio St. 2d 319, 384 N.E. 2d 245 (1978), the Office of Consumer Counsel argued that it was not within the Commission's rule making authority to permit the pass-through of purchased power which is neither an acquisition nor a delivery cost. The Ohio Edison company generated electricity on its own system. On occasion, however, for reasons of necessity or economy, the company purchased electricity generated by other utilities. The company's practice was to pass costs related to the purchased electricity to serviced customers through a fuel cost adjustment clause. The company charged its customers for the acquisition and delivery costs of fuel incurred by the generating, or selling, utility. These costs were reflected in a portion of the purchase price paid by the company for the electricity. The court rejected the O.C.C.'s position, stating that costs of fuel do not cease to exist on sales of power, but are incorporated in the price paid for electricity. The ultimate consumer, receiving the benefit of power purchases, is in effect charged for the acquisition and delivery costs of the

generating company.[2] Thus, the court permitted the inclusion of these costs in the FAC of the purchasing utility, which through a chain of transactions was actually absorbing these costs.

> Appellant argues essentially that the words "purchased power" do not appear in these definitions. While this is true, it is not dispositive of the issue. R.C. 4905.01 does not limit recoverable fuel costs under a fuel cost adjustment clause to the utility that generates electricity. Its scope is far broader. The statute merely states that the cost of acquiring title to, and delivery of, fuel is recoverable under a fuel cost adjustment clause. Normally these costs would be passed directly to serviced customers as an expense of the utility which generates the electricity. However, when a generating utility sells electricity to another utility, as here, the purchasing utility must bear the acquisition and delivery costs as part of the purchase price. These costs have not ceased to exist upon sale; they have merely been incorporated in the price paid for the electricity. Customers of the purchasing utility who receive the benefit of these fuel expenditures are, in fact, charged for the acquisition and delivery costs of the generating utility, via the purchasing utility, which the statute permits.

Consumers' Counsel v. Public Utilities Commission, 56 Ohio St. 2d 319, 321-22, 384 N.E. 2d 245, 247 (1978).

Throughout its order, the Commission has repeatedly stated that the capacity portion of purchased and interchange power fuel cost are not permitted to be recovered in the Commission's fuel

2. Delivery and acquisition costs are defined in R.C. 4905.01(E) and (F), respectively:

(E) "Delivery cost" means the cost of delivery of fuel, to be used for the generation of electricity, from the site of production directly to the site of an electric generating facility.

(F) "Acquisition cost" means the cost to an electric light company of acquiring the title of fuel to be used for the generation of electricity. * * * Such term does not embrace any associated cost including, but not limited to, delivery cost, the cost of handling the fuel after its delivery to such facility, the cost of such processing, readying, or refinement of the fuel as may be necessary in order to use the fuel to generate electricity or the cost of disposing of any residue of such fuel after it has been so used.

cost adjustment formula. In its order the Commission found as a fact and concluded:

> The capacity costs of purchased and interchange power were and are not included in said formula. The fuel cost adjustment formula was adopted to enable the Commission and Staff to review more effectively the fuel cost filings made in accordance with G.S. 62-134(e) in the expedited proceedings provided for by that statute.
>
> The inclusion of the allowed fuel costs of purchased power and interchange power has not been modified or altered since the adoption of the formula in 1976. In nearly forty individual proceedings and two generic proceedings concerning the formula and the recovery of fuel costs, this Commission has consistently allowed the recovery of CP&L's allowed fuel costs for purchased power and interchange power. As acknowledged in our Order dated May 18, 1978, in Docket No. E-2, Sub 316, the Public Staff has also heretofore recognized that "(p)roperly monitored, the formula accurately tracks changes in the cost of all fuel, nuclear as well as fossil, and the energy portion of purchased and interchange power."
>
> A review of our application of the language and procedures of G.S. 62-134(e) clearly indicates our uniform and undisturbed interpretation that the cost of a utility's fuel to be recovered in a fuel proceeding includes allowed fuel costs for purchased and interchange power which are described in the fuel cost adjustment formula. The formula's computation includes only the costs of fuel used to generate or produce power or the cost of equivalent energy purchased. For example, the cost of a ton of coal burned by Duke Power Company included in the price of power purchased by CP&L is just as much a cost of fuel to CP&L as if CP&L had actually burned the coal itself. Consequently, the cost of fuel burned by a selling utility should be considered a component of the fuel cost of the purchasing utility which may be recovered in a proceeding pursuant to G.S. 62-134(e) . . . . Any other conclusion is simply at odds with the language of G.S. 62-134(e) and our consistent construction of such language.
>
> The Public Staff has urged the Commission to abandon that consistent construction of the provisions of G.S. 62-134(e)

based on the Public Staff's interpretation of the recent decision of the Court of Appeals of North Carolina in *Virginia Electric and Power Company*, 48 N.C. App. 452, supra (Vepco). While the Public Staff acknowledges that our previously adopted treatment of the costs of purchased and interchange power in fuel cost adjustment proceedings was the appropriate application of G.S. 62-134(e), the Public Staff now argues that as a consequence of the Vepco decision, the consideration of such costs must be reserved for a general rate making proceeding pursuant to G.S. 62-133.

It is a fundamental rule of statutory interpretation that the construction placed upon a statute by the regulatory body required by law to administer the statute is entitled to great weight. *Gill v. Board of Commissioners*, 160 N.C. 176, 76 S.E. 203 (1912). *See also State ex rel. Utilities Commission v. McKinnon*, 254 N.C. 1, 118 S.E. 2d 134 (1961).

The Commission found and concluded that:

In addition to North Carolina, twenty-two of the other twenty-four states east of the Mississippi River permit purchased power to be included in their fuel clauses. The Federal Energy Regulatory Commission (FERC) also includes purchased power in wholesale fuel clauses. The Public Utility Regulatory Policies Act (PURPA) of 1978, requires states with automatic fuel adjustment clauses "to provide incentives for efficient use of resources (including incentives for economical *purchase* and use of fuel and electric energy) . . ." and authorizes the FERC to exempt electric utilities from any provision of state law, or from any state rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities if the FERC determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources.

The energy portion of purchased and interchange power fuel costs has been allowed to be included in fuel clause proceedings for Carolina Power & Light Company since 1976; the capacity portion of such costs are not permitted to be recovered in the Commission's fuel cost adjustment formula. In 1980, the purchased power and interchange transactions of Carolina Power & Light Company reduced its power produc-

tion costs by approximately $4.5 million on a total company basis. In the four-month period ending December 31, 1980, such transactions reduced CP&L's total company power production costs by approximately $1 million. Substantially all of the power purchased in the four-month test period by CP&L was economy power which is inherently cheaper than power generated at that point in time from CP&L's own generating plants.

* * *

Adoption of the adjustment proposed herein by the Public Staff would lead to the result that for the test period, Vepco would be denied the right to recover in its base fuel cost rates the amount which the Company expended for allowed fuel costs of purchased and interchange power in an effort to reduce system fuel costs and thereby benefit the using and consuming public. In this regard, Vepco witness Keesecker testified that, on a total company basis, Vepco expended approximately $68 million for purchased and interchange power during the four-month period ending December 31, 1980, and that if Vepco had itself generated the same level of power which it purchased during said period by use of its own oil-fired generating units, the Company's fuel costs would have been increased by approximately $54 million. Vepco had every right and expectation that it would recover such fuel-related costs since the Commission has permitted those types of recoveries since late 1975 pursuant to the fuel cost adjustment formula adopted in general rate cases and generic hearings.

The Commission further found and concluded that: "It is the declared policy of the State of North Carolina to encourage the coordination of the operation of utility systems to increase the economy and reliability of utility service."

Thus, inclusion of purchased power in the fuel adjustment clause is often considered an incentive to use low-cost sources of power. Purchased power is a substitute for that power which a utility ordinarily would generate itself. The ability to buy power from another utility at a price less than the cost of self-generation is clearly desirable from the standpoint of economic efficiency and there is little question that it is beneficial to the ultimate con-

sumer. Purchased power transactions involve millions of dollars in split-second decisions of utility dispatchers. Although administrative review of purchased power transactions has to be extremely difficult, this fact did not present an issue in these proceedings. Public Staff witness Sullivan verified the fact that the calculations submitted by CP&L and Vepco were mathematically accurate and that, had the Public Staff included the allowed fuel cost of purchased power and interchange power, its computation of the base fuel cost component would have been identical to that filed by CP&L and Vepco.

G.S. 62-2 declares the public policy of the State of North Carolina to be, in pertinent part, to "provide fair regulation of public utilities in the interest of the public," to "promote adequate, reliable and economical utility service," to "provide just and reasonable rates . . . consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy," to "foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed," and to promote and coordinate "interstate and intrastate public utility service and reliability of public utility energy supply." Thus, it is consistent with these policies for utilities to supply power to each other from available capacity in order to increase the reliability and economy of the operations of each other and to improve the quality and economy of the services provided to their consumers. It is my opinion that G.S. 62-134(e) did not prevent the purchasing utility, who absorbed the fuel component cost of the generating utility, from having such energy expenditures included in its fuel based rates. The Commission met the statutory mandate by requiring all fuel costs, including the fuel cost portion of purchased and interchanged power, to be included in fuel based rates and its order should be affirmed.

House Bill 1594, amending Chapter 62 of the General Statutes, ratified 17th June 1982, repealed G.S. 62-134(e). It has no application to this case, it having been enacted subsequent to the order of the Commission to which this appeal relates. I note, however, that the new legislation provides that the Commission may allow the utility to charge as a rider to their rates the cost of fuel and the fuel component of purchased power used in providing their North Carolina customers with electricity from the

cost of fuel and the fuel component of purchased power established in their previous general rate case.

STATE OF NORTH CAROLINA v. CLINTON DALE LONG AND JAMIE RAY WATKINS

No. 8113SC1096

(Filed 3 August 1982)

1. **Criminal Law § 111.1— informing prospective jurors of charges against defendants**

The trial court's statement to prospective jurors that defendants were charged with "conspiracy and trafficking in marijuana" met the requirement of G.S. 15A-1213 that the judge "briefly inform" prospective jurors of the charges against each defendant, a detailed explanation of the charges not being required until the court's instructions to the jury after the presentation of evidence.

2. **Criminal Law § 111.1— instructions on charges against defendants—removal of some charges—curative instruction—similar evidence**

In a prosecution for conspiracy and trafficking in marijuana, any prejudice in the trial court's instruction to the jury prior to trial that one defendant was also charged with failing to stop for a blue light and siren and carrying a concealed weapon was cured when the trial court removed those counts and instructed the jury not to consider them. Furthermore, defendants were not prejudiced by the possible inference from such instruction that defendants had tried to elude arrest since explicit testimony on the subject was admitted at trial without objection by defendants.

3. **Automobiles and Other Vehicles § 46— opinion testimony as to speed**

A police officer who followed defendants' vehicle for three miles in his automobile could properly state his opinion as to the speed at which he was traveling when trying to overtake defendants' vehicle.

4. **Criminal Law § 46.1— evidence of flight by defendants**

An officer was properly permitted to testify that after being stopped, defendants jumped out of their vehicle and attempted to run away, since an accused's flight from the scene of the crime is competent evidence on the question of guilt.

5. **Criminal Law § 169.6— failure of record to show excluded testimony**

The exclusion of testimony will not be held prejudicial where the record fails to show what the excluded testimony would have been.

6. **Narcotics § 3.1— admissibility of one bale of marijuana**

In a prosecution for trafficking in marijuana, the trial court properly permitted the State to exhibit to the jury one of the 172 bales of marijuana which

defendants were charged with possessing to illustrate how each of the 172 bales had been dissected to determine whether it contained marijuana throughout.

7. Criminal Law § 50.2— opinion testimony by nonexpert

An SBI agent was properly permitted to testify as to the world-wide transmission capabilities of an amateur radio found in a truck hauling marijuana, even though the agent was never qualified as an expert, where the agent testified that he was familiar with amateur radios such as the one found in the truck and with their transmission capabilities and that he had at one time been licensed to operate such radios, since the agent was clearly more qualified than the jury to form an opinion as to the transmission capabilities of the radio found in the truck.

8. Narcotics § 4— trafficking in marijuana—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for trafficking in marijuana by the possession of 10,000 pounds or more of marijuana where it tended to show that defendants were riding in and operating a truck containing 172 bales of marijuana weighing 10,090 pounds, the storage area of the truck reeked with the odor of marijuana, and defendants attempted to flee when the truck was stopped by the police.

9. Criminal Law § 158.1— admissibility of photograph—absence from record on appeal

The admissibility of a photograph could not be determined on appeal where it was not included in the record on appeal as required by App. R. 9(b)(3).

10. Criminal Law § 122.2— requiring jury to deliberate further—no coercion of verdict

The trial court did not coerce guilty verdicts by twice requiring the jury to continue deliberations after it had reported an inability to agree where, following the initial difficulties, the jury continued deliberating until the end of the day and at that time reported that the vote had changed, and where the court did not express an opinion as to the guilt or innocence of the defendants and did not imply that any juror should surrender his own free will and judgment.

11. Criminal Law § 131.2— newly discovered evidence—corroboration of trial testimony—no new trial

Defendants were not entitled to a new trial on the basis of newly discovered evidence where such evidence merely corroborated their own testimony.

12. Narcotics § 5— trafficking in narcotics—reduction of sentence—cooperation against others—naming person at trial

The trial court did not err in failing to reduce defendants' sentence for trafficking in marijuana pursuant to G.S. 90-95(h)(6) on the ground that they had provided substantial assistance in the identification, arrest or conviction of an accomplice, accessory, co-conspirator or principal where defendants merely

named at trial a third person as the only one they knew to be connected with the truck used to haul the marijuana.

13. Criminal Law § 138.2; Narcotics § 5— trafficking in marijuana—no cruel and unusual punishment

Minimum sentences of 16 years and fines of $200,000 imposed upon defendants for trafficking in more than 10,000 pounds of marijuana came within the statutory limits and did not constitute cruel and unusual punishment although defendants contended the punishment was disproportionate to the crime in that they were simply driving a truck which contained more than 10,000 pounds of marijuana in its locked storage compartment to which they had no key.

APPEAL by defendants from *Bowen, Judge.* Judgments entered 4 June 1981 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 26 April 1982.

Defendants were each indicted for three counts of conspiracy to traffic in marijuana by the possession, transfer and delivery of 10,000 pounds or more of marijuana and three counts of trafficking in marijuana by the possession, transfer and delivery of 10,000 pounds or more of marijuana. The charges were consolidated for trial.

State presented evidence at trial tending to show the following: On the morning of 16 December 1980, Detective Cecil Logan of the Brunswick County Sheriff's Department observed a U-Haul truck traveling south on Highway 17. Logan began following the truck and became suspicious that it was involved in drug traffic. He advised another officer of his location by radio, turned on his blue light and siren and attempted to stop the truck. Logan was traveling in excess of 55 or 60 miles per hour at this time. After following the truck for three miles, Logan pulled up beside the driver and motioned for him to pull over. The driver, defendant Watkins, accelerated instead and turned his wheel to the left, nearly running Logan off the road. Officer Nance then arrived on the scene and stopped the truck by pulling in front of it and stopping his vehicle. As soon as the truck stopped, a male passenger jumped out and ran into the woods. Officer Nance followed and apprehended him. Both defendants also jumped out of the truck and started running, but Logan pulled his revolver and stopped them. Logan and Nance then noticed the strong odor of marijuana emanating from the rear storage area of the truck. The key to the storage area was found in the possession of the male passenger,

Felix Morales-Rivero. After obtaining a search warrant, Logan and Nance opened the rear of the truck and found 172 bales of marijuana weighing 10,090 pounds. In the cab of the truck Logan found a box and a bag containing a ham radio and antenna capable of world-wide transmission. Investigation of the rental agreement for the truck revealed that the agreement had been signed by one Elliott Wade Coleman. Joann Kraft, the rental agent, identified Watkins from a photograph as one of two men who accompanied Coleman when he rented the truck.

Each defendant moved for a directed verdict at the close of State's evidence. Upon denial of their motions, defendants presented the following evidence: On 15 December 1980, David Horne offered to pay defendant Watkins $500 to drive a truck loaded with furniture from Holden Beach, North Carolina, to Columbia, South Carolina. Out of the $500, Watkins was to pay someone to follow him to Columbia to bring him back to his home in North Myrtle Beach, South Carolina. On the morning of 16 December 1980, Horne picked up Watkins and drove him to Holden Beach to pick up the truck. On the way, they stopped to pick up defendant's friend, Long. Long agreed to ride with Watkins and Horne to pick up the truck in Holden Beach, after which Long and Watkins planned to return to pick up Long's truck so that Long could follow Watkins to Columbia. Upon arriving in Holden Beach, Horne introduced Morales-Rivero and explained that Morales-Rivero would ride with defendants in order to show them where to leave the truck loaded with furniture. Defendants and Morales-Rivero got in the truck and began driving down Highway 17 toward South Carolina. Watkins was at the wheel. About one mile from the South Carolina state line two police cars drove past and motioned for them to pull over, which Watkins did. After pulling over, Morales-Rivero jumped out of the truck and ran. Defendants got out of the truck but did not run. Defendants knew nothing of the marijuana in the back of the truck and had not noticed any odor coming from the truck. Defendants do not know Elliott Wade Coleman and did not accompany him when he rented the truck. The picture of Watkins which Joann Kraft identified was taken shortly after his arrest on 16 December 1980. Watkins has changed his appearance since then by cutting his hair and shaving his beard, and Ms. Kraft was unable to identify him at trial.

Several witnesses testified to the good character of the two defendants.

On rebuttal State introduced into evidence the photograph of defendant Watkins identified by Joann Kraft.

At the close of the evidence defendant Watkins's renewed motion for directed verdicts on all charges was denied. Defendant Long's motion for directed verdicts was allowed on two of the conspiracy charges but denied as to all other charges. Thereafter, State agreed to dismiss all of the charges against defendants except one count of trafficking by possession of 10,000 pounds or more of marijuana as to each defendant and one count of conspiracy to traffic by possession of 10,000 pounds or more of marijuana as to defendant Watkins. The jury found both defendants guilty of trafficking by possession of 10,000 pounds or more of marijuana. Watkins was found not guilty on the conspiracy charge. From judgments imposing prison terms and fines, defendants appeal.

Attorney General Edmisten, by Associate Attorney G. Criston Windham, for the State.

Marvin J. Tedder for defendant appellants.

MORRIS, Chief Judge.

[1] Defendants make thirty-one assignments of error on appeal. In their first assignment, they argue that the trial judge was overly brief in his statement of the charges to the prospective jurors. Defendants concede that G.S. 15A-1213 requires only that the judge "briefly inform" prospective jurors of the charges against each defendant and specifically prohibits the judge from reading the pleadings. Nevertheless, defendants contend that in this case the judge should have stated the charges in their entirety and explained the elements thereof rather than saying only that defendants were charged with "conspiracy and trafficking in marijuana." We find no error. The purpose of G.S. 15A-1213 is to "orient the prospective jurors as to the case" in such a way as to avoid giving jurors a "distorted view of the case" through use of the "stilted language of indictments and other pleadings." Official Commentary to G.S. 15A-1213 and G.S. 15A-1221, referring also to G.S. 15A-1213; *State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684

(1981), *cert. den. and appeal dismissed*, 305 N.C. 306 (1982); *State v. McNeil*, 47 N.C. App. 30, 266 S.E. 2d 824, *disc. review denied*, 301 N.C. 102, 273 S.E. 2d 306 (1980), 450 U.S. 915, 67 L.Ed. 2d 339, 101 S.Ct. 1356 (1981); *State v. Laughinghouse*, 39 N.C. App. 655, 251 S.E. 2d 667, *cert. denied*, 297 N.C. 615, 257 S.E. 2d 438 (1979). The court's statement of the charges here was sufficient for that purpose. A detailed explanation of the charges is not required until the judge's instructions to the jury after the presentation of evidence.

[2] In their second and third assignments of error defendants contend that the trial judge gave prejudicial conflicting instructions to the jury prior to trial when he first stated that defendant Watkins was also charged with failing to stop for a blue light and siren and carrying a concealed weapon but subsequently stated that the defendants were not so charged or that if they were, it was not the jury's concern. According to defendants, the initial incorrect statement implied that they had attempted to elude arrest, and its prejudicial effect was not cured by the subsequent conflicting instruction. We disagree. The initial charge was made in response to State's motion, at the opening of trial, to consolidate with the six counts of conspiracy and trafficking in marijuana misdemeanor charges of failing to stop for a blue light and siren and carrying a concealed weapon against defendant Watkins. The court allowed consolidation. Following jury selection, however, the court instructed the jury that the misdemeanor charges were not to be considered. The record does not reveal why those charges were withdrawn. In any event, any error in the initial consolidation was cured by the court's subsequent removal of those counts and explicit instructions to the jurors not to consider them. *See State v. Bumgarner*, 299 N.C. 113, 261 S.E. 2d 105 (1980); *State v. Hart*, 44 N.C. App. 479, 261 S.E. 2d 250 (1980). Furthermore, defendants could not have been prejudiced by the possible but remote inference from the initial charge that defendants had tried to elude arrest since explicit testimony on the subject was admitted at trial without objection by defendants.

[3] In assignments four and five, defendants again object to the admission of evidence which tended to show that they attempted to elude arrest. They first argue that Officer Logan's opinion as to the speed at which he was traveling when trying to overtake the U-Haul truck was inadmissible because Logan was not shown

to have had a reasonable opportunity to judge such speed and because the court failed to instruct the jury that testimony that a vehicle is traveling between one named speed and another is testimony only that the vehicle was traveling at the lower estimated speed. This argument fails for several reasons. Defendants failed to object to the testimony at trial and have, therefore, waived their right to do so on appeal. *State v. Lucas,* 302 N.C. 342, 275 S.E. 2d 433 (1981). Even if defendants had objected to the testimony, they waived that objection by eliciting the same testimony on cross-examination. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976). Admission of the testimony was proper, in any event, since it is obvious that a trained police officer who follows a vehicle for three miles in his automobile has had a reasonable opportunity to judge the speed at which his own vehicle is traveling. Finally, omission of the stated charge was without prejudice since, even had the trial court given the instruction, the testimony would still have established that Logan was traveling in excess of 55 m.p.h.

[4] Defendants also object to the admission of Officer Logan's testimony tending to show that after being stopped, defendants jumped out of the truck and attempted to run away. Again, defendants waived their right to object to this testimony on appeal by failing to object to it at trial and by eliciting similar testimony on cross-examination. *State v. Lucas, supra; State v. Covington, supra.* In addition, an accused's flight from the scene of the crime is competent evidence on the question of guilt. *State v. Jones,* 292 N.C. 513, 234 S.E. 2d 555 (1977); *State v. Drakeford,* 37 N.C. App. 340, 246 S.E. 2d 55 (1978).

Defendants have abandoned assignments of error six through nine by failing to argue them on appeal. App. R. 28(b).

[5] In the next three assignments of error, defendants object to the court's exclusion of testimony by Officer Logan. Defendants attempted to question Logan on cross-examination as to the type of bond posted by Morales-Rivero, as to alleged exculpatory statements made by defendants following their arrest, and as to whether defendants had been charged with resisting arrest in connection with this case. State's objections to these questions were sustained. Defendants assert various reasons why the answers to the questions were admissible and their exclusion,

prejudicial. The answers do not appear in the record, however, and we are therefore unable to determine whether the court's rulings were prejudicial. *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874, 62 L.Ed. 2d 102, 100 S.Ct. 156 (1979); *State v. Carr*, 54 N.C. App. 309, 283 S.E. 2d 175 (1981). Furthermore, defendants subsequently presented direct evidence as to the type of bond furnished by Morales-Rivero and testified that they had refused to make any statements to the officers following their arrest. These assignments are overruled.

Assignments of error thirteen through eighteen are deemed abandoned by reason of defendants' failure to argue them on appeal. App. R. 28(b).

[6] In assignments of error nineteen and twenty defendants argue that it was unduly prejudicial to allow the State to exhibit to the jury, over defendants' objection, one of the bales of marijuana found in the U-Haul truck. According to defendants, the prejudicial effect that such a large amount of marijuana would have on the jury far outweighed any probative value which the marijuana might have. We disagree. State used the bale of marijuana to illustrate how each of the 172 bales found in the truck had been dissected to determine whether it contained marijuana throughout. Such evidence was clearly relevant and was, therefore, admissible even if it did have a significant prejudicial effect on the jury. *State v. Covington, supra; State v. Green*, 251 N.C. 40, 110 S.E. 2d 609 (1959). In any event, we fail to perceive any undue prejudice to defendants from showing the jury only one bale of marijuana out of the 172 bales weighing over 10,000 pounds which defendants were charged with possessing.

[7] Defendants next assign error to the admission of testimony by John Dorsett of the S.B.I. as to the world-wide transmission capabilities of the amateur radio found in the U-Haul truck on the ground that Dorsett had not been qualified as an expert in that field. However, defendants failed to object specifically to Dorsett's qualifications to so testify and have, therefore, waived objection to them. *State v. Wright*, 52 N.C. App. 166, 278 S.E. 2d 579, *cert. denied*, 303 N.C. 319 (1981). Further, Dorsett did testify that he was familiar with amateur radios such as the one found in the truck and with their transmission capabilities and that he had at one time been licensed to operate such radios. Thus, even

though never qualified as an expert, he was clearly more qualified than the jury to form an opinion as to the transmission capabilities of the amateur radio found in the U-Haul truck. *Id.* This assignment of error is overruled.

[8] Defendants contend in assignments of error twenty-two and twenty-six that the court erred in denying their motions for directed verdicts at the close of State's and all of the evidence on the grounds that there was no showing that defendants knew the U-Haul truck contained marijuana and no showing of any conspiracy between defendant Watkins and any other person. We note first that defendants waived the right to challenge the denial of the motion made at the close of State's evidence by presenting their own evidence at trial. G.S. 15-173; *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). As to the evidence of conspiracy, defendant Watkins was acquitted of that charge, rendering harmless any error in submitting this count to the jury. The remaining evidence, taken in the light most favorable to State, was clearly sufficient to overcome the motion as to the charge of trafficking by possession of 10,000 pounds or more of marijuana. An accused has possession of narcotics within the meaning of the law when he has the power and intent to control their disposition or use or when the evidence places him in such close juxtaposition to them that a jury could conclude that they were in his possession. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Roseboro*, 55 N.C. App. 205, 284 S.E. 2d 725 (1981), *cert. den. and appeal dismissed*, 305 N.C. 155, --- S.E. 2d --- (1982). The evidence in the present case meets both tests. Defendants were sufficiently close to the marijuana to raise an inference of possession in that they were riding in and operating a truck which reeked marijuana odor from the storage area. Further, they exhibited knowledge and control of the marijuana by attempting to outrun two police cars and to flee when the truck was stopped by the police.

In their twenty-third assignment of error defendants allege prejudicial error by the trial court in sustaining State's objection to the following question asked of defendant Long and concerning a meeting among defendants and Joann Kraft, arranged by defendant's attorney in May 1981, at which Ms. Kraft was unable to identify Long as one of the people who had been present when Elliott Wade Coleman rented the U-Haul truck: "Now, at any

time, and in your presence and in the presence of Mr. Watkins, did she ever make any gestures of how these people looked that she saw?" Defendants contend that the excluded testimony would have corroborated earlier testimony by Ms. Kraft and was therefore admissible. Whether this is true and whether exclusion of the testimony was prejudicial cannot be determined, however, as the answer to the question is not in the record. *State v. Faircloth, supra.* This assignment is, therefore, overruled.

[9] In assignments twenty-four and twenty-five defendants allege that because the photograph of defendant Watkins used for identification purposes by Ms. Kraft portrayed Watkins in an "in custody background," its admission into evidence and exhibition to the jury was prejudicial error. The picture is not included in the record on appeal as required by App. R. 9(b)(3). Consequently, we cannot determine its admissibility, and these assignments must be overruled. *State v. Jeffries*, 55 N.C. App. 269, 285 S.E. 2d 307 (1982).

[10] After deliberating for three hours the jury returned to the courtroom and reported that they were deadlocked nine to three as to each defendant and that they did not feel that they could reach a verdict with additional time. The court then instructed the jury as follows and asked them to resume deliberations:

> I instruct you that a verdict is not a verdict until all twelve of you agree unanimously what your decision shall be. It is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to the individual judgment. In the course of your deliberations, each of you should not hesitate to re-examine your own view and change your opinion if it is erroneous; but none of you should surrender your honest conviction as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

At the end of the day the jury still had not reached a verdict although the numerical count had changed. Upon resuming deliberations the next day, unanimous verdicts were reached as to each defendant. In assignment of error twenty-seven defendants argue that the verdicts were coerced as a result of the jurors having been twice required to continue deliberations

after reporting an inability to agree. We find no error. When a jury experiences difficulty in reaching a unanimous verdict, the trial court may ask them to deliberate further in an attempt to reach agreement so long as the court does not express an opinion as to the guilt or innocence of the defendant and does not imply that any juror should surrender his own free will and judgment. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). The trial court met these requirements in the present case. Further, the court did not unduly coerce the jury by twice requiring them to continue deliberating after difficulties were reported. Following their initial difficulties, the jury continued deliberating until the end of the day at which time they reported that the vote had changed. Under these circumstances, the trial court would have been remiss had it not required the jury to return the next day to continue deliberating. This assignment is overruled.

[11] Following return of the verdicts, defendants moved for a new trial based upon newly discovered evidence consisting of a slip of paper bearing the name and phone number of Elliott Wade Coleman which was found on the person of Felix Morales-Rivero at the time of his arrest. The motion was denied. In their twenty-eighth assignment of error defendants contend that such denial was error because the new evidence "increased the credibility of their stories" that they had had no contact with Coleman, had never met Morales-Rivero prior to 16 December 1980 and had been hired only to transport a truckload of furniture. This argument is without merit and the assignment is overruled. Newly discovered evidence which is merely cumulative or corroborative does not require a new trial. *State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979). Defendants have conceded that their new evidence merely corroborated their own testimony.

[12] Both defendants were sentenced to the sixteen-year minimum prison term and the $200,000 fine required by G.S. 90-95(h)(1)d. Paragraph (6) of that subsection provides that both the minimum prison term and the amount of the fine may be reduced when the person sentenced "has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance." Defendants contend in their twenty-

ninth assignment of error that the trial court erred in failing to find that they had rendered such assistance and reducing their sentences accordingly. The "substantial assistance" to which defendants refer was their willing and voluntary identification at trial of David Horne as the only person they knew to be connected with the U-Haul truck containing marijuana. While it may be true that defendants willingly and voluntarily named David Horne at trial, defendant Long admitted at the presentence hearing that although he had been asked for information by law enforcement officers following his arrest, he had told them that he knew nothing and had given them no information regarding David Horne, who has since died. Watkins did not testify prior to sentencing but stipulated only that he had no other knowledge about the case other than that to which he testified at trial. Upon inquiry by the court, State submitted that it had no information tending to show that defendants had, to the best of their knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators or principals. On these facts we find no error in the sentences imposed by the trial court.

[13] In their last two assignments of error defendants contend that application of the punishment provisions of G.S. 90-95(h) in this case constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, Section 27 of the North Carolina Constitution because the severity of the sentence required by that subsection is disproportionate to defendants' crime. Defendants do not contend that the punishment provisions would be unduly severe in all cases of trafficking in 10,000 pounds or more of marijuana but argue that they are so under the facts of this case because defendants were simply driving a truck which contained more than 10,000 pounds of marijuana in its locked storage compartment to which defendants had no key. We reject this argument. As discussed elsewhere in this opinion, the evidence at trial was sufficient to show that at the time of their arrest defendants had in their possession more than 10,000 pounds of marijuana and were, therefore, guilty of trafficking in marijuana as defined in G.S. 90-95(h)(1). Subparagraph d. thereof authorizes a sentence of imprisonment of not less than sixteen years nor more than forty years and a fine of not less than $200,000 where the trafficking involves 10,000

pounds or more of marijuana. As previously stated, both defendants received the 16-year minimum prison term and the $200,000 fine. Long also received a 16-year maximum prison term; Watkins, an 18-year maximum. These sentences do not exceed statutory limits and, therefore, do not constitute cruel and unusual punishment as to defendants. *See State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980); *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Conard*, 55 N.C. App. 63, 284 S.E. 2d 557 (1981), *cert. den. and appeal dismissed*, 305 N.C. 303 (1982). Further, the United States Supreme Court has recently upheld a sentence of forty years imprisonment and a $20,000 fine for a conviction of possession with intent to distribute nine ounces of marijuana. The Supreme Court held that for crimes classified as felonies and punishable by prison terms, as opposed to death, the length of the sentence is purely a matter of legislative prerogative. *Hutto v. Davis*, --- U.S. ---, 70 L.Ed. 2d 556, 102 S.Ct. ---(1982). We also note that the minimum prison term required by G.S. 90-95(h)(1)d was increased from sixteen years to thirty-five years by amendment effective 1 July 1981. These assignments are overruled.

In the trial below we find

No error.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER AND LIGHT COMPANY (APPLICANT); CHAMPION INTERNATIONAL CORPORATION; AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.

No. 8110UC392

(Filed 3 August 1982)

1. **Utilities Commission § 24— fuel adjustment proceedings not consolidated with general rate case in progress—no error**

The Utilities Commission properly considered an application for a fuel cost-based adjustment in a separate G.S. § 62-134(e) proceeding, rather than consolidating that application with the then-pending general rate case. The application for a fuel cost-based adjustment was entitled to the expedited consideration of a G.S. § 62-134(e) proceeding, and even if the adjusted rate ordered in the proceeding was eventually superseded by the reasonable rates established in the then-pending general rate hearing, it would be of valid force until so superseded. G.S. 62-133.

2. **Utilities Commission § 24— consideration of total fuel cost for electricity consumed by systemwide customers and not only North Carolina customers**

There is no requirement that the Utilities Commission segregate the total fuel cost per unit for only that electricity consumed by North Carolina retail customers from the systemwide fuel cost per unit in determining the appropriate adjustment in future rates based solely on the increased cost of fuel pursuant to an expedited G.S. § 62-134(e) proceeding.

3. **Utilities Commission § 39— consideration of additional gross receipts tax—proper**

Consideration by the Utilities Commission of the G.S. § 105-116 additional gross receipts tax in a G.S. § 62-134(e) proceeding was not improper.

4. **Utilities Commission § 24— historical test period data—use in expedited proceedings proper**

The Utilities Commission may, in an expedited G.S. § 62-134(e) proceeding, use the data from the historical test period as a basis for an increase in the future billing period without having to undergo the delay and burden of fine-tuning such data to compensate for any abnormalities during the test period. It is the full-blown general rate hearing, not the expedited and limited fuel adjustment proceeding, which serves to take account of all the minute factors which bear on the reasonableness of rates.

5. **Utilities Commission § 24— fuel adjustment proceedings—purchased power cost allowed to extent of fuel cost**

In an expedited fuel adjustment proceeding pursuant to G.S. § 62-134(e), the Utilities Commission may include an adjustment for increased costs incurred by the fuel component of purchased power from other utilities.

However, a purchasing utility's increased payments which go towards the selling utility's non-fuel production costs cannot be the basis of an adjustment under G.S. § 62-134(e).

APPEAL by intervenors, Public Staff of the North Carolina Utilities Commission and North Carolina Textile Manufacturers Association from an order of the North Carolina Utilities Commission entered 24 October 1980. Heard in the Court of Appeals on 8 March 1982.

This appeal arises out of an application, by Carolina Power and Light Company (CP&L), for a Utilities Commission order approving an adjustment in the basic rates for electricity to be sold by CP&L to its customers; CP&L sought an increase in such rates "for bills rendered on and after December 1, 1980," and was applying for the rate increase, pursuant to G.S. § 62-134(e), on the sole ground that it had incurred increased fuel expenses in the relevant previous historical test period of May through August 1980. Upon the intervention by the North Carolina Textile Manufacturers Association and the Public Staff of the North Carolina Utilities Commission, the Utilities Commission conducted an evidentiary hearing and thereafter entered an "Order Modifying Adjustment of Rates and Charges Pursuant to G.S. 62-134(e)." By such Order, the Commission found that "[d]uring the four-month test period for the present application of May, June, July and August of 1980, CP&L incurred increases in the cost of fuel and purchased power in the amount of approximately $62 million, . . . [and] CP&L's fuel generating costs were $0.01932 per kilowatt-hour" and the Commission thereupon allowed CP&L a .923 cent per kilowatt-hour increase in its rates, such increase being based on a formula designed to achieve an adjustment for changed fuel costs. Although it is not relevant to this appeal, the Commission ordered that the .923 cent per kilowatt-hour fuel cost adjustment be apportioned over two four-month billing periods, rather than entirely in the applied-for four-month period of December 1980 through March 1981. Hence, the Commission's order mandated CP&L, for the December 1980 through March 1981 billing months, to "adjust its base retail rates by the addition of an amount equal to $.00462 per kilowatt-hour," and mandated that CP&L, "for the Billing Months of April through July 1981 . . . adjust its base retail rates by the addition of an amount equal to $.00461 per kilowatt-hour" in addition to any fuel cost ad-

justment deemed proper after a later fuel adjustment procedure for that second four-month billing period, based on its relevant test period. From the Order of the Commission, each of the intervenors appealed.

Hunton & Williams, by R. C. Howison, Jr., Edward S. Finley, Jr., and Edgar M. Roach, Jr.; and John T. Bode and Robert T. Bockman, for Carolina Power and Light Company, applicant appellee.

Robert F. Page and Karen E. Long, for the Public Staff, North Carolina Utilities Commission, intervenor appellant.

Thomas R. Eller, Jr., for the North Carolina Textile Manufacturers Association, intervenor appellant.

HEDRICK, Judge.

We first note that the statute out of which the proceedings before the Commission, and from which the Commission's order emanated, G.S. § 62-134(e), has since been repealed by 1981 N.C. Sess. Laws Ch. 1197, § 2 (enacted 17 June 1982). The Chapter containing such repeal nowhere states the effect of the repeal on already pending G.S. § 62-134(e) proceedings, but does state, "all rates and changes under G.S. § 62-134(e) shall terminate not later than December 1, 1982." 1981 N.C. Sess. Laws Ch. 1197, § 3 (enacted 17 June 1982). Since the rate increase challenged in the present case pertained to a period well before December 1, 1982, and since "[a] statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication," *In re Will of Mitchell*, 285 N.C. 77, 79-80, 203 S.E. 2d 48, 50 (1974), we will treat G.S. § 62-134(e) as the controlling statute notwithstanding its repeal as to certain fuel adjustment proceedings which are held later than the proceedings at issue in the present case.

[1] The first assignments of error brought forward in the intervenor's briefs relate to the Commission's denial of a motion to have the instant fuel adjustment proceedings, which were being conducted pursuant to G.S. § 62-134(e), consolidated with a CP&L general rate case already in progress and being conducted pursuant to G.S. § 62-133. Intervenors argue that the Commission's Order allowing an upward adjustment, based on increased costs

of fuel, in CP&L's rates was reversible error in that such adjustment was made in an expedited G.S. § 62-134(e) proceeding, which provides for no inquiry into the reasonableness of the increased fuel costs upon which such adjustment is based, rather than in an available, then-pending CP&L general rate case, in which inquiries into the reasonableness of CP&L's management practices are required. Intervenors also argue that the Commission's Order allowing a G.S. § 62-134(e) rate adjustment was further tainted with reversible error in that the challenged Commission Order in the instant proceeding (Docket No. E-2, Sub 402) was incorporated into the Commission's Order in the general rate case (Docket No. E-2, Sub 391), dated 15 January 1981, thereby effectively exempting CP&L's fuel costs from any inquiry into their reasonableness, even in a general rate case.

G.S. § 62-134(e) states in pertinent part:

> Notwithstanding the provisions of this Article, upon application by any public utility for permission and authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation or production of electric power, the Commission shall suspend such proposed increase for a period not to exceed 90 days beyond the date of filing such application to increase rates. . . . The Commission shall promptly investigate applications filed pursuant to provisions of this subsection and shall hold a public hearing within 30 days of the date of the filing of the application to consider such application, and shall base its order upon the record adduced at the hearing, such record to include all pertinent information available to the Commission at the time of hearing. The order responsive to an application shall be issued promptly by the Commission. . . . A proceeding under this subsection shall not be considered a general rate case.

By the clear and express language of G.S. § 62-134(e), "the legislature has provided a procedure by which a public utility may apply to the Utilities Commission for authority to increase its rates and charges *based solely upon the increased cost of fuel* used in the generation of electric power. . . ." *State ex rel. Utilities Commission v. Virginia Electric and Power Co.* [hereinafter referred to as "Vepco"], 48 N.C. App. 453, 460, 269 S.E. 2d 657, 661, *disc. rev. denied*, 301 N.C. 531, 273 S.E. 2d 462

(1980) [emphasis in original]. The legislature enacted G.S. § 62-134(e) not as a substitute for a general rate case, but to provide an expedited procedure by which the volatile and uncontrollable prices of fuels could be quickly taken into account in a utility's rates and charges. *Id.* "[P]lant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. § 62-134(e)." *Id.* at 462, 269 S.E. 2d at 662. Since "[t]he procedure provided [by G.S. § 62-134(e)] is an expedited one 'and shall not be considered a general rate case,' " *Id.* at 460, 269 S.E. 2d at 661 [footnote omitted], inquiries into the reasonableness of the fuel costs incurred (other than the reasonableness of the prices paid for such fuel) are not proper in a fuel adjustment proceeding. *See Id.*

On the other hand, review by the Utilities Commission of the reasonableness of "management decisions . . . *in a general rate case* is not only entirely appropriate but even necessary[;] . . . the Utilities Commission . . . [must] take into account the efficiency of the company's operations in fixing its rates in a general rate case as provided in G.S. 62-133." *Id.* at 461-62, 269 S.E. 2d at 662 [emphasis in original]. This requirement, for general rate cases, of an inquiry into the reasonableness of incurred costs extends to fuel costs incurred by the utility. *See Id.* and G.S. § 62-133(b)(3), requiring the Commission, in a general rate case, to ascertain the "utility's *reasonable* operating expenses." [Emphasis added.]

Hence, a fuel adjustment proceeding under G.S. § 62-134(e) and a general rate case under G.S. § 62-133 are entirely different in their functions and basic procedures. This fundamental difference between the two justifies the action of the Commission in hearing CP&L's application for a rate adjustment based solely on the increased cost of fuel in a G.S. § 62-134(e) proceeding rather than in the then-pending general rate case, since such adjustments for increased fuel costs are to be made in expedited G.S. § 62-134(e) proceedings.

Intervenors, however, are concerned that if adjustments for fuel cost increases are always rendered in expedited G.S. § 62-134(e) proceedings, in which the reasonableness of the increases are irrelevant, then public utilities will always be able to achieve virtually automatic rate increases based on their increased costs of fuel, even if the utilities were manifestly

unreasonable in incurring such increases. Their concern is unwarranted. Rate adjustments granted pursuant to G.S. § 62-134(e) are purely interim adjustments made to a base rate previously determined in a G.S. § 62-133 general rate case; the holding of general rate cases subsequent to fuel adjustment proceedings assures that a utility's fuel costs will be scrutinized for reasonableness. First, a base rate taking all considerations of reasonableness into account (including the reasonableness of fuel costs) is determined in a general rate case. In the interim between the general rate case establishing that base rate, r_1, and the next general rate case establishing base rate r_2, any number of rate adjustments based solely on the changing cost of fuel may be made to r_1, and the effect of such adjustments is cumulative. Hence, if in the interim between r_1 and r_2, three expedited fuel adjustment proceedings are held and have produced respective adjustments to r_1 of a_1, a_2, and a_3, the adjusted rate after those three proceedings will be $r_1 + a_1 + a_2 + a_3$. This adjusted rate may include upward adjustments which are based on absolutely unreasonable fuel costs, yet until the next general rate case such adjustments are permissible. When such a general rate case is held, however, the resulting rate established therein, r_2, is based on only those expenditures (including fuel expenditures) which are reasonable, Vepco, *supra*, and is the new base rate $-r_1$ and the adjustments thereto are superseded and of no further force. In this manner, utility rates, including that portion attributable to fuel costs, *are* periodically made to reflect reasonableness.

In the present case, the Commission properly considered the application for a fuel cost-based adjustment in a separate G.S. § 62-134(e) proceeding, rather than consolidating that application with the then-pending general rate case. The application for a fuel cost-based adjustment was entitled to the expedited consideration of a G.S. § 62-134(e) proceeding, and even if the adjusted rate ordered in the G.S. § 62-134(e) proceeding were eventually superseded by the reasonable rate established in the then-pending general rate hearing, it would be of valid force until so superseded. Further, the intervenor appellants have shown us nothing in the record to prove that the Commission did not follow the proper procedures, as discussed *supra*, for a G.S. § 62-134(e) adjustment.

Under these assignments of error pertaining to the Commission's refusal to consolidate, intervenors additionally cite as grounds for reversal of the Commission's Order in Docket No. E-2, Sub 402, the following language from the "Order Granting Partial Increase in Rates and Charges" entered 15 January 1981 in the concurrent general rate case, Docket No. E-2, Sub 391:

> In addition, the Commission has considered the matter of the appropriate fuel base to be used in the final rates approved in this case. Docket No. E-2, Sub 402, was consolidated with this docket in order to allow full consideration of this matter. The fuel cost and resulting fuel factor found to be appropriate in that docket is just and reasonable, and the Commission affirms its decision in Docket E-2, Sub 402. The rates approved in this docket should reflect the fuel charges approved in Docket No. E-2, Sub 402.

Intervenors argue that this language shows that the Commission, in the general rate hearing numbered E-2, Sub 391, used expedited G.S. § 62-134(e) methodology in setting the fuel cost portion of CP&L's general rate, rather than the full-blown G.S. § 62-133 procedures required of a general rate case. This argument, however, is not grounds for reversal of the Commission's Order challenged in the present case, which was a fuel adjustment proceeding. However erroneous the Commission's procedures may have been in Docket No. E-2, Sub 391, such alleged errors have no bearing on the appeal from the order challenged in the present case, which was entered in Docket No. E-2, Sub 402. These assignments of error are overruled.

[2] Intervenor North Carolina Textile Manufacturers Association (NCTMA) next assigns error to the Commission's consideration of CP&L's systemwide fuel cost per kilowatt-hour for the relevant historical test period in determining the appropriate adjustment in future rates based solely on the increased cost of fuel. The argument here presented is that the Commission was required to consider the total fuel cost per unit for only that electricity consumed by North Carolina retail customers. It is not clear to us that there is any difference between CP&L's systemwide fuel cost per unit of electricity, and its fuel cost per unit of electricity consumed by North Carolina retail customers, and assuming arguendo that the North Carolina figure may be segregated from the

systemwide figures, we are aware of no requirement that the Commission perform such a segregation and rely on only the segregated North Carolina fuel cost per unit in allowing adjustments pursuant to an expedited G.S. § 62-134(e) proceeding. This assignment of error is overruled.

[3] Intervenor NCTMA next assigns error to the Commission's inclusion, in the rate adjustment permitted CP&L, of an amount for the increased gross receipts taxes CP&L would incur on the additional revenues it receives pursuant to the upward adjustment based on increased fuel costs. NCTMA argues that such an allowance is for something other than the increased cost of fuel, that it duplicates allowances made in the subsequent general rate case, and that the allowance is improper since the amount of additional revenues, and of the gross receipts taxes thereon, have not yet even been incurred.

G.S. § 105-116 imposes a tax of six percent on the gross receipts of electric utility companies. As will be demonstrated below, an allowance in a G.S. § 62-134(e) proceeding for this gross receipts tax factor is a permissible method of effecting the purpose, as described in Vepco, *supra*, of G.S. § 62-134(e), which is to enable utilities to receive an expedited adjustment of their rates based on the volatile and uncontrollable costs of fuel. If the Commission, in a fuel adjustment proceeding, determines that fuel costs in the relevant historical test period require an upward adjustment of some amount *a* for the billing period in question, then the utility's revenues per kilowatt-hour will be increased by *a* but then decreased by .06*a*, the gross receipts tax factor. Hence, without an adjustment for the gross receipts tax factor, the utility would not receive an adjustment, *a*, sufficient to keep up with its increased fuel costs, but would receive a net amount less than *a*, to wit *a* minus .06*a*. We will not construe G.S. § 62-134(e) as requiring such a result, since to do so would frustrate the purposes of the statute. *See State ex rel. Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E. 2d 862 (1978). Rather, the gross receipts tax factor may be taken into account in an adjustment granted pursuant to G.S. § 62-134(e). Further, the allowance of adjustments which take such factors into account in a fuel adjustment proceeding and in a subsequent general rate hearing does not result in a double recovery by the utility, since, as previously discussed, the rate established in the subsequent general rate

proceeding supersedes and displaces the rates established previously in the fuel adjustment proceeding. Finally, the fact that the utility has not yet incurred the increased gross receipts taxes allowed for in the adjustment does not make such an adjustment improper. The adjustment is made not to recover costs and taxes previously incurred, *see State ex rel. Utilities Commission v. C. F. Industries*, 299 N.C. 504, 263 S.E. 2d 559 (1980), but to enable a utility to charge a current rate based on a reasonable approximation of what its costs and taxes will be in the relevant billing period. Consideration by the Commission of what CP&L's additional gross receipts tax would be in the billing period for which adjustment was sought was not improper. This assignment of error is overruled.

[4] In their next assignment of error, the North Carolina Textile Manufacturers Association argues that the rate increase allowed by the Commission was tainted by reversible error in that it was based on costs incurred in a previous test period, without any compensating adjustment for abnormalities in that previous test period. The NCTMA here contends that without adjustment for such cost-increasing abnormalities in the previous test period, the experience of such test period cannot be used as a basis for an increase under G.S. § 62-134(e) for the relevant future billing period. NCTMA also contends that the Commission improperly allowed a rate increase to recover past operating expenses which were incurred but not recovered in the previous test period.

"The procedure provided [by G.S. § 62-134(e)] is an expedited one 'and shall not be considered a general rate case,' " Vepco, *supra*, at 460, 269 S.E. 2d at 661; it is a limited proceeding, *Id.*, and is designed to avoid "the regulatory lag . . . incident to repeated general rate cases." *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 472, 232 S.E. 2d 184, 196 (1977). Just as Vepco, *supra*, holds that a G.S. § 62-134(e) proceeding should not be burdened with questions about the reasonableness of fuel costs incurred in the historical test period, so too should such proceeding be free of concerns about how representative the historical test period is with respect to the billing period for which adjustment is sought. The Commission may, in an expedited G.S. § 62-134(e) proceeding, use the data from the historical test period as a basis for an increase in the future billing period without having to undergo the delay and burden of

fine-tuning such data to compensate for any abnormalities during the test period. It is the full-blown general rate hearing, not the expedited and limited fuel adjustment proceeding, which serves to take account of all the minute factors which bear on the reasonableness of rates. *See Id.* Furthermore, NCTMA is incorrect in its contention that the challenged rate adjustment provides for any recovery of past fuel costs incurred by CP&L. The increase approved by the Commission's Order was "pursuant to . . . the formula" which uses past fuel costs as a guide for what the fuel costs will be in the future billing period; the relevance, in the formula, of past fuel costs is not that those past fuel costs be recovered in the future. This assignment of error is without merit.

[5] The final assignment of error employed by intervenors in their attempt to demonstrate the excessiveness of the rate adjustment allowed by the Commission is that the rate adjustment improperly includes an adjustment for increased costs incurred by CP&L in its purchase of power from other utilities. For instance, the intervenor Public Staff argues that adjustments pursuant to an expedited G.S. § 62-134(e) proceeding may be made only for changes in costs incurred by CP&L "for fuel used by CP&L in its own generating plants," and not for changes in costs it incurs in its purchases of power from other utilities. The intervenors further argue that the Commission must first conduct an inquiry into the reasonableness of any past purchase by CP&L of power from another utility before the Commission may allow CP&L to adjust its future rates to correspond to any changing cost it incurred in such purchase, and that such inquiries into reasonableness may be made only in a G.S. § 62-133 general rate hearing, and may not be made in a G.S. § 62-134(e) expedited proceeding.

We again note that G.S. § 62-134(e) provides an expedited procedure by which a utility may be granted an increase in rates based solely on the increased cost of fuel used in the generation of electric power. Vepco, *supra.* The intervenors' assignments of error here under consideration raise the question of what upward adjustment, if any, may be made in a utility's rates in an expedited G.S. § 62-134(e) proceeding when the basis for adjustment is an increase in costs incurred by the utility in its purchase of power from other utilities.

When a utility makes an expenditure for power purchased from another utility, such expenditure constitutes a payment to the selling utility for various items. One such item is the selling utility's profit on the sale; another such item is the cost to the selling utility of producing the power it sold; hence, the purchasing utility's expenditure goes towards various of the selling utility's production costs for the power sold, *e.g.* the labor costs, maintenance costs, construction costs, and fuel costs of *the selling utility*. If a power-purchasing utility's expenditures for purchased power are greater during the relevant historical test period than in the relevant preceding base period, and the increase is attributable to the increase to the selling utility, between the two periods, in its labor, maintenance, and construction costs in producing the power sold, such increase incurred by the purchasing utility will not justify an adjustment in its rates in a G.S. § 62-134(e) proceeding, since G.S. § 62-134(e) proceedings allow only for adjustments "*based solely upon the increased cost of fuel.*" *Id.* at 460, 269 S.E. 2d at 661. Stated differently, when a purchasing utility's increased payments go towards the selling utility's non-fuel production costs, such increased payments cannot be the basis of an adjustment under G.S. § 62-134(e).

A different question, however, is presented when a utility's increase in expenditures for purchased power is attributable to the increase, between the two periods, of the cost to the selling utility of fuel used in producing the power sold. In such an instance, the fuel cost incurred by the selling utility in producing the power it sold to the buying utility during the relevant test period is higher than the selling utility's fuel cost for any power sold the buying utility in the previous base period, and the selling utility has recovered its increased fuel costs by increasing that portion of the buying utility's bill which is attributable to the selling utility's fuel costs. In paying such a bill, the buying utility has incurred, albeit indirectly, an increased cost of fuel. Such an increase in a buying utility's fuel component expenditure for purchased power could therefore justify an increase in the buying utility's rates, pursuant to G.S. § 62-134(e). Vepco, *supra*, states that G.S. § 62-134(e) increases may be "*based solely upon the increased cost of fuel* used in the generation of electric power," *Id.* at 460, 269 S.E. 2d at 661, and such a basis for an increase includes the increased cost of fuel used by a selling utility in the

generation of electric power, as well as the increased cost of fuel used in the generating plants of the utility applying for adjustment. The increase experienced by the selling utility is incurred by the power-purchasing utility when it pays for the purchased power, and this increase may properly be the basis of an adjustment, based solely on the cost of fuel, in the power-purchasing company's rates, pursuant to G.S. § 62-134(e).

To the allowance of a G.S. § 62-134(e) adjustment for an increase in the fuel component of purchased power, the intervenors object on the grounds that such an allowance would exempt the applicant utility's purchases of power from an examination into the reasonableness of such purchases, and that the increased costs incurred therefrom could be taken into account in an expedited G.S. § 62-134(e) proceeding, which proceedings make no inquiry into the overall prudence of the utility's management practices. This argument is only partially true: the only increased component of purchased power costs which may be the basis of a G.S. § 62-134(e) adjustment is the fuel cost component, and nothing else. Intervenors are correct, however, insofar as they argue that under our ruling today, adjustments may be made for increases in the fuel cost component of purchased power even if the utility was manifestly unreasonable and imprudent in incurring such increases. "[P]lant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. § 62-134(e). Vepco, *supra*, at 462, 269 S.E. 2d at 662. Hence, even if it could be demonstrated that a reasonably managed utility could have served its customers' needs without expending additional funds on purchased power and could have thereby avoided the increased fuel component of purchased power costs, the power-purchasing utility could still use G.S. § 62-134(e) to obtain an upward adjustment for the increased fuel component.

That this result obtains, however, is no refutation of our holding allowing expedited G.S. § 62-134(e) adjustments for the fuel component of purchased power costs. It is the language of the statute which requires an expedited adjustment for increases based on fuel costs, and this language implicitly extends to the fuel component of purchased power costs. Each item of the power production costs incurred by a utility may be either reasonable or unreasonable; with respect to most such costs, *e.g.* labor costs, an

increase therein can never be the basis of an upward adjustment in future rates until it has been determined in a general rate hearing that the utility was reasonable in incurring such increase. With respect to fuel costs, however, increases therein may be the basis of an upward adjustment pursuant to G.S. § 62-134(e), without any inquiry into whether the utility employed prudent management practices in incurring the increases (with the exception of an inquiry into the reasonableness of the prices paid for such fuel). Vepco, *supra.* Although even increases incurred by a utility for its fuel costs and fuel components must be subjected to scrutiny, in a general rate case, to determine whether they conform to reasonable management practices, such increases may in the interim be the basis of an expedited rate increase under G.S. § 62-134(e) without a determination as to reasonableness. Vepco, *supra.* This expedited process is simply the way the statute works, and the language employed by the legislature indicates its intention to include increases in the fuel cost component of purchased power thereunder.

In the present case, the record is ambiguous as to exactly what costs of the relevant historical test period were considered by the Commission in allowing CP&L to adjust its rates upward. An exhibit introduced by CP&L and entitled "Nevil Exhibit B" stated that "Total Cost Fuel" for the relevant May 1980 through August 1980 test period was $191,757,875. That figure was relied upon in the computation of the adjustment, and the figure also appears on another exhibit introduced by CP&L and entitled "Nevil Exhibit C." "Nevil Exhibit C" indicates that the figure is the sum of various component amounts expended by CP&L to achieve its total cost of fuel during the relevant test period, and the exhibit shows what those component amounts are. Amounts are listed for "coal" costs, "oil" costs, and "natural gas" costs. Significantly, however, "Nevil Exhibit C" does not contain the category "Fuel Cost Component of Purchased Power." Instead, the exhibit contains a category for "Purchased Power," and lists $45,452,648 as the total cost thereof. This entry suggests that the Commission allowed a G.S. § 62-134(e) adjustment based on an increase in all costs paid by CP&L for purchased power, rather than just its fuel component costs; as discussed above, G.S. § 62-134(e) may not be used to effect adjustments based on increases in production costs of purchased power other than the fuel costs. That amount of the

$45,452,648 which does not represent the fuel cost component of purchased power may not be considered in determining CP&L's fuel cost for the test period. That such amount may have been improperly considered is further suggested by language in the Commission's Order that "[d]uring the four-month test period . . . , CP&L incurred increases in the cost of fuel and *purchased power* in the amount of approximately $62 million" [emphasis added]; again, the language indicates that, with respect to purchased power costs, more than increases in just the fuel component was considered by the Commission. On the other hand, the record also contains the formula used in calculating the fuel adjustment factor, and an explanation of the variables used in such formula. This explanation breaks down the total fuel costs variable into its various components, one of which is "[p]urchased power *fuel costs* such as those incurred in Unit Power and Limited Term Power purchases where the fossil and nuclear fuel costs associated with energy purchased are identifiable and are identified in the billing statement." [Emphasis added.] This language suggests that the Commission properly limited itself to consideration, with respect to purchased power, of the fuel cost component.

Because of the uncertainty in the record as to whether the rate adjustment allowed by the Commission was based in part on increases incurred by CP&L in purchased power costs other than fuel component costs, there is a possibility that the allowed adjustment was too high.

> The reviewing court has power without determining and disposing of the cause to remand it to the lower court for further proceedings, where the record is not in condition for the appellate court properly to decide the questions presented with justice to all parties concerned, and it should exercise such power wherever justice calls for a remand to effect a proper decision.

5B C.J.S. Appeal & Error § 1836, 233 (1958) [footnote omitted]; *see also Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884 (1953); *Trustees of Guilford College v. Guilford County*, 219 N.C. 347, 13 S.E. 2d 622 (1941); *Smith v. Board of County Commissioners of Bladen County*, 191 N.C. 775, 133 S.E. 1 (1926); *Bradley v. Jones*, 76 N.C. 204 (1877); 5 Am. Jur. 2d Appeal & Error § 962 (1962). Hence, the order appealed from is vacated and the cause is

remanded to the Commission for further proceedings to determine what amount, if any, of the "Purchased Power" figure of $45,452,648 is attributable to the fuel component cost of such "purchased power," and for the entry of a new order based on such determination.

Vacated and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. BEVERLY ELAINE TATE

STATE OF NORTH CAROLINA v. RALPH EDWIN TATE, JR.

No. 8121SC1199

(Filed 3 August 1982)

1. **Constitutional Law § 67; Criminal Law § 91.6— confidential informant—disclosure of identity immediately before trial—denial of continuance**

In a prosecution for possessing and manufacturing cocaine, defendants' due process rights were not violated by the trial court's denial of their request for a recess or a continuance for the purpose of interviewing a confidential informant whose name had been furnished to them immediately prior to trial pursuant to a motion filed months before trial where one defendant's affidavit indicated that she knew of the informant's involvement in the crimes from the date of their occurrence; both defendants subpoenaed the informant a month before trial; defendants asked the informant's attorney for an interview with the informant and their request was denied; and the informant was present at the trial and was cross-examined by the defendants.

2. **Searches and Seizures § 44— motion to suppress evidence—failure to make findings of fact**

The trial court did not err in failing to make findings of fact in denying a motion to suppress seized evidence where there was no conflict in the evidence on voir dire. G.S. 15A-977(d) and (f).

3. **Searches and Seizures § 40— search under warrant—items properly seized**

Although cocaine was the only item designated in a search warrant, apparatus commonly used in manufacturing cocaine, large sums of cash, mail belonging to the defendants and photographs of defendants were properly seized as evidence of an offense or the identity of a person participating in an offense. G.S. 15A-242(4).

4. Searches and Seizures § 41— execution of search warrant—notice by officers

Officers executing a search warrant sufficiently complied with the notice requirement of G.S. 15A-249 where they asked defendant when she came to the door if she knew who owned the car parked outside and defendant was advised that the men were police officers and had a search warrant.

5. Constitutional Law § 71; Criminal Law § 80.2— inspection of police reports

Defendants had no right to inspect a police officer's preliminary report since it was the work product of the police and was not used by the officer to refresh his recollection at trial. However, the trial court should have allowed defense counsel to examine pages of a supplemental report used by the officer to refresh his recollection, but defendant was not prejudiced by the court's failure to permit such examination.

6. Narcotics § 4.3— constructive possession of cocaine—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction for felonious possession of cocaine where it tended to show that an informant purchased and used cocaine in an apartment; defendant was present when the informant was using the cocaine; the informant returned to the apartment the following day and purchased more cocaine from defendant's sister; officers searched the apartment later that day and found bags of cocaine on a table in the living room; defendant entered the apartment some thirty to forty-five minutes later; defendant was already living in the apartment when his sister moved there; defendant received his mail at the apartment and kept some of his clothes there; and the lease for the apartment was in defendant's name alone.

7. Criminal Law § 118— failure to state defendant's contentions

The trial court erred in failing to state defendant's contentions after stating the contentions of the State and a co-defendant. G.S. 15A-1232.

8. Criminal Law § 121— entrapment—instruction in final mandate not necessary

The trial court was not required to instruct on the defense of entrapment in the final mandate to the jury where the court sufficiently instructed on entrapment in other portions of the charge.

Judge VAUGHN concurring in part and dissenting in part.

APPEAL by defendants from *Seay, Judge.* Judgments entered 18 May 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 April 1982.

In separate bills of indictment defendant Beverly Elaine Tate and her brother Ralph Edwin Tate, Jr., were charged with felonious possession of cocaine. Beverly was also charged with manufacturing cocaine. Both defendants were found guilty as charged. Ralph received a suspended sentence, was placed on five years probation and was ordered to pay a $1,000 fine. For the posses-

sion conviction, Beverly received a term of twelve months. Her sentence for manufacturing cocaine was suspended.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., and Assistant Attorney General Lisa Shepherd, for the State.

Morrow and Reavis, by John F. Morrow, for defendant appellants.

MARTIN (Robert M.), Judge.

PRE-TRIAL MOTIONS

Prior to trial both defendants filed motions to suppress evidence seized pursuant to a search warrant or, in the alternative, to identify the alleged confidential informant referred to in the application for the search warrant. In support of her 12 February 1981 "MOTION TO SUPPRESS AND/OR TO IDENTIFY INFORMANT," the defendant Beverly Tate filed an affidavit. This affidavit was incorporated for support by both defendants in their motions. Beverly swore that on the morning of 5 November 1980 Barry Wayne Morgan called and indicated he would like to talk with her at her apartment. Beverly later met Morgan at 12:15 p.m. He told her that someone was threatening him because of money owed. He asked Beverly if he could leave some cocaine at her apartment and she consented. Beverly made the additional averments in her affidavit:

> I came home from work at about 5:00 p.m. to 5:15 p.m. The said Barry Wayne Morgan called shortly thereafter and said he would be by the house in a little while. He arrived at about 6:45 p.m. to 7:00 p.m. and told me that he wanted to get some of the cocaine that he left there to show someone who wanted to purchase a large amount of cocaine from him. He told me that he wanted to weight (sic) out some, and I told him that I did not have anything to weigh the cocaine with. We called a person named Steve who came by later with a set of scales that were normally used to weigh gunpowder. He set the scales up on my coffee table and showed Barry Wayne Morgan how to use them. We then helped Barry Wayne Morgan weigh the cocaine and bag it up. All of this was done at the said Barry Wayne Morgan's request. Barry Wayne Morgan then used some cocaine.

Barry Wayne Morgan then asked me if I knew anybody who might want to buy some cocaine. I told him that I would call a friend, and I did call the friend at his request. I thereafter told him that the friend would probably be at the house between 7:30 p.m. and 8:00 p.m. Barry Wayne Morgan then told me that he was behind schedule and needed to leave and asked me if I would try to sell some of his cocaine to my friend. Barry Wayne Morgan then told me that he would hurry back as soon as possible to pick up the cocaine.

I have received three telephone calls from persons who would not identify themselves who have told me that Barry Wayne Morgan was working with the Police Department and that he had set me up. I have been further informed and so allege that charges against the said Barry Wayne Morgan have either been dropped or plea-bargained favorably to Barry Wayne Morgan.

A hearing was held on defendants' motions immediately prior to trial. The District Attorney complied with these motions by informing both defendants that the name of the informant was Barry Morgan. Beverly's attorney then moved for permission to talk with Morgan. Ralph's attorney made a request for a recess or continuance in order to prepare for trial. Both requests were denied.

[1] Defendants now assign error to the denial of this request for a recess or continuance for the purpose of interviewing Morgan. They argue that they were denied due process of law since they filed motions requesting the identification of the informant months prior to trial and were given this information only minutes before trial. In support of their argument defendants rely upon the recent decision in *State v. Hodges*, 51 N.C. App. 229, 275 S.E. 2d 533 (1981). In *Hodges* we held that the defendant's right to due process was violated when the State refused to reveal the identity of an informant who was present and participated in the alleged sale of marijuana. The indictment disclosed that defendant had allegedly sold marijuana to S.B.I. Agent Bowden. Defendant was not aware of any other person being present and participating in the offense until he overheard the name of the informant the day before trial. He immediately moved for a continuance, but his motion was denied. The trial court did, however, order the ar-

rest of the informant. The informant had not been found at the time of trial. We concluded that "[t]he name of the participating informant should have been disclosed to the defendant in advance of trial and in time for him to interview the informant and determine whether his testimony would have been beneficial to defendant." *Id.* at 232, 275 S.E. 2d at 535.

The facts in the case *sub judice* do not compel the same conclusion. The defendant Beverly Tate's affidavit clearly indicates that she knew of Morgan's involvement in the crimes from the date of their occurrence. The record on appeal reveals that both defendants subpoenaed Morgan a month before trial; that they asked Morgan's attorney for an interview with his client and that their request was denied. Unlike the informant in *Hodges*, Morgan was present at the trial and was cross-examined by the defendants. We fail to see how any of defendants' due process rights were violated. Defendant Ralph Tate's Assignment of Error No. 1 and defendant Beverly Tate's Assignment of Error No. 2 are overruled.

After the trial court denied either a recess or continuance, the court considered defendant Beverly Tate's written motion to suppress all evidence obtained as a result of the search warrant. She alleged in her motion and supporting affidavit that the warrant failed to designate the items to be seized; that items not designated in the warrant were seized improperly; that the officers failed to give appropriate notice before entering the apartment; that the officers failed to read the warrant to her before searching the apartment and that the officers improperly detained or searched persons in her apartment. At the *voir dire* hearing on this motion, Detective Spillman of the Winston-Salem Police Department testified for the State. The defense presented no witnesses. At the conclusion of Detective Spillman's *voir dire* testimony, the court entered the following order:

> From the evidence offered, the Court finds that a search warrant was issued by Deputy Clerk of the Superior Court R. R. Vannoy pursuant to the application of Police Officer R. A. Spillman; that the return of said warrant was made on November 5, 1980, by Officer R. A. Spillman of the Winston-Salem Police Department; and the Court finds, determines, and concludes from the evidence offered that the search war-

rant is a valid search warrant, amply supported by the application, and that the search warrant, together with attachment No. 1 (containing a physical description of both the apartment and the defendants) and the inventories of the property seized, are valid and not in violation of any of the constitutional rights of Beverly or Ralph Tate.

The objections of the defendants, Beverly and Ralph Tate, to the search warrant and their Motions To Suppress the same are denied and dismissed.

[2] Assignments of Error Nos. 5, 6 and 9 involve the trial court's order denying the motion to suppress. Defendants argue in Assignment of Error No. 5 that the trial court did not make sufficient findings of fact to support the conclusions of law in this order. They emphasize that this was a violation of G.S. 15A-977. We recognize that both G.S. 15A-977(d) and (f) require the trial judge to make findings of fact after conducting a hearing on a motion to suppress evidence. Case law subsequent to this statute has recognized an exception to the general rule.

> If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. (Citations omitted.) In that event, the necessary findings are implied from the admission of the challenged evidence. (Citation omitted.)

State v. Phillips, 300 N.C. 678, 685, 268 S.E. 2d 452, 457 (1980). Both defendants failed to present any testimony to refute Detective Spillman. Since Spillman's testimony supported the trial court's conclusion of law that the search warrant was valid, no error was committed.

[3] We do note that Detective Spillman admitted seizing items in the apartment other than the bags containing cocaine. Cocaine was the only item designated in the search warrant. Defendants, however, are wrong in their belief that the seizure of other items constituted a violation of G.S. 15A-242. These other items consisted of large sums of cash, apparatus commonly used in manufacturing cocaine, mail belonging to the defendants and the defendants' photographs. G.S. 15A-242(4) allows the seizure of

items pursuant to a search warrant when there is probable cause to believe that the items constitute "evidence of an offense or the identity of a person participating in an offense." The items seized clearly fall into this category. *See State v. Williams*, 299 N.C. 529, 263 S.E. 2d 571 (1980).

By Assignment of Error No. 6 defendants contend that the trial court's conclusions of law were insufficient to support the order denying the motion to suppress evidence. They specifically argue that the court concluded only that there was no constitutional violation and failed to determine whether defendants' rights under Chapter 15A of the North Carolina General Statutes were violated. We find no merit to this argument, since no evidence of a substantial violation of Chapter 15A was presented at the *voir dire* hearing.

[4] We further find no merit to defendants' argument in Assignment of Error No. 9. Here defendants assert that the officer executing the search warrant did not comply with the notice requirement in G.S. 15A-249; and that the evidence seized must therefore be excluded. This statute provides that the officer "must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched." Detective Spillman's *voir dire* testimony reveals that he and several other detectives went to the apartment. When Beverly came to the door, they asked her if she knew who owned the car parked outside. She was advised that the men were police officers and had a search warrant. The evidence does not indicate a violation of G.S. 15A-249.

Assignments of Error Nos. 3 and 4 refer solely to pretrial errors assigned by defendant Beverly Tate. Her third assignment of error reads as follows:

> The trial court committed prejudicial error, per se, when it refused to conduct an evidentiary hearing on the defendant, Beverly Tate's, motion to suppress evidence obtained under a search warrant as said motion to suppress contested the truthfulness of the affidavits allegedly showing probable cause for the issuance of the search warrant.

As previously noted Beverly filed two pre-trial motions: "MOTION TO SUPPRESS AND/OR TO IDENTIFY INFORMANT" and "MOTION TO

SUPPRESS." Also, as noted, hearings were held on both of these motions. Since the latter motion did not raise the issue of the truthfulness of the affidavits allegedly showing probable cause, the court was not required to hear evidence on this issue. The issue of the truthfulness of the affidavit was raised only in the "MOTION TO SUPPRESS AND/OR TO IDENTIFY INFORMANT." Therein defendant prayed "that an order issue directing the State of North Carolina to furnish to the defendant the name, address and other information known to the State concerning the identity of the confidential informant *or, in the alternative,* to suppress all evidence obtained under the search warrant in the instant case." (Emphasis supplied.) Since defendant was given the name of the informant before trial, the court properly refused to consider her alternative motion to suppress evidence. Defendant requested relief in the alternative and received it. She should not be allowed to complain that she failed to receive more than she requested.

[5] During the *voir dire* hearing on the *femme* defendant's motion to suppress evidence seized under the search warrant, Detective Spillman was questioned concerning his application for the warrant and the subsequent search. On cross-examination he admitted that he had earlier read the pages of his preliminary report but that he was not using these notes to refresh his recollection. Beverly's counsel moved that Spillman's notes be marked as an exhibit and that he be allowed to examine them. The trial court denied this request. Later during the *voir dire* examination, Detective Spillman related the statements Beverly made to him during the search of the apartment. He admitted that he was using notes in his supplemental report to refresh his recollection. The court allowed defense counsel to examine three pages of this report. The court refused to allow defense counsel to examine the remaining two pages of the report, although Spillman admitted that he had also used these pages to refresh his recollection during his testimony.

The *femme* defendant has alleged error in Assignment of Error No. 4 to the court's refusal to allow her counsel to inspect the pages of Spillman's preliminary report as well as two of the pages from his supplemental report. The court properly denied defense counsel's request to inspect the notes compiling Spillman's preliminary report. Since these notes were the work product of the Winston-Salem Police Department and were not

used by Spillman to refresh his recollection at trial, the defense had no right to examine them. *State v. Blue*, 20 N.C. App. 386, 201 S.E. 2d 548 (1974). It does appear from the record that the court should have allowed defense counsel to examine the two remaining pages of Spillman's supplemental report. Defendant, however, has failed to show how she was prejudiced by this denial. In passing, we note that counsel never indicated to the court his reasons for examining any of Spillman's notes.

MOTIONS TO DISMISS

[6] At the conclusion of the State's evidence and again at the end of all the evidence, defendant Ralph Tate moved for dismissal on the ground that the evidence was insufficient to prove the possession charge. The court denied both motions, and defendant has assigned error.

> In ruling upon the defendant's motion to dismiss . . ., the trial court is limited *solely* to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged *may* be drawn from the evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.

State v. Smith, 40 N.C. App. 72, 78-79, 252 S.E. 2d 535, 539-40 (1979). With this function in mind, we shall consider defendant Ralph Tate's allegation of failure by the State to show sufficient evidence.

The State's evidence tends to show that on 5 November 1980 Detective Spillman obtained a search warrant to search the persons of both defendants and Apartment 4850-H located at Thales Road in Winston-Salem. The warrant was supported by affidavit. Therein Spillman swore that a reliable informant had told him that there was cocaine in the apartment. Barry Morgan testified at trial that he visited the apartment on 4 November 1980. While in the apartment he both used and purchased cocaine. Ralph Tate was present when Morgan was using cocaine. After Morgan left the apartment, he informed Detective Spillman of his purchase.

At Spillman's request, Morgan returned to the apartment the following day and purchased more cocaine. Immediately thereafter he informed Spillman that he had purchased the cocaine from Beverly Tate. Spillman obtained a search warrant and went to the apartment. Bags of cocaine were found on a table in the living room and Beverly was arrested. Approximately thirty to forty-five minutes after the detectives entered the apartment, defendant Ralph Tate opened the door and walked in. Spillman testified that he arrested Ralph because he had information that this defendant also lived in the apartment. No controlled substances were found on his person. Beverly testified that when she moved into the apartment in September or October 1980, her brother Ralph was living there. She further testified that Ralph received his mail at the apartment; that he kept some of his clothes there and that the lease was in his name alone.

The evidence was sufficient for the jury to find Ralph guilty of possession of cocaine. In an analogous situation, we upheld the defendant's conviction for possession of a controlled substance. *State v. Wells*, 27 N.C. App. 144, 218 S.E. 2d 225 (1975). There the State's evidence tended to show that the controlled substance was found in an apartment rented to defendant; that the apartment was vacant at the time of the search; that defendant had been seen in the apartment more than three days prior to the search and that mail addressed to him and his clothing were found therein. In upholding the conviction we quoted the following language from *People v. Galloway*, 28 Ill. 2d 355, 192 N.E. 2d 370:

> "Where narcotics are found on premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt."

Id. at 145, 218 S.E. 2d at 226. In light of this Court's decision in *Wells*, the trial court correctly determined that a reasonable inference of defendant Ralph Tate's guilt could be drawn from the evidence.

JURY ARGUMENT

In Assignment of Error No. 13 the defendants allege error in a portion of the District Attorney's argument to the jury. We

have carefully examined the argument and find no prejudicial error.

> [A]rguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts. (Citations omitted.) Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. (Citations omitted.)

State v. Taylor, 289 N.C. 223, 226-27, 221 S.E. 2d 359, 362 (1975). No such impropriety has been shown here.

CHARGE TO THE JURY

Both defendants have alleged prejudicial error in the jury charge. Our examination of the charge confirms defendant Ralph Tate's allegations.

[7] Defendant Ralph Tate has assigned error to the trial judge's failure to state his contentions to the jury, and the State has conceded error in its brief. The record shows that the judge stated the contentions of the State and Beverly Tate. The prevailing law does not require the trial judge to state the contentions of the parties. However, when he chooses to do so, he is then required to give equal stress to the contentions of all parties. This requirement applies even when defendant does not testify, since testimony favorable to the defense often will be elicited from the State's witnesses. *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980). In the case before us, testimony favorable to defendant Ralph Tate was given by his sister, the co-defendant. This failure by the trial judge to give equal stress to opposing parties is a violation of G.S. 15A-1232. As mandated by *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978), such a violation is prejudicial error necessitating a new trial.

[8] The *femme* defendant argues that the trial judge committed prejudicial error when he failed to mention the defense of entrapment in his final mandate to the jury. Evidence of this defense was presented in Beverly Tate's testimony. The record shows that immediately prior to the final mandate, the judge explained

the defense of entrapment as well as the elements which the defendant must prove before a jury could find her not guilty because of entrapment. She contends that this explanation did not cure the defective mandate. Her argument is based upon our Supreme Court's decision in *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). *Dooley* held that the failure of the trial court to include an instruction on self-defense in the mandate was prejudicial error notwithstanding the court's discussion of the law on self-defense in the body of the charge.

We do not interpret the holding in *Dooley* as extending to other defenses such as entrapment. Our recent decision in *State v. Patterson*, 50 N.C. App. 280, 272 S.E. 2d 924 (1981), is in harmony with this conclusion. The defendant in *Patterson* had relied upon the defense of others at trial. The trial judge failed to instruct the jury on this defense in its final mandate. We ordered a new trial and gave the following rationale:

> The symmetry of our law would be skewed severely, and logic would be defied, were instructions to be required in the final mandate to the jury as to the mitigating circumstance of self-defense but not as to the mitigating circumstance of defense of others. These defenses are clearly the same in nature, and the rationale for requiring instructions in the final mandate as to one applies with equal force as to the other.

Id. at 285, 272 S.E. 2d at 927. We find that the defense of entrapment is not the same in nature to the defenses of self-defense or defense of others. The trial judge therefore was not required to charge in his final mandate on the defense of entrapment.

For error noted in the charge, defendant Ralph Edwin Tate, Jr., is entitled to a new trial. The defendant Beverly Elaine Tate received a fair trial free of prejudicial error.

As to defendant Ralph Edwin Tate, Jr.,

New trial.

As to defendant Beverly Elaine Tate

No error.

Judge ARNOLD concurs.

Judge VAUGHN concurs in the case of Beverly Elaine Tate but dissents in the case of Ralph Edwin Tate, Jr.

Judge VAUGHN dissenting.

I find no error in the charge of the court in the case of Ralph Edwin Tate so prejudicial as to require a new trial. The judge merely recapitulated the evidence of the State and Beverly Tate. Ralph Edwin Tate offered no evidence. The only reference to the "contentions" of the State is found in the following sentence immediately preceding the recapitulation of the State's evidence.

> "Now in this case the State of North Carolina has offered evidence which in substance tends to show, and the State of North Carolina argues and contends it tends to show, that. . . ."

In my opinion, the judge fully and correctly instructed the jury on the essential features of the case. If there was some part of the State's evidence defendant considered so favorable to him that he desired further elaboration, it was his duty to call that to the attention of the trial judge.

STEEL CREEK DEVELOPMENT CORPORATION, PLAINTIFF, AND R. S. SMITH AND WIFE, EVELYN L. SMITH, ADDITIONAL PARTY PLAINTIFFS v. EARL TERRY JAMES AND MARTHA S. JAMES, D/B/A TERRY'S MARINA, DEFENDANTS

No. 8126SC725

(Filed 3 August 1982)

1. Appeal and Error § 68— former appeal—law of the case

The decision of the Supreme Court on a prior appeal of a trespass action establishing that plaintiffs owned the submerged land on which defendants at one time affixed their boathouses became the law of the case on that issue.

2. Waters and Water Courses § 5— navigable waters—insufficient evidence for determination

Evidence that a lake was used for recreational boating and that small seaplanes had occasionally landed on its surface was insufficient for a deter-

mination as to whether the lake had the capacity to support "trade and travel in the usual and ordinary mode" and was thus a navigable body of water.

3. Waters and Water Courses § 3— ownership of submerged land—right to proscribe fixtures above land

The owner of submerged land, like the owner of dry land, owns also to the sky and to the depths. Therefore, the owners of submerged land had the right to proscribe permanent fixtures lying above such land and were entitled to enjoy the waters above such land free of defendants' boathouses.

4. Appeal and Error § 68— prior judgment not law of the case

In an action in which plaintiffs alleged that defendants were trespassing both by sinking anchors onto their submerged land and by floating boathouses on the waters above it, a partial summary judgment which granted a mandatory injunction ordering removal of the anchors and which denied summary judgment on the issue of damages and the Supreme Court decision which affirmed such judgment did not become the law of the case on the issue of injunctive relief as to the boathouses, and the superior court on remand properly ordered removal of the boathouses.

5. Evidence § 56— rental value of submerged land—exclusion of testimony

In an action to recover damages for trespass by sinking anchors into plaintiffs' submerged land and by floating boathouses on the waters above it, the trial court did not err in refusing to permit a realtor who had extensive experience appraising various types of property to state his opinion as to the rental value of plaintiffs' land where the witness admitted during voir dire examination that he had never appraised river bottom land, had never sold a boathouse or marina, was not familiar with the expense of operating a boathouse, and did not hold himself out as an expert in boathouse values or rentals, and where the witness by his own admission did not confine his appraisal to the plaintiffs' land on which defendants trespassed.

6. Trespass § 8— trespass to submerged land—damages—erroneous instruction

In an action to recover damages for trespass by sinking anchors into plaintiffs' submerged land and floating boathouses on the waters above it, plaintiffs were entitled to the fair rental value of their property during the period of the trespass regardless of operating losses shown by defendants, and the trial court thus erred in instructing that the jury could consider net operating losses of the boathouses in determining fair rental value.

APPEAL by defendants and cross-appeal by plaintiffs from *Gaines, Judge.* Judgment entered 30 January 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1982.

Fairley, Hamrick, Monteith & Cobb, by Laurence A. Cobb and F. Lane Williamson, for plaintiffs.

Harkey, Coira, Fletcher and Lambeth, by Henry Lee Harkey, Francis M. Fletcher, Jr., and Philip D. Lambeth, for defendants.

WHICHARD, Judge.

On 21 April 1972 plaintiff, Steel Creek Development Corporation, filed this action in District Court, Mecklenburg County, asserting that defendants were trespassing on its submerged property located under Lake Wylie, a flooded portion of the Catawba River. The trespass alleged consisted of construction of certain floats and boat slips which were placed on the waters over plaintiff's land. Plaintiff sought an order directing defendants to remove the floats and slips, an injunction against further development on its property, and other relief deemed appropriate.

On 14 June 1972 the District Court declined to issue a temporary injunction directing defendants to remove the floats and slips pending trial. Defendants then filed an answer which, *inter alia*, denied the trespass on plaintiff's land. As a further defense defendants contended (1) that the waters upon which they had erected the floats and slips were public waters, and (2) that plaintiff, through its president, R. S. Smith, knew of the plans for construction of the floats and slips, made no objection thereto, and should therefore be equitably estopped from complaining of defendants' actions.

On 10 June 1974 plaintiff was allowed to amend its complaint to allege that since institution of the suit, defendants had erected additional floats and slips from which they were deriving substantial rental income. Plaintiff prayed for judgment for the fair rental value of the submerged land for so long as it was occupied by defendants and for a permanent injunction ordering removal of the floats and slips. Defendants' answer admitted the completion of one set of boat slips, but denied that it had been affixed to plaintiff's submerged land.

After transfer of the action to Superior Court, plaintiff's motion to amend its complaint to add, as parties plaintiff, R. S. Smith and Evelyn L. Smith, to whom the corporate plaintiff had conveyed all its property upon dissolution, was allowed. Defendants answered the amended complaint asserting a new further answer, defense, and counterclaim, to wit, that plaintiffs had "pursued a course of conduct to bring about the financial ruin of the Defendants," thus allowing plaintiffs to be in a position to acquire defendants' property at great financial loss and detriment to

defendants. Defendants claimed loss of franchises and damage to their reputation, and sought $500,000 in damages. Plaintiffs moved to strike defendants' answer, asserting that defendants were entitled only to answer any new matter arising from the amendment to the complaint. This Court, in *Development Corp. v. James*, 35 N.C. App. 272, 241 S.E. 2d 122 (1978), held that the order granting defendants thirty days to file responsive pleadings to the amended complaint allowed them to respond "in any proper way they deem appropriate to the amended complaint." *Id.* at 273, 241 S.E. 2d at 123. Judge Britt dissented, but plaintiffs did not appeal. In reply to defendants' counterclaim, plaintiffs pled the three year statute of limitations.

At the conclusion of discovery, both parties moved for summary judgment. An affidavit filed by plaintiff R. S. Smith established that in 1930 plaintiffs had purchased the disputed land, subject to the right of Duke Power Company to back, pond, or raise the waters of the Catawba River; and that defendants had erected two boathouses, both of which were anchored on plaintiffs' land. Defendants submitted the affidavit of Earl Terry James, which did not deny plaintiffs' ownership of the land.

Judge Snepp determined there was no genuine issue as to any material fact except damages, and granted partial summary judgment for plaintiffs. He ordered defendants to remove the anchors on plaintiffs' submerged land and permanently enjoined defendants from using the land in that manner.

This Court dismissed defendants' appeal from that judgment as interlocutory, but the Supreme Court granted defendants' petition for discretionary review. In *Development Corp. v. James*, 300 N.C. 631, 638, 268 S.E. 2d 205, 210 (1980), the Supreme Court held that plaintiffs had "established beyond genuine dispute that anchors connected to the boathouses built and launched by defendants in 1971 and 1972 trespass on submerged land owned by the plaintiffs." In reaching this conclusion, the Court relied heavily on an order of Judge Snepp finding that, since defendants failed to deny that part of plaintiffs' amended complaint alleging conveyance of the disputed land by the corporate plaintiff to the individual plaintiffs, that conveyance, and therefore plaintiffs' ownership, was deemed to be admitted. *Id.* After also determining that plaintiffs had shown defendants' evidence insufficient

with respect to one or more of the essential elements of defendants' estoppel defense, the Court affirmed the partial summary judgment and remanded for trial on the issue of damages.

Before trial plaintiffs filed a motion (1) alleging that (a) cables attaching the boathouses to the anchors continued to rest on their submerged land, and (b) the boathouses themselves were permanently affixed above said land, and (2) seeking an order directing defendants to remove the boathouses from above the submerged land. Defendants responded, contending that in his partial summary judgment Judge Snepp refused to hold that the boathouses floating above plaintiffs' submerged land constituted a trespass, and that they had fully complied with the injunctive order.

At trial plaintiffs offered evidence tending to show that the fair market rental value of their property for the period from 1 January 1972 until 31 December 1980, was $15,414.00. Defendants' evidence tended to show that the annual rental value of the property was $10.00.

The issues and answers were:

1. What amount of damages, if any, are the plaintiffs entitled to recover of the defendants by reason of a trespass occurring by the sinking of anchors on the plaintiffs' property?

ANSWER: $1.00

2. What amount of damages, if any, are the plaintiffs entitled to recover of the defendants by reason of a trespass occurring by the floating and maintaining of boathouses above plaintiffs' submerged land?

ANSWER: $100.00

The court ordered defendants to pay plaintiffs $101.00 and to remove the two boathouses from the surface of the water above plaintiffs' submerged land.

Defendants appeal, and plaintiffs cross-appeal.

DEFENDANTS' APPEAL

[1] The first issue presented is whether defendants trespassed when they floated two boathouses above plaintiffs' submerged land.

As part of this issue, defendants seek to relitigate a question which has been settled, to wit, whether the submerged land is owned by plaintiffs. Judge Snepp's partial summary judgment and the Supreme Court opinion in *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980), established that plaintiffs owned the submerged land on which defendants at one time affixed their boathouses. That determination is the law of the case.

> "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal."

Transportation, Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E. 2d 181, 183 (1974), *quoting* Parker, J., dissenting in part in *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E. 2d 298, 305 (1962). Hence, to the extent that defendants seek to relitigate the question of ownership of the submerged land, their assignment of error is overruled.

[2] Defendants also attempt to raise the ownership issue under this assignment of error by contending that the waters of Lake Wylie are navigable, and that the State therefore owns the land thereunder. If a body of water is navigable in fact, then it is navigable in law. The test is "the capability of being used for purposes of trade and travel in the usual and ordinary mode . . . and not the extent and manner of such use." *Taylor v. Paper Co.*, 262 N.C. 452, 456, 137 S.E. 2d 833, 836 (1964). *See also* G.S. 146-64(4); *Parmele v. Eaton*, 240 N.C. 539, 548, 83 S.E. 2d 93, 99 (1954).

The navigability issue appears to have been raised for the first time in this litigation on this appeal. The record reveals only that Lake Wylie is used for recreational boating, and that small seaplanes have occasionally landed on its surface. This evidence does not suffice to determine the capacity of the lake to support "trade and travel in the usual and ordinary mode." *Taylor, supra.* We are bound by, and may not indulge in speculation on matters *dehors*, the record. *Equipment Co. v. Hertz Corp. and Contrac-*

tors, Inc. v. Hertz Corp., 256 N.C. 277, 285, 123 S.E. 2d 802, 808 (1962). We thus do not consider the navigability issue on this appeal.[1]

[3] The remaining question under this assignment of error is whether plaintiffs own the waters above their submerged land. While the presence of the water may be transitory, the owner of submerged land, like the owner of dry land, owns also to the sky and to the depths: *Cujus est solum, ejus est usque ad coelum et ad inferos.*[2] *See Ingold v. Assurance Co.*, 230 N.C. 142, 145, 52 S.E. 2d 366, 368 (1949); *Webster's Real Estate Law in North Carolina* § 7 (Hetrick Rev. 1981). The owner of submerged land thus has the right to proscribe permanent fixtures lying above such land. As owners of the submerged land, plaintiffs are entitled to enjoy the waters above such land free of defendants' boathouses. The determination that plaintiffs are so entitled was not error.

[4] The second issue presented is whether the partial summary judgment granted by Judge Snepp and affirmed by the Supreme Court was a final judgment, and is therefore *res judicata* on the issue of injunctive relief. Where, as here, the issue sought to be litigated was allegedly decided in an earlier appeal of the same case, the question is not whether the judgment is *res judicata*, but whether it has become the law of the case. *See Transportation, Inc. v. Strick Corp., supra.* In those terms, defendants assert that if Judge Snepp's judgment, which was affirmed by the Supreme Court, is the law of the case, Judge Gaines erred in allowing plaintiffs' motion for expanded injunctive relief and in ordering the removal of defendants' floats and slips from the waters over plaintiffs' submerged land.

1. Subsequent to oral argument counsel for defendants advised this court of the recent decision in *Hartman v. United States*, 522 F. Supp. 114, 117 (D.S.C. 1981). The United States District Court for the Rock Hill Division of South Carolina there found the waters of Lake Wylie to be navigable for purposes of determining admiralty jurisdiction. That decision does not bind this Court in determining the issue defendants attempt to present here, however; and absent record evidence, we are unable to make the determination requested.

2. An Irish lawyer named Sullivan once argued an air rights case before the highest court of Great Britain. A member of the court asked during oral argument: "Mr. Sullivan, have your clients not heard of the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*?" Sullivan responded: "My lords, the peasants of Northern Ireland speak of little else."

While there are cases granting the trial court authority to modify an injunction upon "a clear showing of changed conditions meriting relief," *McGuinn v. High Point*, 219 N.C. 56, 62, 13 S.E. 2d 48, 52 (1941); *see generally* Annot., 68 A.L.R. 1180 (1930); Annot., 136 A.L.R. 765 (1942), Judge Gaines' order did not modify the partial summary judgment granted by Judge Snepp, but instead granted injunctive relief where Judge Snepp's order was silent. In his partial summary judgment, Judge Snepp found there was no genuine issue as to any material fact except damages, and that plaintiffs were entitled to "injunctive relief requiring removal of the concrete anchors placed by defendants on the submerged land owned by the plaintiffs, the continuing use of which is a continuing trespass for which money damages are inadequate relief." The judgment found for plaintiffs on all the substantive, as opposed to the remedial, issues. Plaintiffs had alleged that defendants were trespassing both by sinking anchors onto their submerged land and by floating boathouses on the waters above it. Judge Snepp agreed. The partial summary judgment addressed two of the remedial issues through a mandatory injunction ordering removal of the anchors and a denial of summary judgment on the issue of damages. Judge Snepp did not rule on the question of injunctive relief as to the floats and slips, and the Supreme Court opinion thus did not address the question.

There is, then, no law of the case as to the issue of the injunctive relief ordered by Judge Gaines. Given our holding that plaintiffs have a right to have the waters above their submerged land free of permanent fixtures, Judge Gaines acted properly in ordering the removal of defendants' boathouses. Further, given the implicit findings by Judge Snepp as to the extent and continuing nature of defendants' trespass, mandatory injunction was the only adequate remedy available. We find no merit in defendants' contentions to the contrary.

PLAINTIFFS' CROSS-APPEAL

[5] Plaintiffs assign error to the court's refusal to allow the opinion testimony of a realtor, with extensive experience appraising various types of property, as to the rental value of their land. A witness who has knowledge of value gained from experience, information, and observation, may generally give his opinion of the value of specific real property. *Highway Commission v. Conrad*,

263 N.C. 394, 399, 139 S.E. 2d 553, 557 (1965); 1 *Stansbury's North Carolina Evidence* § 128 (Brandis Rev. 1973). Here, however, the witness admitted during *voir dire* examination that he had never appraised river bottom land, had never sold a boathouse or marina, was not familiar with the expense of operating a boathouse, and did not hold himself out as an expert in boathouse values or rentals. Further, in arriving at the rental value opinion plaintiffs sought to introduce, the witness by his own admission did not confine his appraisal to the plaintiffs' land on which defendants trespassed. In view of these facts, it was not error to exclude the proffered testimony.

[6] Plaintiffs also contend the court erred (1) in its instruction that the jury could consider net operating losses of the boathouses in determining fair rental value, and (2) in its refusal to instruct on damages as plaintiffs had requested. The instruction plaintiffs requested was:

> The measure of damages . . . is the rental value of the land during the period of the trespass, in addition to any other distinct damage done.
>
> In determining the rental value of the land during the period of the defendants' trespass, . . . you may estimate the rental value by determining the actual rents defendants obtain from the use of the land, but the recovery by the plaintiffs is not limited to the value received by the defendants, and the defendants are liable for the actual rental value of the land and not what the defendants actually gathered from the land.

One measure for recovery of rental value after a trespass is "the completely objectified one for the rental value of the land during the dispossession." D. Dobbs, *Remedies* § 5.8, p. 366 (1973). An alternative, more subjective measure "allows recovery of whatever rents or profits were actually received by the trespasser from the use of the land, subject, perhaps, to deductions for certain expenses." *Id.* This measure is usually optional and is used only when the rent actually received exceeds the objective rental value measure. *Id.*

North Carolina appears to allow recovery of the fair rental value unless actual rent is greater. In *Credle v. Ayers*, 126 N.C.

11, 35 S.E. 128 (1900), an action for ejectment with claims for mesne profits, the Supreme Court affirmed a determination of damages as the actual rental value of the land rather than the lower figure which defendant in fact collected. The implicit rationale was that the trespasser should not benefit from his "want of good husbandry [which] materially lessened the productiveness of the land." *Id.* at 16, 35 S.E. at 129. *See also* Dobbs, *Trespass to Land in North Carolina Part II. Remedies for Trespass*, 47 N.C.L. Rev. 334, 341-43 (1969); *cf. Seligson v. Klyman*, 227 N.C. 347, 42 S.E. 2d 220 (1947).

Hence, plaintiffs were entitled to the fair rental value of the property regardless of the operating losses shown by defendants. The charge on this issue was incorrect and was prejudicial to plaintiffs; and plaintiffs are therefore entitled to a new trial on the issue of damages.

RESULT

In defendants' appeal, no error.

In plaintiffs' cross-appeal, new trial.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. CHARLES PHILLIP BARRETT

No. 8121SC1168

(Filed 3 August 1982)

1. **Crime Against Nature § 2; Rape and Allied Offenses § 6.1— indictment for sexual offense—conviction of crime against nature—motion for appropriate relief**

Defendant's motion for appropriate relief from his conviction of crime against nature on the ground that he was indicted for a first degree sexual offense and crime against nature is not a lesser included offense thereof is denied. G.S. 14-27.4 and G.S. 14-177.

2. **Criminal Law § 146.4— constitutionality of statutes—question not properly presented**

The constitutionality of the crime against nature statute, G.S. 14-177, could not be considered on appeal where the question of constitutionality was

not raised at trial and was not properly presented by the one assignment of error brought forward on appeal.

Judge BECTON dissenting.

APPEAL by defendant from *Seay, Judge.* Judgment entered 18 June 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 27 April 1982.

Defendant was charged in a proper bill of indictment with a first degree sexual offense in violation of G.S. § 14-27.4. He was found guilty of crime against nature. From a judgment imposing a prison sentence of eight years minimum and ten years maximum, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elaine J. Guth, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

HEDRICK, Judge.

[1] We note that one day after this case was calendared for oral argument in this Court, on 28 April 1982, defendant filed a motion for appropriate relief on the grounds that the criminal offense described in G.S. § 14-177, crime against nature, is not a lesser included offense described in G.S. § 14-27.4, a first degree sexual offense, and that judgment entered on the verdict of crime against nature should be arrested. The motion for appropriate relief is denied.

[2] The only assignment of error brought forward and argued in defendant's brief is set out in the record as follows:

> 3. The Court erred in instructing the jury on the lesser included offense of crime against nature and in entering judgment on the verdict of guilty of crime against nature; on the grounds that G.S. 14-177 is unconstitutionally vague and overbroad on its face and as applied; thereby depriving the defendant of his rights as guaranteed by the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 1, 14, 19, 27 and 36 of the North Carolina Constitution.

The assignment of error set out above purports to be based on Exception No. 2 which is placed in the record after a statement that the jury was impaneled and the attorneys had had a conference with the judge with respect to the instruction to be given, and Exception No. 5 which is placed at the end of the judgment.

On appeal defendant argues G.S. § 14-177 is unconstitutional; however the constitutionality of the statute was not properly raised at trial, and the constitutionality of the statute is not raised on appeal by the one assignment of error brought forward. Therefore, the constitutionality of G.S. § 14-177 is not raised in this Court. Nevertheless, we have examined the record in light of the assignments of error set out in the record and find that the defendant had a fair trial free from prejudicial error.

No error.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

As does the majority, I find no error in the issue raised on appeal. I do believe defendant's motion for appropriate relief should have been granted, however, and I, therefore, dissent.

PROCEDURAL HISTORY

This case was heard in the Court of Appeals on 27 April 1982. On 28 April 1982, the defendant filed with this Court a Motion for Appropriate Relief, pursuant to G.S. 15A-1418 and *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981), to arrest judgment.

Chapter 15A § 1415(a) provides that "[a]t any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in [G.S. 14A-1415(b)]." One of the grounds enumerated is that "[t]he trial court lacked jurisdiction over . . . the subject matter." G.S. 15A-1415(b)(2). This the defendant has asserted in his Motion for Appropriate Relief. The Motion for Appropriate Relief was properly filed with this Court as G.S. 15A-1418(a) provides that "[w]hen a case is in the appellate

division for review, a motion for appropriate relief based on grounds set out in G.S. 15A-1415 must be made in the appellate division." *See State v. Sturdivant*, 304 N.C. at 308, 283 S.E. 2d at 729.

MOTION FOR APPROPRIATE RELIEF

The defendant asserts that the trial court was without subject matter jurisdiction in that the indictment was insufficient to support a conviction of the crime against nature. I agree.

Although the evidence at trial indicated that the defendant committed the crime of fellatio, the defendant was charged with first degree sexual offense by this indictment:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 24th day of February, 1981, in Forsyth County Charles Phillip Barrett unlawfully and wilfully did feloniously with force and arms commit and engage in a sex offense with another person, to wit: [name omitted], by force and against the will of the said [name omitted].
>
> s / ROBERT M. BROWN
> Assistant District Attorney

On the basis of case law and statutory authority, I, too, am compelled to conclude that this indictment is sufficient to charge the crime of first degree sex offense. *See State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982), and G.S. 15-144.2.[1] Moreover, the defendant is able to file a motion for a bill of particulars if he believes the indictment is too broad.

1. G.S. 15-144.2(a) reads:

> In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

Although under G.S. 14-21.1 "sexual act" means cunnilingus, fellatio, analingus, or anal intercourse . . .", and although *State v. Edwards* saves the indictment with regard to the sex offense charge, the indictment, in my view, is not sufficient to support the submission of the crime against nature charge to the jury.

Significantly, G.S. 15-144.2(a), which provides an approved "short form" of the essentials to be averred in a bill of indictment for sex offense, states, in pertinent part, that "the averments and allegations herein [*see* footnote 1, *supra*] . . . will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense, or an assault." Noticeably missing in the list of lesser included offenses is the crime against nature.

An indictment may support the conviction of an offense other than the one charged if the offense is a lesser included offense of the one charged in the indictment. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). In order for a crime to be a lesser included offense of another crime, *all* of the elements of the lesser offense must be included within the elements of the greater.

> It is well-established that when a defendant is indicted for a criminal offense he may be lawfully convicted of the offense charged therein or of any lesser offense if all the elements of the lesser offense could be proved by proof of the facts alleged in the indictment. He may not, upon trial under that indictment, be lawfully convicted of any other criminal offense whatever the evidence introduced against him may be. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960). Similarly, "[i]f the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some element not so included in the greater offense, the lesser is not necessarily included in the greater." *Id.* at 581, 114 S.E. 2d at 235-36.

State v. Davis, 302 N.C. 370, 372-73, 275 S.E. 2d 491, 493 (1981), *quoting State v. Rorie*, 252 N.C. 579, 581, 114 S.E. 2d 233, 235-36 (1958).

The elements of first degree and second degree sexual acts have been defined by our statutes.[2] The crime against nature is not specifically defined by our statutes; however, our Supreme Court has interpreted crime against nature to *require* penetration of or by the sexual organ.

> Conduct declared criminal by G.S. 14-177 is sexual intercourse contrary to the order of nature. Proof of penetration of or by the sexual organ is essential to conviction. This interpretation was put on the statute in *State v. Fenner*, 166 N.C. 247, 80 S.E. 970, decided in 1914. The Legislature has not disapproved of the interpretation then given by amending the statute. That interpretation accords with the interpretation generally given to similar statutes. The Supreme Court of Maine said: "[I]t does not follow that every act of sexual perversion is encompassed within the definition of 'the crime against nature' . . . The crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular distance." *S. v. Pratt*, 116 A. 2d 924; *S. v. Hill*, 176 So. 719 (Miss.); *People v. Angier*, 112 P. 2d 659 (Cal.); *Hopper v. S.*, 302 P. 2d 162 (Okla.); *S. v. Withrow*, 96 S.E. 2d 913 (W. Va.); *Wharton v. S.*, 198 S.E. 823 (Ga.); 81 C.J.S. 371; 48 Am. Jur. 550.

State v. Ludlum, 303 N.C. 666, 670-71, 281 S.E. 2d 159 (1981), *quoting State v. Whittemore*, 255 N.C. 583, 585, 122 S.E. 2d 396, 398 (1961); *see also State v. Fenner*, 166 N.C. 247, 80 S.E. 970 (1914).

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2. The relevant portions of G.S. 14-27.4, the first-degree sexual offense statute, reads:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person;
>
> . . .

In *Ludlum*, the defendant was charged with first degree sexual offense to wit: cunnilingus with a four-year-old girl. Our Supreme Court held that the sexual act did not require a penetration. 303 N.C. at 672, 281 S.E. 2d at 162. After citing dictionary definitions for the term cunnilingus, the Court gave a detailed anatomical definition of the female genitalia. It concluded that:

> [T]he Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties. We conclude, therefore, that the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of any part of a woman's genitalia.

Id.

I believe that a similar analysis is appropriate for the sexual act of fellatio in sexual offense cases. Giving the term its common, ordinary usage, Webster's Third New International Dictionary (1968) defines fellatio as "the practice of obtaining sexual satisfaction by oral stimulation of the penis." I do not understand this definition to require proof of penetration.

Proof of penetration *may or may not* be an element of a sexual act under G.S. 14-27.1; however, penetration is a necessary element of the crime against nature under G.S. 14-177. Because the crime against nature requires proof of penetration and because a sexual act may not require penetration, the crime against nature has a necessary element which may not be in common with the sexual act. In order for an offense to be submitted as a lesser offense, the greater must (not may) include all of the elements of the lesser. *Unless an indictment specifically alleges a sexual act by penetration, it would not include all of the elements of the crime against nature.*

Noticeably absent from the indictment in the case *sub judice* is any averment (there is not even a suggestion) that the crime committed was fellatio. Even more significant is the absence of an

averment that there was a penetration of or by the sexual organ. Again, the crime against nature requires "some penetration, however slight, of a natural orifice of the body." 303 N.C. at 671, 281 S.E. 2d at 159.

That an indictment for "the greater offense . . . must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense" is not new law. *See State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960).

In *Rorie*, our Supreme Court was faced with this issue: "Is a verdict of assault with a deadly weapon supported by a statutory indictment for manslaughter which fails to allege that a homicide was committed by means of an assault and battery or assault with a deadly weapon?" The *Rorie* Court answered the issue in the negative, set aside the verdict, and arrested the judgment. Quoting Wharton's Criminal Law and Procedure the Court said:

> [A]n indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense, or sufficiently sets them forth by separate allegations in an added count, but that when the indictment or information contains all the essential constituents of the minor offense, it sufficiently alleges that offense.

252 N.C. at 581-82, 114 S.E. 2d at 236. The *Rorie* Court then said:

> It must be conceded that the form of indictment under consideration charges an offense of which assault with a deadly weapon may or may not be an ingredient. [Citation omitted.] It does not set out manslaughter by assault and it is certainly insufficient to cover assault and battery or assault with a deadly weapon as an independent charge, separate and apart from the charge of manslaughter.

Id. The same can be said for the indictment in the case *sub judice*. It does not aver that the "sexual offense" committed was fellatio *involving the penetration* of or by a sexual organ, and it certainly does not sufficiently charge the crime against nature as an independent charge.

Further, I believe that the Legislature intended to punish a separate category of offenses by enacting G.S. 14-27.4 and 14-27.5. The offenses punishable under these statutes are violent, forcible acts committed against nonconsenting victims. In *Ludlum*, our Supreme Court spoke of the purpose of the legislation:

> Furthermore, unlike prosecutions under "the crime against nature" statute, G.S. 14-177, in which the act itself, if it is deemed to be such a crime, is punishable, none of the "sexual acts" described by G.S. 14-27.1(4) are punishable *per se* under Article 7A. They are punishable only if committed under the circumstances set out in G.S. 14-27.4 or G.S. 14-27.5. In order for a "sexual act" such as cunnilingus to be punished under this article as a first-degree sexual offense, it must either be committed "by force and against the will" of the victim and the perpetrator must:
>
> "a. [Employ] or [display] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. [Inflict] serious personal injury upon the victim or another person; or
>
> c. . . . [commit] the offense aided and abetted by one or more other persons[;]"
>
> or it must be committed, as in the instant case, upon a victim who is twelve years old or less, the perpetrator being "four or more years older than the victim." G.S. 14-27.4. In order for a sexual act such as cunnilingus to be punishable as a second-degree sexual offense, it must be committed "[b]y force and against the will" of the victim or against a victim
>
> "[w]ho is mentally defective, mentally incapacitated, or physically helpless, and the person performing the acts knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless." G.S. 14-27.5.

Thus in Article 7A prosecutions, although the form of the sexual act is limited to those listed in G.S. 14-27.1(4), the gravamen of the sexual offense itself is that it is committed by force and against the will of the victim or upon a victim

who because of age or other incapacity is incapable of consenting. The purpose of Article 7A is to increase the punishment for various kinds of *forcible* sexual acts, which were not punishable as rapes, beyond that which was available under "the crime against nature" statute, G.S. 14-177, or the statute which prohibits "taking indecent liberties with children." G.S. 14-202.1.

303 N.C. 672-73, 281 S.E. 2d at 163.

For the foregoing reasons, I vote to allow the motion for appropriate relief. The verdict should be set aside and the judgment should be arrested.

PARKER WHEDON v. JEANNETTE C. WHEDON

No. 8126SC754

(Filed 3 August 1982)

1. Divorce and Alimony § 16.8— amount of alimony—ability to pay

While the court must consider the needs of the spouse seeking alimony in the context of the family unit's accustomed standard of living, it must also determine that the supporting spouse has the financial capacity to provide the support needed therefor. G.S. 50-16.5.

2. Divorce and Alimony § 16.8— amount of alimony—ability to pay—income at time of award

Unless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the "capacity to earn" rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made.

3. Divorce and Alimony § 16.9— amount of alimony—ability to pay—immaterial findings

The trial court's order that plaintiff husband pay defendant wife $1,259 per month as permanent alimony until defendant vacated the marital home and $1,467 thereafter was supported by the court's finding that plaintiff's net average monthly income for 1980 would exceed $3,200, and the court's findings of plaintiff's average earnings from 1976 through 1980 and that his recently depressed income from his law practice was not expected to continue were immaterial and could be disregarded. G.S. 50-16.9.

4. Divorce and Alimony § 16.9— alimony—payment of automobile insurance

The trial court's order that the husband pay the wife's automobile liability and collision insurance was a proper incident of the court's sequestration of one of the husband's automobiles to the wife.

5. Divorce and Alimony § 16.9— alimony while living in marital residence—different amount upon move therefrom

The trial court's order that the husband pay one amount of alimony if defendant lives in the marital residence and another amount if she moves therefrom was not void as a conditional or alternative judgment, since the order was definite and certain, and the condition regarding defendant's moving merely operated to render effective one of the provisions of the order.

6. Divorce and Alimony § 16.6— absence of job skills—sufficiency of evidence

The trial court's finding that defendant wife had no readily available job skills was amply supported by evidence that defendant was fifty-five years old, had not worked in the business world in over 20 years, and would be fifty-eight years old before she could renew her teacher's certificate, assuming she successfully completed the necessary courses.

7. Divorce and Alimony § 16.9— possession of residence as alimony—payment of mortgage, taxes and insurance

The trial court did not err in granting sequestration of the marital residence to defendant wife and in ordering plaintiff husband to pay the mortgage payments, ad valorem taxes, and hazard insurance on the residence.

8. Trial §§ 11, 57— nonjury trial—limiting jury arguments

The district court in an alimony case did not err in limiting concluding arguments of counsel to 10 minutes for each party since the argument of counsel in a civil, nonjury case is a privilege, not a right, which is subject to the discretion of the presiding judge.

9. Divorce and Alimony § 18.16— counsel fees—work prior to pleadings

The trial court in an alimony action did not err in allowing counsel fees for work by defendant wife's attorneys prior to the filing of pleadings.

10. Divorce and Alimony § 18.16— counsel fees—two attorneys

An award of counsel fees to defendant wife in an alimony action was not erroneous because defendant was represented by two attorneys where the trial court eliminated duplicate trial time in determining the amount of the award.

11. Divorce and Alimony § 18.16— counsel fees—sufficiency of inquiry

The trial court conducted a sufficiently broad inquiry into the matter of attorney fees in an alimony action where the court held a separate hearing on this issue and made extensive findings of fact on the nature of the services rendered and the amount of time involved, and the court found specifically that plaintiff husband possessed the ability to defray these expenses.

12. Divorce and Alimony § 16.9— income taxes on alimony—erroneous order

While income tax consequences are among factors properly considered in awarding alimony under G.S. 50-16.5(a), the trial court erred in ordering plaintiff husband to pay income taxes on defendant wife's alimony since the tax payments would constitute further taxable income to defendant and result in an interminable cycle of further payments by plaintiff to defendant, and the

uncertainty thus created would render impossible a determination of the precise amount of alimony awarded and the reasonableness or fairness of the award.

APPEAL by plaintiff from *Saunders, Judge.* Judgment entered 17 February 1981 and supplemental order entered 25 March 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1982.

Plaintiff husband filed for absolute divorce based on one year's separation. He admitted that he abandoned defendant, that she is the dependent spouse and he is the supporting spouse, and that she is entitled to reasonable alimony.

After a hearing on permanent alimony, the court entered a judgment making pertinent findings of fact. Based on these findings, it (1) granted sequestration of the marital home and certain personal property to defendant, with plaintiff being responsible for mortgage payments, ad valorem property taxes, and hazard insurance; (2) granted to defendant possession of an automobile, with plaintiff being responsible for the maintenance of liability and collision insurance; (3) ordered plaintiff to pay the sum of $1,259 per month as permanent alimony until defendant vacated the marital home, the monthly payment then to increase to $1,467; and (4) ordered plaintiff to pay "a sum . . . calculated to enable . . . defendant . . . to discharge . . . her obligation for . . . income taxes" on the alimony payments. By separate order, plaintiff was directed to pay defendant's attorneys fees.

From the judgment and order, plaintiff appeals.

Justice & Parnell, by James F. Justice, for plaintiff appellant.

Cannon & Basinger, by A. Marshall Basinger, II, for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff contends the court applied an incorrect standard in determining the amount of permanent alimony.

"Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings,

earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a) (1976). The award will not be disturbed absent a clear showing that the court abused its discretion by ordering payments which are manifestly unsupported by reason. *Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E. 2d 58, 63 (1980). The appropriate amount is essentially "a question of fairness and justice to all parties." *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E. 2d 407, 410 (1976). While the court must consider the needs of the spouse seeking alimony in the context of the family unit's accustomed standard of living, it also must determine that the supporting spouse has the financial capacity to provide the support needed therefor. *See Williams v. Williams*, 299 N.C. 174, 183-84, 261 S.E. 2d 849, 856 (1980).

Plaintiff did not except to a finding that his net average monthly income for 1980 would exceed $3,200. Nor does he assign error to the amount of alimony he was ordered to pay, if that amount was based on his 1980 income. He instead cites error in (1) a finding that determination of the amount of alimony was specifically predicated upon his average earnings from 1976 through 1980, and (2) findings that his recently depressed income for the preceding nine months was not expected to continue due to an anticipated boost in the real estate market (from which he had derived the greater part of his law practice) and his own action in diversifying his law practice. He contends these findings indicate the court did not base the amount of alimony upon his current earnings, but upon past figures, together with a highly speculative future earning capacity projection, all without a showing that he was deliberately depressing his present income to avoid paying alimony.

[2, 3] Absent the unchallenged finding regarding plaintiff's 1980 income, the argument would have merit. Unless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the "capacity to earn" rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made. *Beall*, 290 N.C. at 674, 228 S.E. 2d at 410. Conceding, *arguendo*, that the findings to which plaintiff objects are immaterial and improper, the unexcepted to finding regarding his 1980 income nevertheless suffices to support the award entered. The immaterial findings thus can be disregarded.

In re Custody of Stancil, 10 N.C. App. 545, 549, 179 S.E. 2d 844, 847 (1971). If plaintiff's income continued to decrease, he had the remedy of seeking modification of the award pursuant to G.S. 50-16.9. This assignment of error is overruled.

[4] Plaintiff next contends the court erred in ordering him to pay defendant's automobile liability and collision insurance. He does not, however, contest the propriety of the sequestration of one of his automobiles to the defendant. The insurance payment was a proper incident of the sequestration of the automobile, which was entirely discretionary with the trial court. This contention is without merit.

[5] Plaintiff further objects to the requirement that he pay one amount of alimony if defendant lives in the marital residence and another if she moves therefrom. He contends such an order is void as a conditional or alternative judgment. We disagree. The order gave defendant the temporary sequestration of the residence, recognizing that she was entitled to a dwelling, but also that the residence would probably soon be sold. Upon its sale defendant would still need shelter, and the court allotted a sum of money requisite therefor in her alimony award. The order was definite and certain, and the condition regarding defendant's moving merely operated to render effective one of its provisions. Such a condition does not make the order void. *See Killian v. Chair Co.*, 202 N.C. 23, 29, 161 S.E. 546, 549 (1931).

Plaintiff's argument that there was no evidence regarding defendant's reasonable need for a dwelling if she should leave the marital home is likewise without merit. The order granted defendant funds commensurate with the expenses for an apartment and utilities set forth by plaintiff in his financial affidavit. While it would be the better practice to make this finding based on direct evidence from defendant as to her future shelter needs, the standard of measurement used was sufficient under the facts here.

Plaintiff further contends the court erred in its findings concerning his living expenses and those of defendant. He argues it did not consider a reasonable rental for an apartment in which he could live. We find no error.

At the time of the hearing plaintiff was renting a dwelling from a friend for a nominal sum, and he offered uncontradicted

evidence of his other real estate properties and their debt service, which the court considered in analyzing his expenses. The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves. *See Clark*, 301 N.C. at 131, 271 S.E. 2d at 65 (no rule of law requires a judge to accept a party's assertion of the amount of alimony needed to maintain a particular standard of living). We find no abuse of discretion in the findings regarding plaintiff's reasonable needs and expenses. We also find none in the findings regarding defendant's living expenses. Although they contain minor discrepancies, they are essentially supported by the evidence.

[6] Plaintiff also objects to the finding that defendant had no readily available job skills. The finding was amply supported by evidence that defendant was fifty-five years old, had not worked in the business world in over twenty years, and would be fifty-eight years old before she could renew her teacher's certificate, assuming she successfully completed the necessary courses. This argument is thus without merit.

[7] Plaintiff contends the court erred in granting sequestration of the marital residence to defendant and ordering plaintiff to pay mortgage payments, ad valorem property taxes, and hazard insurance. It is well settled that a court has the authority to grant possession of real estate as part of an alimony award. G.S. 50-17; *Yearwood v. Yearwood*, 287 N.C. 254, 214 S.E. 2d 95 (1975). Plaintiff's argument that the home is too large and expensive to be acceptable for defendant's reasonable needs is without merit. This decision is in the discretion of the trial judge, and we perceive no abuse in the exercise of that discretion. *Upchurch v. Upchurch*, 34 N.C. App. 658, 662, 239 S.E. 2d 701, 704 (1977), *disc. review denied*, 294 N.C. 363, 242 S.E. 2d 634 (1978). We also find no abuse of discretion in the requirement that plaintiff make the necessary mortgage, tax, and insurance payments on the house. *See Beall*, 290 N.C. at 677, 228 S.E. 2d at 412.

[8] Plaintiff's argument that the court erred in limiting concluding arguments of counsel to ten minutes for each party is without merit. Plaintiff acknowledges the general rule that

"counsel does not have an absolute right to argue in a civil, non-jury case. . . . [A]rgument of counsel [in such cases] is a privilege, not a right, which is subject to the discretion of the presiding judge." *Roberson v. Roberson*, 40 N.C. App. 193, 195, 252 S.E. 2d 237, 238 (1979). We perceive no abuse of discretion in the limitation of arguments here.

[9] Plaintiff makes certain contentions concerning the award of attorneys fees to defendant. He first argues the court should have disallowed fees for work by defendant's attorneys prior to the filing of pleadings, because defendant was not a "litigant" before that time. He relies on the precept that "[t]he guiding principle behind the allowance of counsel fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation." *Clark*, 301 N.C. at 136, 271 S.E. 2d at 67.

All litigation inevitably involves certain precursory activity. We do not interpret the terminology quoted above as intended to exclude from services for which fees are allowable legitimate work by counsel in such precursory activity. We thus hold this argument without merit.

[10] Plaintiff next contends the award was erroneous because defendant was represented by two attorneys, and plaintiff is therefore being ordered to pay for a duplication of services. The court, however, eliminated duplicate trial time amounting to $2,280 in value. This matter was in its discretion, and we find no abuse.

[11] Plaintiff further contends the court did not conduct a sufficiently broad inquiry into the matter of attorneys fees. We note that the court held a separate hearing on this issue and made extensive findings of fact on the nature of the services rendered and the amount of time involved. It also found specifically that plaintiff possessed the ability to defray these expenses. The issue presented is whether the court abused its discretion. *See Stanback v. Stanback*, 270 N.C. 497, 508-09, 155 S.E. 2d 221, 229-30 (1967). We find no abuse.

In a memorandum of supplemental authority, plaintiff cites *Condie v. Condie*, 51 N.C. App. 522, 277 S.E. 2d 122 (1981), for the proposition that the trial court had no authority to enter the sup-

plemental order on attorneys fees. In *Condie* no reference was made to attorneys fees in the original judgment. *Id.* at 528, 277 S.E. 2d at 126. The original judgment here expressly provided that the court would consider an award of attorneys fees upon presentation of affidavits. The cases are thus distinguishable.

Plaintiff further contends the court erred in refusing to allow him to reargue (1) evidence of his net income and assets, and (2) the effect of the court's prior alimony award upon his ability to pay. The court had previously heard extensive testimony concerning the financial status of the plaintiff. It was clearly aware of the amount of alimony awarded in the prior order and its effect on plaintiff's financial capability. We thus find no error in the action complained of.

[12] We do find error in the following provision ordering plaintiff to pay defendant's income taxes resultant upon the alimony award:

> In addition to the alimony award set forth in the preceding paragraph, the plaintiff is ORDERED and DIRECTED to pay to the defendant on or before the 10th day of April, the 10th day of June, the 10th day of September, and the 10th day of January of each year beginning with the 10th day of April, 1981, a sum of money calculated to enable [the] defendant to pay and to discharge in full her obligation for State and Federal income taxes (both estimated payments and final payments) on the alimony payable by the plaintiff to the defendant, to the end that the defendant shall receive the sums ordered in the preceding paragraph a[s] net after-tax alimony payments. The defendant shall account to the plaintiff within ten days after each tax filing period so as to reveal the exact amount of income taxes paid on alimony, and in the event of either an overpayment or an underpayment in alimony so as to achieve the net amount set forth in this order the parties shall adjust the payments between themselves within ten days thereafter.

Income tax consequences are among factors properly considered in awarding alimony under G.S. 50-16.5(a), and they should be given appropriate importance in determining the amount of alimony required to meet the reasonable needs of the dependent spouse. *See Clark*, 301 N.C. at 132-33, 271 S.E. 2d at 65-66. Because the tax payments by plaintiff ordered here constitute

further taxable income to defendant, however, the order results in an interminable cycle of further payments by plaintiff to defendant. *See* I.R.C. § 71 (1976). The uncertainty thus created renders impossible determination of the precise amount of alimony awarded, and the reviewing court thus cannot determine the reasonableness or fairness of the award. *See Tan v. Tan*, 49 N.C. App. 516, 522-23, 272 S.E. 2d 11, 16 (1980), *disc. review denied*, 302 N.C. 402, 279 S.E. 2d 356 (1981). *See also Kraunz v. Kraunz*, 293 N.Y. 152, 157-58, 56 N.E. 2d 90, 92 (1944) (unlawful to require supporting spouse to pay income tax on alimony payment to dependent spouse).

We therefore vacate that portion of the judgment which requires plaintiff to pay the income taxes on defendant's alimony. The cause is remanded for further proceedings in this regard not inconsistent with this opinion. Our affirmance, except as hereinabove vacated, of the judgment and supplemental order, should not be interpreted to preclude modification of non-vacated portions thereof if such is deemed appropriate to achieve fairness to all parties in light of vacation of the award of income tax payments on defendant's alimony.

Affirmed in part, vacated in part, and remanded.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

IN THE MATTER OF HUYCK CORPORATION v. C. C. MANGUM, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE STATE OF NORTH CAROLINA, THIRD PARTY DEFENDANTS

No. 8110SC1167

(Filed 3 August 1982)

1. Appeal and Error § 6.6— action against State—denial of motion to dismiss—immediate appeal

An immediate appeal lies under G.S. 1-277(b) from the trial court's refusal to dismiss a suit against the State on the ground of governmental immunity.

2. State § 4— third party contract action against State

A third party contract action could properly be maintained against the State and the Department of Transportation where the cause of action accrued after the decision of *Smith v. State*, 289 N.C. 303 (1976). G.S. 1A-1, Rule 14(c) and G.S. 143-291 *et seq.*

3. State § 4— third party complaint against Department of Transportation

G.S. 136-29 does not prohibit a contractor from filing a third party complaint against the Department of Transportation, arising out of the same transaction or occurrence, ancillary to an action in the General Court of Justice brought by a party not privy to the contract.

Judge VAUGHN dissenting.

APPEAL by third party defendants North Carolina Department of Transportation and State of North Carolina from *Brannon, Judge.* Order entered 21 August 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 10 June 1982.

This appeal arises from the denial of the motions to dismiss of third party defendants, State of North Carolina and Department of Transportation [hereinafter referred to as DOT], made in response to the third party complaint against them filed by defendant and third party plaintiff, C. C. Mangum, Inc. [hereinafter referred to as Mangum]. The facts necessary to dispose of the State of North Carolina and DOT's assignments of error will be stated in the body of this opinion.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, for defendant and third party plaintiff-appellee C. C. Mangum, Inc.

Attorney General Edmisten, by Associate Attorney Evelyn M. Coman, for third party defendant-appellants North Carolina Department of Transportation and State of North Carolina.

HILL, Judge.

While under contract with DOT for road work on highway U.S. No. 1 North, employees of Mangum operating its machines in the course of their employment ruptured gas lines servicing Huyck Corporation [hereinafter referred to as Huyck] on or about 24 August 1978 and on or about 8 June 1979. As a result of the severed lines, Huyck was compelled to close down its operations. Huyck subsequently brought suit against Mangum alleging negligence. Mangum thereupon filed a third party complaint

against the Public Service Company of North Carolina, Inc. [hereinafter referred to as gas company] alleging that it negligently failed to relocate or lower its gas lines so they would not be in conflict with Mangum's work on the highway. Mangum also filed a third party complaint against the State and DOT, alleging that it breached its contract and warranty with Mangum by failing to cause the gas lines to be relocated or lowered. In its third party complaints, Mangum also seeks to recover sums withheld by the State under a liquidated damages clause in its contract with the State for delay in the completion of the project. Mangum also seeks indemnification for any sums that it might be adjudged liable to Huyck. DOT answered the third party complaint against it and alleged, *inter alia*, a lack of jurisdiction over the subject matter of the third party complaint and that the complaint is barred by the doctrine of sovereign immunity. The judge below denied the motions to dismiss.

[1] On oral argument, Mangum argued that the judge's order denying the motions to dismiss on the grounds stated above is interlocutory and not appealable. G.S. 1-277(b) states that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." Although the State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suits, *Dalton v. Highway Commission*, 223 N.C. 406, 27 S.E. 2d 1 (1943), "[w]e have previously held that an immediate appeal lies under G.S. 1-277(b) from the trial court's refusal to dismiss a suit against the State on grounds of governmental immunity." *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 383, 269 S.E. 2d 217, 219 (1980). *Accord Sides v. Cabarrus Memorial Hospital, Inc.*, 22 N.C. App. 117, 205 S.E. 2d 284 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E. 2d 297 (1975). Therefore, we find that the present appeal may be maintained.

The question for our disposition is whether the judge below erred in denying the State and DOT's motions to dismiss for lack of subject matter jurisdiction. For the following reasons, we affirm the order denying the motions to dismiss.

At the outset of this opinion, we note that Mangum's third party complaint alleges two types of claims against the State and

DOT: (1) a claim for moneys withheld from the contract by DOT under the liquidated damages clause as a result of the delays caused by the gas line ruptures, and (2) a claim for indemnification in the event that it is adjudged liable to Huyck. Both of these claims are grounded upon an alleged breach by DOT of its contractual obligation to Mangum.

[2] The State and DOT first contend that Rule 14(c) of the North Carolina Rules of Civil Procedure does not allow third party *contract* actions to be maintained against the State. The rule states as follows:

> Notwithstanding the provisions of the *Tort Claims Act*, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the *Tort Claims Act*.

G.S. 1A-1, Rule 14(c) (emphasis added). Thus, the State and DOT argue that the Tort Claims Act, G.S. 143-291, *et seq.*, is the only substantive law waiving the State's sovereign immunity. For this reason, they contend that the present action cannot be maintained under Rule 14(c).

As noted above, this action is grounded in contract. Although there is nothing in Rule 14(c) to allow a third party contract action against the State, as the State and DOT contend, the case of *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), clearly establishes that the State and its agencies may be sued in contract. Chief Justice Sharp, speaking for the Court, stated as follows:

> We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, . . . in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.

Id. at 320, 222 S.E. 2d at 423-24.

In *MacDonald v. The University of North Carolina at Chapel Hill*, 299 N.C. 457, 463, 263 S.E. 2d 578, 582 (1980), the Supreme Court "reaffirm[ed] the conclusion of *Smith* in favor of a wholly prospective application of the abrogation of the doctrine of sovereign immunity." The effect of *Smith* upon the doctrine of sovereign immunity likewise has been recognized by this Court. *See, e.g. Wojsko v. State*, 47 N.C. App. 605, 267 S.E. 2d 708 (1980); *Vaughn v. County of Durham*, 34 N.C. App. 416, 240 S.E. 2d 456 (1977), *disc. rev. denied*, 294 N.C. 188, 241 S.E. 2d 522 (1978); *In re Metric Constructors, Inc. v. Lentz*, 31 N.C. App. 88, 228 S.E. 2d 533 (1976).

Therefore, we find that *Smith* is applicable to the present third party complaint by Mangum against the State and DOT since the action accrued after 2 March 1976. It is clear that the court below had jurisdiction of the subject matter before it.

Nevertheless, the State and DOT argue that when Mangum contracted with DOT, it contracted that G.S. 136-29 would be the *exclusive* remedy in any action upon the contract. They contend that the statute does not provide for the sort of third party complaint filed in this case.

G.S. 136-29 states as follows:

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based. In addition, the claimant, either in person or through counsel, may appear before the State Highway Administrator and present any additional facts and argument in support of his claim. Within 90 days from the receipt of the said written claim or within such additional time as may be agreed to between the State Highway Administrator and the contractor, the State Highway Administrator shall make an investigation of said claim and may allow all or any part or may deny said claim and shall have the authority to reach a compromise agree-

ment with the contractor and shall notify the contractor in writing of his decision.

(b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.

(c) All issues of law and fact and every other issue shall be tried by the judge, without a jury; provided that the matter may be referred in the instances and in the manner provided for in Article 20 of Chapter 1 of the General Statutes.

(d) The submission of the claim to the State Highway Administrator within the time and as set out in subsection (a) of this section and the filing of an action in the superior court within the time as set out in subsection (b) of this section shall be a condition precedent to bringing such an action under this section and shall not be a statute of limitations.

(e) The provisions of this section shall be deemed to enter into and form a part of every contract entered into between the Department of Transportation and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.

[3] The State and DOT are correct when they argue that Mangum's recovery, if any, must be based upon the terms and provisions of the contract. *Nello L. Teer Co. v. Highway Commission*, 265 N.C. 1, 143 S.E. 2d 247 (1965). G.S. 136-29(e) provides that the statute is deemed to be a part of "every contract" between DOT and "any contractor." G.S. 136-29 is therefore *a* remedy in an action upon the contract. However, we conclude that G.S. 136-29 does not prohibit a contractor from filing a third party complaint against DOT, arising out of the same transaction or occurrence, ancillary to an action in the General Court of Justice brought by a party not privy to the contract. To compel a contractor to proceed first upon the settlement procedure of G.S.

136-29 before joining the State and DOT in an action already filed in the General Court of Justice could result in a forfeiture of that remedy under these circumstances.

For these reasons the judge's order denying the State and DOT's motions to dismiss is affirmed. We emphasize that nothing said in this opinion is to be construed as a commentary upon the merits of the parties' claims.

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I vote to grant discretionary review of this interlocutory order denying appellants' motion to dismiss and to reverse the same. Such claims as Mangum may have against appellants arise out of the written contract—whether for breach of the contract by failing to remove the gas lines or for the liquidated delay damage withheld by appellants. In that contract, Mangum agreed that the timely filing of a claim with the State Highway Administrator "shall be a condition precedent to bringing" an action for any claim "under the said contract." G.S. 136-29. Since Mangum did not comply with the condition precedent, the Superior Court had no subject matter jurisdiction.

I do not, as the majority states, understand the State to argue that the Tort Claims Act "is the only substantive law waiving the State's sovereign immunity." Obviously it is not. The question of sovereign immunity does not arise in the case and *State v. Smith*, quoted by the majority, does not appear to be relevant. Indeed, the Court in *Smith* expressly referred to the statute in question as follows:

> "The legislature has already consented to be sued in many important contractual situations for example . . . G.S. 136-29(b) allows a road construction contractor to sue *if his contract claim is denied by the State Highway Administrator*. . . ." (Emphasis added.)

Smith v. State, 289 N.C. 303, 321.

Mangum could not have filed its suit directly against appellants because it did not comply with the contract and the statute. Even if the State could be made a third party defendant in a *contract* action, and it cannot in the absence of legislative authorization, the failure to meet the condition precedent would still bar the suit.

STATE OF NORTH CAROLINA v. MAYLON THEO WHITLEY

No. 8110SC1008

(Filed 3 August 1982)

1. **Burglary and Unlawful Breakings § 4; Criminal Law § 77.1— testimony concerning co-defendant's incriminating statements made in defendant's presence—admissible as admission by silence**

The trial court did not err in allowing a co-defendant's girlfriend to testify as to statements made by the co-defendant in defendant's presence since the statements incriminated both defendant and co-defendant, defendant was in a position to hear and understand the co-defendant's statement, and the defendant had the opportunity to speak but did not deny the co-defendant's statement. Under these circumstances, the statements were admissible as an admission by silence.

2. **Searches and Seizures § 24— sufficiency of affidavit supporting search warrant**

In a prosecution for breaking and entering and larceny, the trial court properly refused to suppress the fruits of a search made pursuant to a search warrant since the affidavit, which was based on information supplied by an informant, indicated that the informant was able to describe particular items in sufficient detail to identify them as items described on a list of stolen property, and since the informant's tip was sufficient to supply "reasonable cause to believe that the proposed search would reveal the presence upon the described premises of the objects sought."

3. **Criminal Law § 111.1— reading indictments in charge to jury—no error**

The trial court did not err in reading verbatim, at the beginning of the charge, two indictments against defendant since (1) G.S. 15A-1221(b) (Cum. Supp. 1981), which forbids reading of indictments to the jury, became effective long after defendant's trial, and (2) the prohibition against reading the indictments to the jury is inapplicable to the judge's jury charge.

4. **Larceny § 5— instructions on doctrine of recent possession proper**

In a prosecution for breaking and entering and larceny, the trial court clearly conveyed to the jury in its charge that the jury must find beyond a

reasonable doubt that defendant possessed the same property that was stolen when it charged on the doctrine of recent possession.

APPEAL by defendant from *Brewer (Coy E., Sr.), Judge.* Judgment entered 3 August 1971 in Superior Court, WAKE County. Certiorari allowed by the Court of Appeals 15 June 1981. Heard in the Court of Appeals 2 March 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of breaking and entering and larceny.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders Malcolm R. Hunter, Jr., and Lorinzo L. Joyner, for defendant.

WHICHARD, Judge.

[1] The State's evidence tended to show that three men participated in the commission of a breaking and entering and larceny; and that after the theft all three went to a home which one of the participants (Watson) shared with his girlfriend (Hawkins). Defendant's first argument is that the following testimony by Hawkins was inadmissible hearsay:

> Watson said that they had broken in a home and that they had parked the car on a road around behind the store. They had to go through the woods. They had broke in the home and that they had to leave because they heard someone coming and they were trying to get a television out of the home, and then someone drove up.

At trial defendant did not object to or move to strike this testimony. Thus, absent abuse of discretion by the court, there was no error in its admission. *State v. Spaulding,* 288 N.C. 397, 411-12, 219 S.E. 2d 178, 187 (1975), *death sentence vacated,* 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976). We find no abuse of discretion.

We further find the statement admissible as an admission by silence.

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

Spaulding, 288 N.C. at 406, 219 S.E. 2d at 184. *See also State v. Bowden*, 290 N.C. 702, 714-16, 228 S.E. 2d 414, 422-23 (1976).

The witness' testimony established that Watson's statements were made in defendant's presence, and that Watson expressed firsthand knowledge of the theft. That defendant was in a position to hear and understand Watson's statement, and had the opportunity to speak, is shown by the following testimony of the witness which immediately preceded the challenged statement:

> Watson and [defendant and the third participant] came to my house. . . . They brought with them some rifles, and money, rings. They put these items on the bed, talking about splitting it up. . . . I was in the room with them at the time they were discussing and splitting up. . . .
>
> . . . .
>
> They stayed at my house about thirty minutes I guess. . . .
>
> . . . .
>
> Q. . . . [D]uring the time that the three . . . were at your house, . . . was there any discussion about where the property had come from?
>
> A. Yes, sir.
>
> Q. And who was in that discussion?
>
> A. All three of them.
>
> Q. What was said about that?
>
> . . . .
>
> A. . . . [Watson and defendant] were both in on the conversation and they were both talking about the same thing.

Q. . . . [T]hey were talking about where the stuff they had in your bedroom came from?

A. Yes, sir.

Because defendant did not deny Watson's statement about how he and defendant acquired the stolen property, the witness' testimony established an admission by silence by defendant. We find no error in the court's failure to exclude the statement *ex mero motu.*

[2] Defendant next contends the court erred in refusing to suppress the fruits of a search made pursuant to a search warrant, because the affidavit underlying the warrant is insufficient on its face for failure to show the informant's basis of knowledge.

An "affidavit is sufficient if it supplies *reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought* and that they will aid in the apprehension or conviction of the offender." *State v. Vestal,* 278 N.C. 561, 575-76, 180 S.E. 2d 755, 765 (1971). (Emphasis supplied.) To supply reasonable cause to believe the objects sought are on the described premises, the affidavit supporting a search warrant must provide the magistrate with underlying circumstances from which to judge the validity of the informant's conclusion that the articles sought are at the place to be searched. *Aguilar v. Texas,* 378 U.S. 108, 114, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514 (1964); *State v. Hayes,* 291 N.C. 293, 298-99, 230 S.E. 2d 146, 149-50 (1976); *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972).

The affidavit here recites the following information:

> The facts which establish probable cause for the issuance of a search warrant are as follows: INFORMATION OBTAINED FROM A RELIABLE CONFIDENTIAL INFORMER WHOSE INFORMATION HAS PROVEN CORRECT IN THE PAST AND HAS LED TO THE RECOVERY OF STOLEN PROPERTY BEFORE. THIS INFORMANT HAS ITEMS DESCRIBED ON THE ATTACHED LISTS OF STOLEN PROPERTY IN THE POSSESSION OF MAYLON THEO WHITLEY IN THE PAST 2 WEEKS. THE INFORMANT STATES THAT MAYLON THEO WHITLEY HAS SOME OF THIS PROPERTY IN HIS POSSESSION NOW.

IN THE SECOND WEEK OF FEBRUARY, 1971, MAYLON THEO WHITLEY AND 2 OTHER MEN DID HAVE AND SELL TO MR. MILTON MASSEY OF KNIGHTDALE N.C. A SEARS TELEVISION SET BEARING SERIAL # 528-81108. THIS T.V. WAS STOLEN FROM THE RESIDENCE OF MR. RAYMOND L. MURRAY ON 2/8/71. THE INFORMANT STATES THAT ON THIS SAME WEEK MAYLON THEO WHITLEY HAD IN HIS POSSESSION A NUMBER OF GUNS, ROLLED MONEY (SILVER) AND OTHER ITEMS THAT FIT THE DESCRIPTION OF THE ITEMS STOLEN FROM THE RESIDENCE OF MR. PHILIP W. BLAKE OF RT. # 2, KNIGHTDALE N.C. ON 2/10/71. ALSO 2 OF THESE GUNS ON THE ATTACHED LIST HAVE BEEN RECOVERED FROM MR. WILL HUDSON OF 2205 EVERS DRIVE BY THE WAKE COUNTY SHERIFF'S DEPT. THESE 2 GUNS WERE LEFT WITH MR. HUDSON BY ONE OF THE SAME MEN THAT WAS WITH MAYLON WHITLEY WHEN THE T.V. SET WAS SOLD TO MR. MASSEY. MAYLON WHITLEY IS KNOWN TO MOST LOCAL LAW ENFORCEMENT AGENCIES AS A BREAK IN ARTIST AND HE HAS A CRIMINAL RECORD IN THIS STATE. HE IS UNDER VARIOUS CRIMINAL INDICTMENTS IN THREE COUNTIES AT THIS TIME AND IS PRESENTLY OUT ON BAIL WAITING TRIAL.

If the informant had stated to the affiant that recently he *personally had seen* the stolen items in defendant's possession at his residence, the affidavit would clearly suffice. *See, e.g., Hayes, supra,* 291 N.C. at 299, 230 S.E. 2d at 150; *State v. Graves,* 16 N.C. App. 389, 391-92, 192 S.E. 2d 122, 124 (1972); *State v. Shirley,* 12 N.C. App. 440, 443-44, 183 S.E. 2d 880, 882-83, *cert. denied,* 279 N.C. 729, 184 S.E. 2d 885 (1971). Absent a statement, however, claiming personal observation or otherwise

> detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation.

Spinelli v. United States, 393 U.S. 410, 416, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 589 (1969).

The affidavit here attributes three statements to the informant: (1) that defendant had in his possession, within the preceding two weeks, items described as stolen property on lists, attached

to the affidavit, which were compiled by victims of the thefts; (2) that defendant currently has some of these items in his possession; and (3) that during the second week in February 1971 (about one week before the 22 February 1971 affidavit and search warrant) defendant had in his possession items which fit the description of certain stolen items, specifically including guns and rolled silver money. The affiant testified on *voir dire* that he presented no information to the magistrate other than that contained in the affidavit.

Because the affidavit does not describe how the informant gathered his information, the informant's tip had to provide sufficient detail to show that the information was based on "something more substantial than a casual rumor." *Spinelli, supra.* The affidavit indicates that the informant was able to describe particular items in sufficient detail to identify them as items described on lists of stolen property. This detailed description supports the inference that the informant personally observed the allegedly stolen items.

It is also essential, however, that the informant's tip reveal that the objects sought are on the premises to be searched. *See Campbell, supra,* 282 N.C. at 131-32, 191 S.E. 2d at 757. The warrant here authorized a search of defendant's residence, but the informant stated only that the items were in defendant's possession. Since at least some of the items the informant alleged defendant possessed are not such as could reasonably be expected to be stored on defendant's person, however, the inference that the stolen goods were possessed at defendant's residence reasonably arises from the informant's allegations. *See Campbell,* 282 N.C. at 130-31, 191 S.E. 2d at 757 (informant's allegations, clearly distinguishable from those in instant case, do not support such an inference). Thus, the informant's tip was sufficient to supply "reasonable cause to believe that the proposed search . . . [would] reveal the presence upon the described premises of the objects sought," *Vestal, supra,* 278 N.C. at 576, 180 S.E. 2d at 765. This assignment of error is therefore overruled.

[3] Defendant next contends the court erred in reading verbatim, at the beginning of the charge, two indictments against him. G.S. 15A-1221(b) (Cum. Supp. 1981), which forbids reading of indictments to the jury, became effective 1 July 1978, long after

defendant's trial. Further, in *State v. McNeil*, 47 N.C. App. 30, 34, 266 S.E. 2d 824, 826, *cert. denied*, 301 N.C. 102, 273 S.E. 2d 306 (1980), 450 U.S. 915, 67 L.Ed. 2d 339, 101 S.Ct. 1356 (1981), this court said:

> [W]e find that this prohibition [G.S. 15A-1213] against reading the pleadings to the jury is inapplicable to the judge's jury charge. At that phase of the trial, 'to infer that they [the jury] would be given a distorted view of the case by a mere reiteration of the charge *couched in the words of the indictment* would be illogical.' *State v. Laughinghouse*, 39 N.C. App. 655, 658, 251 S.E. 2d 667, 669, *cert. denied and appeal dismissed*, 297 N.C. 615, 257 S.E. 2d 438 (1979). [Emphasis supplied.]

We thus overrule defendant's assignment of error to the reading of the indictments.

[4] Defendant finally contends the court erred in its instruction on the doctrine of recent possession.

> The inference that the person in possession of the goods is the thief arises upon proof beyond a reasonable doubt that (1) the property described in the indictment was stolen, (2) the property shown to have been possessed by the accused was the stolen property, and (3) the possession was recently after the larceny.

State v. Fair, 291 N.C. 171, 174, 229 S.E. 2d 189, 190 (1976). Defendant argues the court erred by failing to charge that, before the inference arises, the jury must find beyond a reasonable doubt that the property in defendant's possession was the *identical* property that was stolen. *See State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968).

The court adequately instructed on this point in the following portions of the charge:

> [T]he State . . . must prove beyond a reasonable doubt the defendant took property belonging to Phillip W. Blake and that he carried it away from the place where it was lawfully kept, that is the dwelling house of Phillip W. Blake, [and] that the owner did not consent to the taking and carrying away of the property . . . .

. . . .

. . . The law is that "If and when it is established that a building has been broken into and entered and that the merchandise—and that merchandise has been stolen therefrom, the recent possession of *such* stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering."

. . . .

. . . I charge you that if you find from the evidence and beyond a reasonable doubt, that on or about the 10th day of February 1971, the defendant Maylon Theo Whitley, did take and carry away property, personal property, belonging to Phillip Blake, without the consent of the owner, Phillip Blake, from his dwelling house, after a breaking and entering or entering, with the intent to steal said property and that he was not entitled to take it; then it would be your duty to return a verdict of guilty of felonious larceny . . . . [Emphasis supplied.]

Viewed as a whole and construed contextually, the charge clearly conveyed to the jury that it must find beyond a reasonable doubt that defendant possessed the same property that was stolen.

No error.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

LOU S. NELSON v. SIMMONS I. PATRICK, JOHN E. FLOURNOY, GWENDOLYN S. ROMBOLD, AND KINSTON RADIOLOGICAL ASSOCIATES, P.A.

No. 813SC1166

(Filed 3 August 1982)

1. Physicians, Surgeons and Allied Professions § 12.1— medical malpractice action—voluntary dismissal of one claim—no dismissal of another

In a medical malpractice action, plaintiff's voluntary dismissal of a claim based on the "negligence of the defendants in rendering medical services to the plaintiff" did not result in the dismissal of plaintiff's claim for negligent failure of defendants to obtain her informed consent for the treatment.

2. Physicians, Surgeons and Allied Professions § 13— medical malpractice—failure to disclose risks of treatment—statute of limitations

An action based on the failure of defendant physicians adequately to inform plaintiff of the risks of radiation therapy and to obtain her informed consent to radiation treatment is in the nature of a negligence action, not an action for assault and battery, and the three-year statute of limitations applies. G.S. 1-15(c); G.S. 1-52(16).

3. Physicians, Surgeons and Allied Professions § 17.1— medical malpractice—failure to inform of treatment risks—summary judgment not proper

In a malpractice action based on the alleged negligent failure of defendant physicians adequately to inform plaintiff of the risks of radiation therapy and to obtain her informed consent to such treatment, defendants were not entitled to summary judgment on the ground that plaintiff relied solely upon the recommendation of her prior physician in consenting to the radiation treatment since (1) a genuine issue of material fact as to reliance was presented, and (2) the referring physician was not a "health care provider" with respect to the radiation treatment within the meaning of G.S. 90-21.13(a)(1), and defendants could not shift to the referring physician their duty to obtain informed consent.

APPEAL by plaintiff and defendants from *Brown, Judge.* Judgment signed 25 May 1981 in Superior Court, PITT County. Heard in the Court of Appeals 10 June 1982.

By her complaint filed 5 July 1978, plaintiff alleged that defendants failed to adequately inform her of the known hazards of radiation therapy and thereby did not obtain her informed consent for the radiation treatment. Plaintiff further alleged the negligence of the defendants in administering the radiation treatment. As a result of the treatment, she received severe radiation damage to her intestines.

On 26 May 1981 the case was called for trial and, as recited in the judge's order, "counsel for the plaintiff orally gave notice of voluntary dismissal to the plaintiff's claim for relief based on the negligence of the defendants in rendering medical services to the plaintiff." Defendants then moved for leave to amend their answer, alleging as an affirmative defense that plaintiff's claim for rendering services without her informed consent was barred "by the applicable statute of limitations as prescribed by G.S. Sec. 1-54." The trial court granted the motion to amend and further granted defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendants, by

cross-assignment of error, appeal the denial of their motion for summary judgment.

Narron, Holdford, Babb, Harrison & Rhodes, by William H. Holdford, and Lanier & McPherson, by Dallas W. McPherson, for plaintiff.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Nigle B. Barrow, Jr. and Susan M. Parker, for defendants.

MARTIN (Harry C.), Judge.

[1] The first question before us is whether the trial court erred in dismissing plaintiff's action grounded on the negligent failure of the defendants to obtain her informed consent to the treatment they administered. It is defendants' contention that, bound as we are to the record on appeal, we must adopt their interpretation and find that plaintiff took a voluntary dismissal on the question of defendants' negligent failure to obtain informed consent. In short, they argue that "rendering medical services" includes the obtaining of the informed consent of the patient to the proposed treatment as well as the actual performance of the medical procedure. This may be so in some circumstances; however, in the present case common sense dictates that plaintiff did not intend a dismissal of her entire action, but only the claim under paragraph VI of the complaint alleging negligence in the administering (or rendering) of the treatment. We adopt plaintiff's interpretation of the word "rendering," i.e., the performance of the medical procedure, for the purposes of this appeal, and hold that her claim for the negligent failure of defendants to obtain her informed consent was not voluntarily dismissed.

[2] We next address the issue of whether plaintiff's cause of action sounds in negligence or common law battery. Defendants contend that because uninformed or invalid consent is tantamount to no consent at all, the subsequent treatment constitutes an unauthorized touching of the person, i.e., a battery. By so arguing, defendants would have us hold that any action based on lack of informed consent would be controlled by the one-year statute of limitations for a battery. We do not agree.

Plaintiff's claim is a common law action for malpractice, or negligence, based upon the alleged failure of defendants to

reasonably disclose to her the various choices with respect to the proposed treatment and the dangers inherently and potentially involved in the treatment. *McPherson v. Ellis*, 305 N.C. 266, 287 S.E. 2d 892 (1982). The cause of action is governed to some extent by N.C.G.S. 90-21.13.[1]

Subsection (a)(1) establishes the standard required of health care providers in obtaining the consent of the patient to be "in accordance with the standards of practice among members of the same health care profession with similar training and experience

1. § 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was 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; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

(c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

situated in the same or similar communities."[2] The subsection appears to answer the question left unresolved in *McPherson, supra,* and to require the use of expert medical testimony by the party seeking to establish the standard. *See Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762 (1955).

Subsection (a)(2) establishes an objective standard to determine whether the patient would have obtained a general understanding of the procedures or treatments contemplated and of the usual and most frequent risks and hazards inherent in them.

Subsection (a)(3) establishes an objective standard to determine whether the patient would have undergone the proposed treatment or procedure had he been advised by the health care provider in accordance with the statute.

In the case sub judice, the plaintiff consented to the treatment, but contends that it was not an informed consent.

Where a medical procedure is completely unauthorized, it constitutes an assault and battery, i.e., trespass to the person. *Hunt v. Bradshaw, supra* (Bobbitt, J., concurring). *See Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754 (1956). If, however, the procedure is authorized, but the patient claims a failure to disclose the risks involved, the cause of action is bottomed on negligence. Defendants' failure to make a proper disclosure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. N.C. Gen. Stat. § 1-15(c) (Cum. Supp. 1981); N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1981). *See Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339 (1968); *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617 (1964).

Under our holding, it is unnecessary for us to discuss plaintiff's third assignment of error respecting the trial court's granting of defendants' motion to amend their answer to plead the one-year statute of limitations. Plaintiff's claim for relief is not barred by the statute of limitations. Nor is it necessary to further discuss this issue upon defendants' argument that the court erred in denying their motion for summary judgment.

2. This was also the standard in North Carolina prior to the statute. *McPherson v. Ellis,* 305 N.C. 266, 287 S.E. 2d 892 (1982).

[3] Defendants also contend that they are entitled to summary judgment because plaintiff relied solely upon the recommendation of her prior physician, Dr. Satterfield, in consenting to the radiation procedure. In plaintiff's verified complaint, properly considered by the court on defendants' motion for summary judgment, she stated that she saw defendant Patrick "to consider undergoing a course of elective radiation therapy." A genuine issue of material fact exists. *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980); *Lowe's v. Quigley*, 46 N.C. App. 770, 266 S.E. 2d 378 (1980).

Moreover, under the facts of this case, defendants are the "health care providers" within the meaning of subsection (a)(1) of the statute. Dr. Satterfield was simply the referring physician. He was not a "health care provider" with respect to the radiation treatment. In order to receive the benefits of subsection (a)(1), defendants had a positive duty to obtain the informed consent of plaintiff to the radiation therapy in accordance with the subsection. They cannot shift their duty to Dr. Satterfield.

Absent the statute, defendants had the duty to obtain the informed consent of plaintiff before administering the radiation therapy to her. *Hunt v. Bradshaw, supra. See generally* W. Wadlington, J. Waltz and R. Dworkin, Cases and Materials on Law and Medicine 484-524 (1980).

Reversed.

Judges VAUGHN and HILL concur.

CHARLES S. SCALLON, ADMINISTRATOR OF THE ESTATE OF LARRY ALAN AIKEN v. PHILLIP McINTYRE HOOPER AND CHARLES KENNETH CALDWELL

No. 8110SC1111

(Filed 3 August 1982)

1. Rules of Civil Procedure § 68— offer of judgment—payment of costs

Where an offer of judgment was made by defendant and served on 21 May 1979 and the judgment for plaintiff was for less than the sum offered, the trial court erred in taxing costs against the plaintiff up to and including 15 Oc-

tober 1979, since under G.S. 1A-1, Rule 68(a) the judgment should have ordered the plaintiff to pay costs incurred only after 21 May 1979.

2. **Death § 7.7— wrongful death action—instruction on exemption of damages from taxation**

It is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are exempt from federal and state income taxes.

3. **Insurance § 104; Trial § 11— jury argument concerning insurance**

In a wrongful death action, defense counsel's argument to the jury that defendant would be "legally obligated to pay every single dollar of [the] verdict" and that the jury must deal "cautiously and fairly with the estate and the property of" defendant was improper since it could have been interpreted by the jury as meaning that defendant was not protected by automobile liability insurance.

4. **Rules of Civil Procedure § 59; Trial § 52.1— new trial on issue of damages—no abuse of discretion**

The trial court in a wrongful death action did not abuse its discretion in setting aside a verdict for plaintiff of $10,000 and in granting a new trial on the issue of damages on the ground that the verdict was "inadequate and contrary to the greater weight of the evidence."

APPEAL by plaintiff and defendants from *Godwin, Judge.* Judgment entered 11 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 28 May 1982.

Plaintiff-administrator instituted this action to recover damages for the alleged wrongful death of Larry Alan Aiken, who died 1 July 1976, at the age of 22, as the result of a collision on 30 June 1976 in Long Beach, North Carolina.

At the time of the collision decedent was employed as a Junior Engineer by Soils and Materials Engineers, Inc. He was operating a pickup truck owned by his employer. Defendant Hooper, aged 17, was operating a 1975 Pontiac convertible, registered in the name of Charles K. Caldwell, but in the possession of his estranged wife, Janet A. Caldwell.

It was stipulated that the negligence of defendant Hooper was the sole proximate cause of the death of plaintiff's intestate, and that the Pontiac operated by defendant Hooper was registered in the name of defendant Charles K. Caldwell.

In October 1979 at trial limited to the issues of agency and damages, the jury answered the agency issue in favor of defend-

ant Caldwell and awarded plaintiff $1,000 for pain and suffering and $10,000 for the wrongful death. On motion of plaintiff the trial court set aside the $10,000 verdict for wrongful death and granted a new trial on that issue only, denying the motion to set aside the $1,000 verdict for pain and suffering. Plaintiff appealed, and this Court ordered a new trial for error related to the agency issue, reported in 49 N.C. App. 113, 270 S.E. 2d 496 (1980), *disc. rev. denied*, 301 N.C. 722, 276 S.E. 2d 284 (1981).

At the second trial in April 1981 the jury again returned a verdict in favor of defendant Caldwell on the agency issue and awarded plaintiff $17,500 for the wrongful death. After the plaintiff gave notice of appeal, defendants gave notice of appeal pursuant to Rule 3, Rules of Appellate Procedure, and assigned as error: (1) the granting by the trial court of plaintiff's motion for a new trial on the issue of damages after the first trial and (2) the taxation of court costs against the defendants.

Bailey, Dixon, Wooten, McDonald & Fountain by Wright T. Dixon, Jr., Gary S. Parsons and Carson Carmichael, III, for plaintiff appellant-appellee.

Ragsdale & Liggett by George R. Ragsdale, Peter M. Foley, and John N. Hutson, Jr., for defendant appellees.

CLARK, Judge.

[1] Plaintiff has twice appealed from judgments in his favor. His displeasure with the favorable judgments is perhaps explained by defendants' offer of judgment in the amount of $50,001.00 entered on 21 May 1979. The offer was not accepted by the plaintiff. We cannot ignore this offer of judgment and the substantial disparity which exists between the amount offered and the amounts of the jury verdicts because plaintiff and defendant have excepted and assigned error to that part of the judgment taxing against the plaintiff the costs incurred "up to and including the entry and indexing of judgment of Judge Hamilton Hobgood, setting aside the jury verdict returned in this case on October 15, 1979 . . . ." This provision in the judgment was based on G.S. 1A-1, Rule 68(a), which provides in pertinent part that if an offer to allow judgment is not accepted, and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must *pay*

the costs incurred after the making of the offer." (Emphasis added.)

The purpose of Rule 68 is to encourage settlements and avoid protracted litigation. The offer operates to save the defendant the costs from the time of that offer if the plaintiff ultimately obtains a judgment for less than the sum offered. 7-Pt. 2 Moore's Federal Practice and Procedure § 68.06 (2d ed. 1982).

Since in this case the offer was made and served on 21 May 1979 and the judgment was for less than the sum offered, the trial court erred in taxing costs against the plaintiff up to and including 15 October 1979. Under Rule 68(a) the judgment should have ordered the plaintiff to pay the costs incurred after 21 May 1979. However, we have determined that the judgment must be reversed and the case remanded again for a new trial. Thus, the assessment of costs by the trial court depends upon the judgment finally obtained by the plaintiff.

[2] The plaintiff assigns as error the following instruction to the jury: "[Y]ou're to be aware that any recovery that may be had in this case . . . is not subject to income taxes either with the State or Federal Government."

The accuracy of the instruction is not challenged. For the federal exemption *see* Internal Revenue Code, § 104(a)(2), 26 U.S.C. § 104(a)(2), and *Norfolk and W. Ry. Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S.Ct. 755, *reh. denied*, 445 U.S. 972, 64 L.Ed. 2d 250, 100 S.Ct. 1667 (1980); and for the state exemption *see* G.S. 105-141(b).

Plaintiff argues that the instruction violates the collateral source rule, recognized in North Carolina, which refuses to allow the tort-feasor credit for the reasonable value of benefits to which he has contributed nothing. *Young v. R.R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966); 22 Am. Jur. 2d *Damages* § 206 (1965); 5 Strong's N.C. Index 3d *Damages* § 10 (1977). On the other hand, defendant argues that the collateral source rule only applies to direct benefits received by an injured party in compensation for the injury, as in *Young, supra*, in which the court refused to allow credit on damages for medical expenses paid through an insurance policy carried by plaintiff's employer. Defendant relies on *Norfolk & W. Ry. Co. v. Liepelt, supra*, which held that the

refusal to instruct the jury that the award would not be subject to income taxes was reversible error because otherwise the jury would calculate a wrongful death award under the assumption that any award will be taxable to the recipient.

The question has never been specifically addressed by the North Carolina courts, but a majority of other jurisdictions have ruled that the incidence of income tax as it relates to the damages award in wrongful death cases should not be mentioned in instructions to the jury. Annot., 63 A.L.R. 2d 1393 (1959); 1 S. Speiser, *Recovery for Wrongful Death*, § 8:14 (1975).

The majority view is not within, but is closely related to, the collateral source rule. And the reason generally given by the courts in support of the majority view differs from that given to support the collateral source rule. The reason courts adopt the majority view of refusing to take income tax consequences into consideration in awarding damages for wrongful death is that the amount of a recipient's future income tax liability is too conjectural or speculative a factor. *Mitchell v. Emblade*, 80 Ariz. 398, 298 P. 2d 1034 (1956); *Atlantic Coast Line R. Co. v. Brown*, 93 Ga. App. 805, 92 S.E. 2d 874 (1956); *Hall v. Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77, 50 A.L.R. 2d 661 (1955); *Highshew v. Kushto*, 235 Ind. 505, 134 N.E. 2d 555 (1956); *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W. 2d 42 (1952); *Smith v. Pa. R. Co.*, 47 Ohio Ops. 49, 99 N.E. 2d 501 (1950); *Dixie Feed & Seed Co. v. Byrd*, 52 Tenn. App. 619, 376 S.W. 2d 745 (1963), *appeal dismissed*, 379 U.S. 15, 13 L.Ed. 2d 84, 85 S.Ct. 147 (1964); and *see* cases compiled in A.L.R. 2d Later Case Service, Supplementing 63 A.L.R. 2d 1393.

In North Carolina the recovery in a wrongful death case is based largely on losses suffered by particular beneficiaries. G.S. 28A-18-1 and -18-2. The purpose of damages is to restore these beneficiaries to the position they would have occupied had there been no death. It would be inequitable to give the income tax exemption instruction to the jury without allowing evidence relative to the effect that the exemption would have on the future tax liability of each of the particular beneficiaries. And consideration of the taxation issue as it relates to each beneficiary would ordinarily involve abundant and intricate evidence and jury instructions on present and future tax and nontax liabilities of each

beneficiary. This would unduly complicate a wrongful death action, which is already complicated by our statute, G.S. 28-18-2, requiring many specific and some general elements to be considered in determining the present monetary value of the decedent to beneficiaries.

We adopt the majority view that it is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are exempt from federal and state income taxes. We note that in the case *sub judice*, the tax exemption instruction was given to the jury by the trial court, apparently at the request of the defendant after all the evidence was presented and without prior notice to the plaintiff, who thus had no opportunity to present evidence relating to the effect of the income tax exemption on the various beneficiaries.

Having determined that the tax exemption instruction was reversible error which requires a new trial, we will determine the issues raised by those other assignments of error which may recur upon retrial, but upon finding error we do not determine whether the error would have been prejudicial.

[3] Plaintiff assigns as error defendant's argument to the jury, over his objection, that the defendant would be "legally obligated to pay every single dollar of [the] verdict . . ." and that the jury must deal "cautiously and fairly with the estate and the property of Phillip Hooper."

In a court of justice neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law. *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955); *Yost v. Hall*, 233 N.C. 463, 64 S.E. 2d 554 (1951). During the trial of a case it is improper to mention insurance in either a positive or negative manner. *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965); *Electric Company v. Dennis*, 259 N.C. 354, 130 S.E. 2d 547 (1963); 1 Stansbury's N.C. Evidence § 88 (Brandis rev. 1973); Annot., 4 A.L.R. 2d 761 § 4 (1949).

When this argument is considered in light of the agency issue—the jury found that defendant was not the agent of the registered owner of the automobile which defendant was operating—there is an implication, and the jury could reasonably

infer, that defendant had no insurance coverage and that the award of any substantial damages would constitute a significant burden on the young defendant. Plaintiff does not seek punitive damages. The wealth or poverty of the defendant is not an issue. The argument that defendant would be obligated to pay every single dollar of the damage award may be interpreted by the jury as meaning that defendant was not protected by automobile liability insurance. The accuracy of the argument is irrelevant. Insurance was not an issue, and the argument was unfair to the plaintiff and improper.

[4] The defendant argues that in the first trial the court abused its discretion in granting a new trial on the issue of damages. The court found that the award of $10,000 was "inadequate and contrary to the greater weight of the evidence." The defendant relies on *Worthington v. Bynum and Cogdell v. Bynum*, 53 N.C. App. 409, 281 S.E. 2d 166 (1981); and *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E. 2d 168 (1978). In these two cases the Court of Appeals approved the rationale in *Taylor v. Washington Terminal Co.*, 409 F. 2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 24 L.Ed. 2d 85, 90 S.Ct. 93 (1969), and reversed the trial court's granting of a new trial for excessive verdict when the quantum of damages found by the jury was clearly within "the maximum limit of a reasonable range." But *Bynum, supra*, was appealed to the Supreme Court of North Carolina, which overruled *Howard v. Mercer, supra*, reversed the Court of Appeals, and reinstated the trial court's order for a new trial, 305 N.C. 478, 290 S.E. 2d 599 (1982).

The *Bynum* decision is controlling and we find no abuse of discretion in the order of the trial court setting aside the damage award and granting a new trial.

The other assignments of error are not discussed since they are not likely to recur upon retrial.

The judgment is reversed, and we order a

New trial.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. DELMAR F. WHITE

No. 8115SC1326

(Filed 3 August 1982)

Physicians, Surgeons and Allied Professions § 2; Statutes § 4.1— statutes regulating practice of pharmacy—constitutional

Construing G.S. 90-72 and 90-73 *in pari materia* with G.S. 90-71 and considering the administrative regulations adopted by the Board of Pharmacy pursuant to the authority granted by G.S. 90-57, the terms "drug" and "medicine" in G.S. 90-72 and 90-73 do not have their broad, popularly accepted meanings. The statutes deal with the practice of pharmacy, and the State may regulate the practice of pharmacy in the interest of the public health, safety and welfare; therefore, these statutes do not invade any area of constitutionally protected freedom, and the doctrine of overbreadth has no application to them. Further, these statutes give a person of ordinary intelligence fair notice of what is forbidden by them, and provided sufficient notice for a defendant who was charged with conducting a business for the purpose of selling drugs at retail and dispensing a prescription drug to determine whether his conduct in each case was proscribed.

APPEAL by the State from *McLelland, Judge.* Judgment entered 13 July 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 26 May 1982.

Defendant was charged with five counts of conducting a business for the purpose of selling drugs at retail, the defendant not being licensed as a pharmacist, in violation of G.S. 90-73. Defendant was charged with one count of dispensing a prescription drug, the defendant not being licensed as a pharmacist, in violation of G.S. 90-72. Defendant was convicted of all charges in district court. He appealed to superior court where he moved to dismiss the charges on grounds that the two statutes involved are unconstitutional. A hearing was held, and an order was entered finding facts and concluding that G.S. 90-72 and 90-73 are unconstitutionally vague and overbroad. The superior court dismissed all charges, and the State appeals.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

William V. McPherson, Jr. for defendant appellee.

Bailey, Dixon, Wooten, McDonald and Fountain, by Kenneth Wooten and Gary S. Parsons, for Amicus Curiae North Carolina Board of Pharmacy.

WEBB, Judge.

The principles governing the interpretation of statutes challenged as unconstitutional are well established. There is a presumption in favor of constitutionality. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961). When the constitutionality of a statute is challenged, every presumption will be indulged in favor of its validity. *State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967). The unconstitutionality of the statute must appear clearly. *State v. Anderson*, 275 N.C. 168, 166 S.E. 2d 49 (1969). If the statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *State v. Frinks*, 284 N.C. 472, 201 S.E. 2d 858 (1974). It is also well established that when a statute is unclear in its meaning, the courts will interpret the statute to give effect to the legislative intent. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). The legislative intent will be ascertained by such *indicia* as

> " 'the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means . . . .' "

Id. at 239, 244 S.E. 2d at 389, *quoting State v. Partlow*, 91 N.C. 550 (1884).

The statutes involved in this case read as follows:

"§ 90-72. Compounding prescriptions without license.

If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drugstore, pharmacy, or other place of business, shall cause or permit anyone not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this Article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00).

§ 90-73. Conducting pharmacy without license.

> If any person, not being licensed as a pharmacist, shall conduct or manage any drugstore, pharmacy, or other place of business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this Article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00), and each week such drugstore or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense."

The trial court found that neither statute defined the terms "drug" or "medicine" and that if these terms are given their popularly accepted definitions, the statutes would embrace conduct which is commonly regarded as lawful and which was not intended to be made criminal. We do not believe that these statutes, when properly interpreted, give the terms "drug" and "medicine" their broad, popularly accepted meanings.

The statutes involved are from the statutory provisions regulating the practice of pharmacy in this State. G.S. 90-53 *et seq.* G.S. 90-71 provides in part as follows:

> "It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this Article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this Article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this Article . . . .
>
> Nothing in this section shall be construed to interfere with . . . the selling at retail of nonpoisonous domestic

> remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients . . . ."

G.S. 90-71 involves the same subject matter as G.S. 90-72 and 90-73. G.S. 90-71 provides that certain proscribed conduct shall be unlawful, and G.S. 90-72 and 90-73 provide that the proscribed conduct shall be misdemeanors subject to specified punishment. *See Board of Pharmacy v. Lane*, 248 N.C. 134, 141, 102 S.E. 2d 832, 837-38 (1958). The three statutes are to be construed *in pari materia*. *Id.* When so construed, the limitations specified in G.S. 90-71 are to be read into G.S. 90-72 and 90-73. Thus, these latter statutes do not proscribe either the selling at retail of nonpoisonous domestic remedies or the selling of patent or proprietary preparations which do not contain poisonous ingredients.

Our construction of these statutes finds support in the administrative regulations adopted by the Board of Pharmacy pursuant to the authority granted by G.S. 90-57. These regulations are not controlling authority, *Duke Power Co. v. Commissioner of Revenue*, 274 N.C. 505, 164 S.E. 2d 289 (1968); however, they are evidence of what the statutes mean and may be considered when an issue of statutory construction arises, *Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978); *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973). The Board has adopted a broad definition of the term "drug." 21 NCAC 46 .0203. However, the Board has also defined the terms "nonpoisonous domestic remedies" and "patent or proprietary preparation." Nonpoisonous domestic remedies are defined to include "those drugs and preparations specified in General Statutes Section 90-71, and aspirin tablets, iodine tincture USP, and milk of magnesia, except that it shall not mean any of these of which the sale by a general merchant is otherwise prohibited by law." 21 NCAC 46 .0205. Patent or proprietary preparation is defined as

> "a medicinal preparation which is intended for use in the cure, mitigation, treatment, or prevention of disease in man or other animal pursuant to self-diagnosis; when the same is identified by and sold under a trademark, trade name, or other trade symbol, privately owned or registered with the United States Patent Office; which preparation is sold in the original and unopened package of the manufacturer or pri-

> mary distributor; which preparation in itself is not poisonous as defined in .0204 of this Section; which preparation is sold or offered for sale and is advertised for sale to the general public by the manufacturer or primary distributor; which preparation meets all of the requirements of the Federal Food, Drug and Cosmetic Act and the North Carolina Food, Drug and Cosmetic Act, and regulations promulgated under either of these; and the labeling of which preparation does not contain the legend, 'Caution: Federal Law prohibits dispensing without prescription' or any other legend or statement of like import."

21 NCAC 46 .0206. Poison is defined as "any substance which, when introduced into the body by any route of administration in an amount of 5 Gm. or 5 cc or less, or when acting locally, causes as the usual effect in a normal healthy adult serious injury to tissue, marked disturbances in bodily functions, or destruction of life." 21 NCAC 46 .0204.

Construing G.S. 90-72 and 90-73 *in pari materia* with G.S. 90-71 and considering the administrative regulations quoted above, we conclude that the terms "drug" and "medicine" in G.S. 90-72 and 90-73 do not have their broad, popularly accepted meanings. With our construction of G.S. 90-72 and 90-73 in mind, we turn to the constitutional challenges posed by defendant. Defendant argues that these statutes are unconstitutional as overbroad and vague.

"[T]he overbreadth doctrine is a separate principle devised to strike down statutes which attempt to regulate activity which the State is constitutionally forbidden to regulate . . . ." *State v. Banks*, 295 N.C. 399, 405, 245 S.E. 2d 743, 748 (1978). As stated in *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed. 2d 325, 338 (1964), "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Defendant argues that the present statutes are overbroad since they include such "over-the-counter" drugs as headache and cold remedies that are commonly sold by general merchants. We disagree. The present statutes, as interpreted by us above, do not include such sales. The statutes deal with the practice of pharmacy, and the State

may regulate the practice of pharmacy in the interest of the public health, safety and welfare. *Board of Pharmacy v. Lane, supra.* Since these statutes do not invade any area of constitutionally protected freedom, the doctrine of overbreadth has no application to them.

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. (Citation omitted.)" *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 83 S.Ct. 594, 598, 9 L.Ed. 2d 561, 565 (1963). The standard is whether the statutory language gives a person of ordinary intelligence fair notice of what is forbidden by the statute. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *In re Banks, supra.* A statute which does not involve First Amendment freedoms must be examined in light of the facts of the particular case when challenged as unconstitutionally vague. *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975); *United States v. National Dairy Products Corp., supra.* The statute is not to be weighed in the delicate scales required where First Amendment freedoms are at stake. *In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978). The record in the present case indicates the nature of the conduct for which defendant was charged. It indicates, for example, that on one occasion the defendant sold a prescription drug and that on another occasion he added a liquid to a bottle of cough syrup and sold the bottle. We conclude that G.S. 90-72 and 90-73 provided sufficient notice for the defendant to determine whether his conduct in each case was proscribed. It may be that some of the charges against the defendant will not stand up at trial. However, such will entitle the defendant to a dismissal as to those charges, not a declaration that the statutes are unconstitutionally vague.

Reversed and remanded.

Judges CLARK and WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIAM FREDERICK LINDSEY

No. 8129SC1433

(Filed 3 August 1982)

Searches and Seizures § 26— search warrant for dwelling—staleness of information—no probable cause

Information concerning the presence of marijuana in defendant's home which was received from a confidential informant more than a year prior to the issuance of a warrant to search the home was too stale to establish probable cause for issuance of the warrant. Furthermore, more recent information from an undercover agent concerning defendant's operation of a service station where drug activities occurred and his presence at a friend's apartment where drugs were sold was insufficient to establish a reasonable inference that defendant continued to possess drugs in his home at the time the search warrant was issued.

Judge WEBB dissenting.

APPEAL by defendant upon writ of certiorari from *Howell, Judge.* Judgment entered 13 February 1981 in Superior Court, POLK County. Heard in the Court of Appeals 11 June 1982.

Defendant was found guilty as charged of possession of more than one ounce of marijuana. He appeals from the imposition of a suspended sentence of not less nor more than five years and a fine of $1,000.

Prior to trial defendant moved to suppress evidence obtained pursuant to a search warrant. After a *voir dire* hearing, this motion was denied.

At trial the State presented evidence which tended to show that pursuant to a search warrant, law enforcement officials searched defendant's automobile and a mobile home shared by defendant and his brother. Plastic bags containing what was later identified by an S.B.I. chemist as marijuana were found in the bedrooms and the kitchen of the trailer. The total weight of the marijuana was approximately four ounces.

The defendant presented no evidence.

Attorney General Edmisten by Associate Attorney G. Criston Windham for the State.

Christopher S. Crosby for defendant appellant.

CLARK, Judge.

Defendant first argues that the information which formed the basis for the search warrant was too stale to establish probable cause and that therefore the court erred in denying his motion to suppress the evidence obtained.

The search warrant was issued on 7 January 1980 upon the affidavit of S.B.I. Officer Ned Whitmire. Whitmire stated that a confidential informant told Whitmire that he knew defendant to habitually keep drugs on his person, had seen drugs at defendant's home, and had seen defendant give drugs to his own children. This information was received over a year prior to issuance of the warrant. However, the information relied upon to establish probable cause came not only from the foregoing informant, but also from Ed Woods, an undercover agent of the Polk County Sheriff's Department. Approximately three weeks prior to issuance of the warrant, defendant and another man sold Woods over ten pounds of marijuana and 377 doses of phenobarbital. A month prior to this, defendant had attempted to sell two pounds of marijuana to Woods. Woods had also purchased drugs in defendant's presence at a service station run by defendant. The agent had seen defendant at a friend's apartment on several occasions when drugs were being sold.

It is fundamental that a search warrant is not issued except upon a finding of probable cause. G.S. 15A-242 to -245. Probable cause means that there must exist "a reasonable ground to believe that the proposed search will reveal the presence *upon the premises to be searched* of the objects sought and that those objects will aid in the apprehension or conviction of the offender. (Citation omitted.)" *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E. 2d 752, 755 (1972) (emphasis added).

Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. 68 Am. Jur. 2d *Searches and Seizures* § 70 (1973). The general rule is that no more than a "reasonable" time may have elapsed. The test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932);

State v. King, 44 N.C. App. 31, 259 S.E. 2d 919 (1979). Common sense must be used in determining the degree of evaporation of probable cause. *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630 (1979), *cert. denied*, 444 U.S. 836 (1980). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . ." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A. 2d 78, 106, *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976).

As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant. Annot., 100 A.L.R. 2d 525 (1965). This rule may not be appropriate in all cases, depending upon such variable factors as the character of the crime and the criminal, the nature of the item to be seized and the place to be searched. *Andresen v. Maryland*, *supra*. For example, in *State v. Louchheim*, *supra*, our Supreme Court held that although a period of fourteen months between observation of business records and issuance of search warrant had elapsed, there was a substantial basis for the magistrate to conclude the business records were "probably" still located at defendant's business offices when the search warrant was issued. The court based its decision on the particular facts of that case: the alleged crime was a complex one (conspiracy to commit felonious false pretenses and feloniously obtaining property by false pretenses), taking place over a number of years; the place to be searched was an ongoing business; the affidavit alleged that the invoices were never removed from defendant's offices; and the items to be seized included books, records and documents kept in the course of business by defendant's corporation.

Similarly, in *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980), the passage of five months between the time an alleged accomplice last saw a hatchet and welder's gloves and the date of issuance of the search warrant was held not to dissipate probable cause. In that case, the court relied upon the fact that the items to be seized were not incriminating in themselves, were of enduring utility to defendant, and were normally kept by defendant at his parents' home.

The reasoning of the *Louchheim* and *Jones* decisions is inapplicable, however, to the facts of the case before us. Unlike the foregoing cases, the subject of this search warrant was not an item expected to be kept for extended periods of time or designed for long-term use. Rather, the item sought to be seized was marijuana, a substance which can be easily concealed and moved about and which is likely to be disposed of or used. We therefore find that the year-old information was too stale to establish probable cause to search defendant's residence.

Although the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities, the year-old information was the only evidence of residential possession by defendant. The more recent information provided by undercover Agent Woods concerned defendant's operation of a service station where drug activities occurred and his presence at a friend's apartment where drugs were sold. The fact that defendant had this more recent involvement with drugs establishes no reasonable inference that he continued to possess drugs in his home at the time the search warrant was issued. The affidavit merely implicates a probability of the continued presence of drugs in defendant's home. Nowhere in the recent information from Agent Woods is there any statement that drugs were possessed or sold in or about the dwelling to be searched.

We conclude that the search warrant was invalid in that the information concerning residential possession was too stale to establish probable cause and in that there were no reasonable grounds presented by the more recent information to believe the proposed search of defendant's home would produce the drugs specified in the application for the warrant. Since there was not sufficient basis for finding probable cause to issue the search warrant, the evidence obtained as a result of its issuance was erroneously admitted at trial.

The order denying defendant's motion to suppress is reversed. Because the judgment was based upon the admission of this evidence, defendant is entitled to a

New trial.

Judge WHICHARD concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe that evidence that marijuana was in the defendant's home one year previously together with evidence that the defendant had sold marijuana recently is evidence from which a magistrate could conclude there is probable cause marijuana is in the defendant's home.

IN THE MATTER OF THE ESTATE OF J. E. COLLINS, DECEASED

No. 8130SC1119

(Filed 3 August 1982)

Appeal and Error § 6.2— appeal from order setting case for jury premature

In an action stemming from objections to the appointment of an administratrix of an estate, an appeal from an order of the trial court setting a trial by jury of an issue of fact raised by the "pleadings" and evidence before the clerk was premature.

APPEAL by respondent, Mary Lee Collins, from *Thornburg, Judge.* Order entered 18 August 1981. Heard in the Court of Appeals 7 June 1982.

J. E. Collins died in June 1980. His sister, his mother, and his wife survived him. He and his wife were separated at the time of his death. His sister was granted letters of administration, and the wife filed objections and exceptions and gave notice of appeal. The mother of deceased renounced her right to administer and requested that her daughter, sister of deceased, be appointed. On hearing the appeal, Judge Thornburg entered an order revoking the order granting letters of administration to the sister and remanded the cause to the Clerk for further proceedings. The wife filed written application for appointment as administratrix, and on 1 August 1980, the Clerk entered an order appointing her as administratrix. Claim for funeral expenses was filed with the administratrix as was a claim of the sister for funeral expenses

and legal fees paid by her. The administratrix denied the claim for legal fee. The sister filed a motion requesting that the letters of administration issued to the wife be revoked and asking for a "full evidentiary hearing". The wife filed a motion to dismiss that petition. The Clerk entered an order directing the administratrix to appear and show cause why the letters issued to her should not be revoked. On hearing the Clerk entered an order denying the sister's motion, allowing the wife's motion to dismiss, and reaffirming the appointment of the wife. The sister filed "notice of objection and exception". The Clerk also entered an order allowing the sister's claim for counsel fee and court costs. The administratrix gave notice of appeal from that order. On hearing of appeal, Judge Sitton entered an order denying the sister's demand for a jury trial, vacating the order allowing the claim for attorney's fees, and remanding "the Clerk's Order of January 2, 1981 regarding Mary Lee Collins' (sic) motion to dismiss . . . to the Clerk of Superior Court for Swain County for further hearing for proper findings of fact and conclusions of law." The wife filed objections and exceptions to this order. Thereafter and on 21 April 1981 the sister filed a complaint, and summons was served on the administratrix. She prayed as follows:

> (1) That Petitioner's original Motion filed on November 14, 1980, be taken with the Verification filed on December 2, 1980, and the Affidavit filed on December 3, 1980, together with this Complaint, and be heard and the Court determine whether or not the Letters of Mary Lee Collins should be revoked.
>
> (2) That an Order issue to Mary Lee Collins to show cause why her Letters of Administration should not be revoked.
>
> (3) That a hearing date in this matter be set.
>
> (4) That Petitioner be appointed Administratrix of the Estate of J. E. Collins.
>
> (5) That Mary Lee Collins be required to account for all assets of the Estate and that the motor vehicle and all other personal property be placed in the custody of the Court until a final determination of the issues before the Court.
>
> (6) That inquiry be made and be determined who are the rightful heirs at law of J. E. Collins.

(7) That the Clerk of Superior Court of Swain County declare that Mary Lee Collins did willfully and without just cause abandon and refuse to live with J. E. Collins during his lifetime.

(8) That Mary Lee Collins be barred from all rights to administer the Estate of J. E. Collins, all rights of intestate succession in said Estate, the right to claim or succeed to a homestead and the real property of J. E. Collins, and any rights or interest in the property of J. E. Collins of any sort or nature, real or personal.

(9) That the Clerk issue an Order, requiring that various witnesses appear whose names shall be provided by the attorney of the respective parties and that these witnesses be sworn and their testimony be recorded by a Court Reporter.

At the same time the mother filed a complaint and summons was served on the administratrix. Her prayer for relief was as follows:

(1) That the Letters of Administration previously issued to Mary Lee Collins be revoked; that an Order issue requiring her to appear before the Court and show cause why the Letters should not be revoked.

(2) That Polly Collins Medford be appointed Administratrix of the Estate of J. E. Collins.

(3) That Mary Lee Collins be required to account for all the assets in said Estate, and that the motor vehicle and all other personal property be placed in the custody of the Court until a final determination of the issues before the Court.

(4) That all the funds which Mary Lee Collins took from the account of Jessie Lee Medford be returned to Jessie Lee Medford.

(5) That a hearing date in this matter be set.

(6) That an inquiry be made and a determination made as to who are the rightful heirs at law of J. E. Collins.

(7) That the Clerk of Superior Court of Swain County declare that Mary Lee Collins did willfully and without just cause abandon and refuse to live with J. E. Collins during his lifetime.

(8) That Mary Lee Collins be barred from all rights to administer the Estate of J. E. Collins, all rights of intestate succession in said Estate, the right to claim or succeed to a homestead and the real property of J. E. Collins and any rights or interest in the property of J. E. Collins of any sort or nature.

(9) That the Clerk issue an Order requiring that various witnesses appear whose names shall be provided by the attorneys for the respective parties and that these witnesses be sworn and their testimony be recorded by a Court Reporter.

The Clerk entered an order setting the matter for hearing on 12 May 1981 "pursuant to order of the Honorable Claude S. Sitton dated February 26, 1981, remanding this cause to the Clerk of Superior Court of Swain County for further hearing for proper findings of fact and conclusions of law". The administratrix filed answer to the two complaints. On 8 June 1981, a hearing was had before the Clerk at which both petitioner and respondent put on evidence. At the conclusion of the hearing and on 22 June 1981, the Clerk entered an order reciting that the hearing was had "upon remand by the Honorable Claude S. Sitton of Mary Lee Collins' (sic) Motion to Dismiss the Petitioner's Motion that Mary Lee Collins show cause, if any there be, why she should not be removed as administratrix of the Estate of J. E. Collins . . ." The court concluded that an issue of fact exists, to wit: "Did Mary Lee Collins willfully and without just cause abandon and refuse to live with the deceased, J. E. Collins, and was not living with him at the time of his death." Upon that finding the court concluded that the issue of fact should be tried by a jury, and ordered the cause transferred to the civil issue docket of the Swain County Superior Court to be tried at the next session of Superior Court. From the entry of that judgment, the wife objected and excepted. On 18 August 1981, Judge Thornburg entered an order reciting that the matter had been placed on the motion calendar for the 18th of August 1981 at the regular 17 August 1981 Session of the Superior Court of Swain County; that counsel for the wife, administratrix, and counsel for the sister were present; and that the court heard arguments of counsel and read and considered written briefs. The court ordered that the cause be set for jury trial in the Superior Court of Swain County "in accordance with the

order of the Clerk of the Superior Court of Swain County dated 22 June 1981". From the entry of this order, the wife, administratrix, appeals.

Joseph A. Pachnowski, Gerald R. Collins, Jr., and Orville Coward, for appellee Jessie Lee Medford.

Herbert L. Hyde for appellant Mary Lee Collins, administratrix.

MARTIN (Harry C.), Judge.

Obviously this matter has been unnecessarily complicated and protracted. Apparently, nothing, at least at the time of the appeal, had been done with respect to the complaint filed by the sister and answer thereto filed by the wife, administratrix. In any event, this appeal is premature. Judge Thornburg, in his discretion, ordered a trial by jury of the issue of fact raised by the "pleadings" and evidence before the Clerk and set out in his order of 22 June 1981. There is no contention that he abused his discretion. The matter was properly before him. See *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967), and *In re Estate of Adamee*, 28 N.C. App. 229, 221 S.E. 2d 370 (1976), *rev. on other grounds*, 291 N.C. 386, 230 S.E. 2d 541 (1976).

The parties have noted objections and exceptions throughout the record properly preserving their right to bring those matters forward on appeal when a final appealable order is entered.

After the one issue which will resolve the right to qualify as administratrix is resolved by the jury, the Superior Court will not appoint a personal representative, but will remand the matter to the Clerk for the purpose of appointing a personal representative consistent with the decision of the Superior Court. *In re Estate of Adamee*, supra.

The appeal is dismissed.

Judges HILL and BECTON concur.

Flack v. Garriss

PATRICK RANDOLPH FLACK AND LOIS ELAINE FLACK, BY AND THROUGH THEIR GUARDIAN AD LITEM, LOIS R. FLACK GARRISS v. MARCUS A. GARRISS, BIANCA M. BROWN, GILBERT W. CHICHESTER, CMC FINANCE GROUP, INC.

No. 816SC1164

(Filed 3 August 1982)

1. **Fraudulent Conveyances § 3.4— alleged fraudulent conveyance of notes —dismissal of action against attorney**

An action concerning the allegedly fraudulent conveyance of notes was properly dismissed as to defendant attorney where the complaint merely alleged that the attorney had custody of the notes and asked that a temporary injunction be issued to prevent the further transfer of the notes, such a restraining order was entered, and the notes themselves were produced in open court and introduced into evidence.

2. **Fraudulent Conveyances § 3— action to set aside conveyance of notes —instructions on elements of action**

In an action to set aside the allegedly fraudulent conveyance of notes, the trial court's instruction that "first there must be a voluntary conveyance" was not prejudicial error where the trial court properly defined "voluntary conveyance" and also thereafter correctly stated the law regarding a conveyance made upon valuable consideration but with the intent to defraud creditors.

Judge VAUGHN concurring in part and dissenting in part.

APPEAL by plaintiffs from *Fountain, Judge.* Judgment entered 8 June 1981 in Superior Court, HALIFAX County. Heard in the Court of Appeals 10 June 1982.

Josey, Josey & Hanudel, by C. Kitchin Josey, for plaintiff-appellants.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, for defendant-appellees Garriss and Brown.

Chichester & Harris, by Gilbert W. Chichester, for defendant-appellee Chichester.

Moore & Van Allen, by Robert W. King, Jr., for defendant-appellee CMC Finance Group, Inc. (No brief on appeal.)

HILL, Judge.

In this action plaintiffs, by and through their guardian ad litem, sought to have three notes of indebtedness declared to be

solely owned by defendant Garriss so that they could levy against the notes in accordance with a prior judgment.

At various times in 1972, defendant Garriss purchased three ten-year subordinated capital notes of the CMC Finance Group, Inc., each with a face value of $10,000. Defendant Garriss and Lois R. Flack Garriss were married on 20 January 1976 and were divorced on 11 February 1977. Mrs. Garriss filed an action on 9 March 1977 on behalf of the two children, Lois Elaine Flack and Patrick Randolph Flack, seeking to recover maintenance and support for the children from defendant Garriss.

On 27 January 1978, during the pendency of this action, defendant Garriss transferred the notes in question to defendant Bianca M. Brown in consideration of $20,000 and the remaining interest from the notes. Defendant Gilbert W. Chichester, acting as attorney for defendant Garriss, signed the note transfer as witness.

By consent order dated 29 March 1978 defendant Garriss agreed to pay Mrs. Garriss, for the benefit of the two children, the sum of $36,000 for each child payable at the rate of $400 per month. The order provided that failure to make a payment, after 30 days' written notice from Mrs. Garriss and a judicial determination of nonpayment, would cause the balance of the remaining payments to come due. The consent judgment specifically stated that the judgment was not a lien upon any real property and could not be enforced by execution and levy against defendant Garriss or any of his property until an order was entered by the court and noted by the clerk finding the requisite nonpayment of support along with the remaining amount to be paid.

On 29 August 1979, defendant Garriss last made payment pursuant to the consent judgment. By letter dated and mailed 11 September 1979, Mrs. Garriss gave defendant Garriss written notice of his failure to pay the child support installment. On 6 November 1979, an order was entered in the Superior Court of Halifax County, finding that defendant Garriss did not make the required child support payment and that more than 30 days had elapsed since he was notified of this failure to make the payment. The order declared that the sum of $29,200 for each child was due and payable from defendant Garriss.

After the entry of the 6 November 1979 order, execution was issued on any property of defendant Garriss wheresoever located. All such executions were returned stating that no property was to be found with the exception of $1,321.67.

Plaintiffs then instituted this action seeking to have the transfer of notes from defendant Garriss to defendant Bianca M. Brown set aside as a fraudulent conveyance and defendant Garriss declared the sole owner of the notes. At the hearing on this matter, the trial judge dismissed the action as to defendant Chichester. The jury returned a verdict in favor of the remaining defendants. Plaintiffs appeal.

[1] Plaintiffs first argue that the trial judge erred in dismissing the action as to defendant Chichester at the close of all the evidence. Plaintiffs concede that a motion for dismissal made pursuant to Rule 41(b) in a trial by jury may properly be treated as a motion for directed verdict under Rule 50(a), and we find no error on this ground. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970). Nor do we find error in the judge's dismissal even when the evidence against defendant Chichester is considered in the light most favorable to plaintiffs. Regarding defendant Chichester, the complaint merely alleged that Chichester had custody of the notes transferred from Garriss to Brown and asked that a temporary injunction or restraining order be issued to prevent the further transfer or disposal of the notes. On 27 February 1980, such a restraining order was entered and the notes themselves were produced in open court and introduced into evidence by defendants Garriss and Brown. In light of the foregoing, there were no issues to be submitted to the jury concerning defendant Chichester nor any relief to be obtained from him. This assignment of error is overruled.

[2] Plaintiffs next would have us find prejudicial error in the trial judge's instructions to the jury. In his charge, the judge began his explanation of a fraudulent conveyance by stating that "[f]irst there must be a voluntary conveyance, and a voluntary conveyance or a conveyance is deemed to be voluntary when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." Plaintiffs argue that this statement misled the jury by restricting the jurors' decision to an initial finding that the conveyance was voluntary, thus

obviating the other possible determination that the conveyance was fraudulent if made upon valuable consideration but with the actual intent to defraud creditors on the part of the grantor with notice of the fraud by the grantee. *See generally Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). We find no error.

Plaintiffs acknowledge that the trial judge properly defined "voluntary conveyance" and also shortly thereafter correctly stated the law regarding a conveyance made upon valuable consideration but with the intent to defraud creditors. The trial judge then distinguished the terms "voluntary conveyance" and "valuable consideration," thus further separating the two legal principles for the jury. Reading the charge as a whole, we find that the correct law of the case was presented to the jury in such a manner that there was no reasonable possibility that they were misled or misinformed. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967).

For these reasons, in the trial we find

No error.

Judge MARTIN (Harry C.) concurs.

Judge VAUGHN concurs as to defendant Chichester but dissents as to the other defendants.

Judge VAUGHN dissenting.

I concur in the result reached as to defendant Chichester.

I must, however, dissent from the opinion of the majority as to the other defendant. The judge instructed the jury that:

> "First, there must be a voluntary conveyance, and a voluntary conveyance or a conveyance is deemed to be voluntary when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud."

That instruction is obviously wrong and went to the heart of plaintiffs' case. There was ample evidence that would have permitted the jury to find for plaintiffs without finding that there

was a voluntary conveyance. The error was never corrected and was manifestly prejudicial. For the error assigned, I vote to order a new trial.

DORIS S. MARTIN, EMPLOYEE-PLAINTIFF v. MARS MANUFACTURING COMPANY, INC., EMPLOYER-DEFENDANT, CNA INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8110IC837

(Filed 3 August 1982)

Master and Servant § 60.4— injury at Christmas party—compensable as arising out of and in course of employment

The Industrial Commission correctly ordered an award of workers' compensation to plaintiff for an injury to her ankle sustained while dancing at a Christmas party sponsored by defendant-employer for its employees since (1) the event was clearly employer-sponsored, (2) employees were encouraged to attend, *inter alia*, by being paid to attend, and plaintiff had maintained a known custom of attending, (3) the employer paid all the expenses of the event, and (4) the employer benefited from the event through such tangible advantages as having an opportunity to make speeches and present awards. Such evidence established a sufficient nexus between claimant's injury and her employment to permit the award of compensation as arising out of and in the course of her employment.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 9 March 1981. Heard in the Court of Appeals 1 April 1982.

Defendants appeal from an award of workers' compensation to claimant for an injury to her ankle sustained while dancing at a Christmas party sponsored by defendant-employer for its employees.

Lentz, Ball & Kelley, P.A., by Ervin L. Ball, Jr., for plaintiff appellee.

Harrell & Leake, by Larry Leake, for defendant appellants.

WHICHARD, Judge.

On 21 December 1979 defendant-employer sponsored, and paid all the expenses of, a Christmas party for its employees. The party was held at a Moose Lodge near the business premises.

Personnel office employees posted notices at the plant regarding the party. All employees were invited and encouraged to attend. Attendance was voluntary, however, and no attendance records were kept.

Wages were paid for the time employees spent at the party. Employees who did not attend were also compensated and were not required to work in lieu of attendance. The party was an annual event which the majority of the employees usually attended.

The plant manager considered the party an employee fringe benefit, a definite purpose of which was to improve employer-employee relations. He made a twenty to thirty minute speech at the party, in which he praised the employees for their work and presented service awards.

Claimant had worked for defendant-employer for seven years. During that time she had attended all but one of these annual parties. While dancing at the 21 December 1979 party, claimant turned her ankle and fell on it. The injury sustained therefrom required surgery and resulted in permanent partial disability of the right foot.

Defendants' primary contention is that claimant's injury did not arise "out of and in the course of the employment." G.S. 97-2(6). In *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E. 2d 347 (1980), this Court approved and adopted the Larson method of analysis for determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of the employment. Applying that method of analysis to the facts here, we uphold claimant's award.

In *Chilton*, 45 N.C. App. at 15, 262 S.E. 2d at 348, the Court stated:

> Several questions should be considered in determining whether compensation will be awarded:
>
> (1) Did the employer in fact sponsor the event?
>
> (2) To what extent was attendance really voluntary?
>
> (3) Was there some degree of encouragement to attend evidenced by such factors as:
>
> a. taking a record of attendance;

b. paying for the time spent;

c. requiring the employee to work if he did not attend; or

d. maintaining a known custom of attending?

(4) Did the employer finance the occasion to a substantial extent?

(5) Did the employees regard it as an employment benefit to which they were entitled as of right?

(6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

The questions were quoted from 1A Larson, *Workmen's Compensation Law* § 22.23, p. 5-85 &-86.

None of these questions could be answered affirmatively in *Chilton*.[1] This Court consequently reversed the award of compensation. Here, by contrast, uncontradicted evidence establishes affirmative answers to four of the six questions.

The event was clearly employer-sponsored (question (1), *supra*). Employees were encouraged to attend, *inter alia*, by being paid for the time spent; and claimant had attended all but one of these annual events in her seven years of employment with defendant-employer, thus "maintaining a known custom of attending" (question (3), *supra*). The employer paid all the expenses of the event (question (4), *supra*). Finally, the employer benefited from the event through such tangible advantages as having an opportunity to make speeches and present awards (question (6), *supra*).

Larson further states:

[W]hen the employer plans a regular outing and urges his employees to go to a specified place for the purpose, continuing their pay while there, it may be said that both the time and space limits of the employment are expanded to [party-

1. The record established that the employer paid *some* of the expense of the occasion, but not that it "finance[d] the occasion to a substantial extent." (Question 4, *supra*.)

> day] at the [party-place]. When to all this is added evidence that the employer is deriving benefit from the outing, the combination should easily suffice to bring it within the scope of employment.

Larson, *supra*, § 22.23, at p. 5-91. *See also, e.g., Kelly v. Hackensack Water Co.*, 23 N.J. Super. 88, 92 A. 2d 506 (1952), *affirming* 10 N.J. Super. 528, 77 A. 2d 467 (1950) (employee died from fall while on company picnic; evidence showed employer used occasion for speeches and awards; compensation awarded; lower court "perceive[d] that a wholesome contribution to a sound employer-employee relationship resulted from the outing"); *Chorley v. Koerner Ford, Inc.*, 19 N.Y. 2d 242, 225 N.E. 2d 737, 279 N.Y.S. 2d 4 (1967) (medical evidence indicated fatal coronary occlusion resulted from decedent's strenuous dancing at employer-sponsored party; death benefits awarded); *Kenney v. Lord & Taylor, Inc.*, 254 N.Y. 532, 173 N.E. 853 (1930) (claimant, while dancing after employer-sponsored dinner, fell and fractured wrist; award of compensation affirmed); *Fagan v. Albany Evening Union Co.*, 261 A.D. 861, 24 N.Y.S. 2d 779 (1941) (newspaper carrier drowned at employer-sponsored picnic; award of compensation affirmed; court stated, "It is obvious that the picnic was one of the activities maintained by the employer for the purpose of developing better service and greater interest on the part of the newspaper carriers and for its own ultimate benefit.").

Pursuant to the foregoing method of analysis approved and adopted by this Court in *Chilton, supra*, and to the well-established principle that the Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees, and its benefits should not be denied by a technical, narrow, and strict construction, *Hinson v. Creech*, 286 N.C. 156, 161, 209 S.E. 2d 471, 475 (1974); *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 588, 281 S.E. 2d 463, 466 (1981), we hold that the evidence here established a sufficient nexus between claimant's injury and her employment to permit the award of compensation. Defendants' assignments of error to the Commission's conclusions and award are therefore overruled.

Defendants rely on the following cases in which our Supreme Court held various fact situations not sufficiently business-related to render an employee's death or injuries compensable under the

Workers' Compensation Act: *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643 (1964) (employee injured while swimming in pool at motel where employer-sponsored meeting to commence following day); *Lewis v. Tobacco Co.*, 260 N.C. 410, 132 S.E. 2d 877 (1963) (employee killed while on hunting trip with sons of employer's office manager to whom employee was assigned as chauffeur); *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97 (1950) (employee injured during employer-sponsored beach trip outside normal business hours); *Barber v. Minges*, 223 N.C. 213, 25 S.E. 2d 837 (1943) (employee killed from injuries suffered during employer-sponsored fishing trip). We find the relationship between the death or injury and the employment in those cases significantly less substantial than that established by the record here. We thus do not believe those cases dictate a reversal of this award.

Defendants further contend that certain findings of fact are not supported by competent evidence. All findings material to the award are fully supported by competent evidence and thus are conclusive on appeal. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 218, 232 S.E. 2d 449, 454 (1977); *Moore v. Piedmont Processing Company*, 56 N.C. App. 594, 596, 289 S.E. 2d 573, 574 (1982). This assignment of error is overruled.

Defendants finally contend the Commission erred in denying its motion to strike claimant's testimony, in response to a question as to what the plant manager said, that the manager "was glad that everybody came to the party." The response was a "shorthand statement" describing the remarks to which the manager himself subsequently testified. *See* 1 *Stansbury's North Carolina Evidence* § 125, pp. 391 (Brandis Rev. 1973). In light of the manager's subsequent testimony, without objection, to the same general effect, claimant's statement clearly did not prejudice defendants.

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. KENNETH EARL GOOCHE

No. 8114SC1227

(Filed 3 August 1982)

1. **Narcotics § 1.3— possession of marijuana with intent to sell and deliver—possession of more than one ounce—no lesser included offense**

Possession of more than one ounce of marijuana is not a lesser included offense of possession of marijuana with intent to sell or deliver.

2. **Narcotics § 2— possession of marijuana with intent to sell or deliver—possession of more than one ounce of marijuana—sufficiency of indictment—alternative verdicts**

An indictment alleging that defendant "did feloniously possess with intent to sell and deliver a controlled substance 59.9 grams of marijuana" was sufficient to charge defendant with both possession of marijuana with intent to sell or deliver and possession of more than one ounce of marijuana, and the trial court properly submitted both crimes as alternative verdicts.

3. **Narcotics § 4.6— instruction that amount of marijuana was more than one ounce**

In a prosecution for possession of more than one ounce of marijuana in which the evidence tended to show that if defendant possessed any marijuana, he possessed 59.9 grams thereof, it was proper for the trial court to instruct the jury that 59.9 grams was in fact more than one ounce and to remove from the jury's consideration the element of the amount of marijuana possessed.

4. **Criminal Law § 99.2— no expression of opinion by trial court**

There was no merit to defendant's contention that the trial judge conveyed to the jury an antagonistic attitude toward the defense in sustaining objections to various defense questions, in making comments that belittled defense counsel, and in summarily denying a defense motion to dismiss.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 30 April 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 29 April 1982.

Defendant was indicted as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30 day of August, 1980, in Durham County Kenneth Earl Gooch unlawfully and wilfully did feloniously possess with intent to sell and deliver a controlled substance 59.9 grams of marijuana which is included in Schedule VI of the North Carolina Controlled Substances Act.

He pleaded not guilty and was tried before a jury.

State's evidence tended to show that on the morning of 30 August 1980 police officers saw the defendant standing at a certain intersection in Durham carrying a pouch with the word "Junk" on it. An officer approached the defendant at about noon. Defendant ran, and two officers chased him. One officer saw defendant throw the pouch away and he retrieved it. The officers caught defendant, and examination of the pouch revealed 25 envelopes containing a total of 59.9 grams of marijuana. Defendant presented evidence. He denied ever having possession of the pouch.

The trial judge submitted three possible verdicts: guilty of possession of marijuana with intent to sell and deliver, guilty of possession of more than one ounce of marijuana and not guilty. The jury convicted the defendant of possessing more than one ounce of marijuana and he appeals.

Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.

Appellate Defender Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

ARNOLD, Judge.

Defendant's first two arguments relate to the following jury instructions:

> The defendant Gooch has been accused of possessing marijuana, which is a controlled substance, with intent to sell or deliver. For you to find the defendant guilty of possessing marijuana, which is a controlled substance, with the intent to sell or deliver it, the State must prove three things each beyond a reasonable doubt:
>
> First, the State must prove and beyond a reasonable doubt that the defendant knowingly possessed marijuana. A person possesses marijuana when he is aware of its presence and has both the power and the intent to control the disposition or use of that substance.
>
> Second, the State must prove that the defendant possessed the marijuana with the intent to sell it, or to deliver it, to someone else. There are two things, possession, as I have defined it, and intent to sell or deliver.

Therefore, ladies and gentlemen, I instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the 30th day of August, 1980, Kenneth Earl Gooch knowingly possessed a quantity of marijuana, and intended to sell or deliver that marijuana to another, it would be your duty to return a verdict of guilty of possessing marijuana with the intent to sell or deliver it.

Now, I will instruct you further that 59.9 grams is in fact more than one ounce. If you do not find those things to be true, or if you have a reasonable doubt as to one or both of those things that I have mentioned, then you will not return a verdict of guilty of possessing marijuana with the intent to sell or deliver it.

If you do not find the defendant guilty of possession with intent to manufacture (sic), you must then determine whether he is guilty merely of possessing a quantity of marijuana more than one ounce. The difference is that mere possessing does not require that you find that the defendant intended to sell or deliver.

Therefore, I instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the 30th of August, 1980, the defendant Gooch knowingly possessed marijuana, it would be your duty to return a verdict of guilty of possessing marijuana, and if you do not so find, or have a reasonable doubt, then it would be your duty to return a verdict of not guilty.

[1] In his first argument, defendant contends that he was not charged with possession of more than one ounce of marijuana, that possession of more than one ounce of marijuana is not a lesser included offense of possession of marijuana with intent to sell or deliver, and that therefore the judge erred in submitting possession of more than one ounce of marijuana as a possible verdict. Defendant is correct in contending that possession of more than one ounce of marijuana is not a lesser included offense of possession of marijuana with intent to sell or deliver.

To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the

> offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other.

State v. McGill, 296 N.C. 564, 568, 251 S.E. 2d 616, 619 (1979). However, we cannot agree with defendant's first contention, that he was not charged with possession of more than one ounce of marijuana, since the two elements of possession of more than one ounce of marijuana are both set forth in the indictment.

[2] In *State v. McGill, supra*, the defendant was indicted for both possession of marijuana with intent to sell or deliver and, by a separate indictment, possession of more than one ounce of marijuana. The evidence tended to show a single transaction. The trial judge instructed the jury to consider the two charges in the alternative, and the jury convicted defendant of possessing more than one ounce of marijuana. The Supreme Court held this procedure to be correct. It wrote:

> It is clear that the State charged the defendant with both these offenses so that the evidence would conform to the pleadings under either means of proving felonious possession. An election is not required in this situation. . . . Although the charges here were contained in two separate indictments, they may be treated as separate counts of the same indictment. *See, e.g., State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915).
>
> In this case the judge instructed the members of the jury to first consider the offense of possession with intent to sell or deliver marijuana. If and only if they found him not guilty of that offense were they to consider the charge of possession of more than one ounce of marijuana. The able trial judge followed the correct procedure in this situation. *See State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957).

296 N.C. at 568-69, 251 S.E. 2d at 619-20. The present case differs from *McGill* in that the two felony possession charges were set forth in separate indictments in *McGill* while in the present case the elements of both forms of felony possession are set forth in

the same count of the one indictment. In the present case, as in *McGill*, the defendant was charged with both possession of marijuana with intent to sell or deliver and possession of more than one ounce of marijuana. It was therefore proper to submit both crimes as alternative verdicts.

[3] In his second argument, the defendant contends that the judge erred in instructing on the elements of possession of more than one ounce of marijuana. Specifically, he argues that the judge failed to make clear that the amount of marijuana possessed had to be more than one ounce in order to convict the defendant of this offense. We find no prejudicial error in the instructions. State's evidence tended to show that the defendant possessed a pouch that contained 25 envelopes. An S.B.I. chemist testified that the 25 envelopes contained a total of 59.9 grams of marijuana. The defendant denied possession of the pouch. Thus, the evidence tended to show that if the defendant possessed any marijuana, he possessed 59.9 grams of marijuana, which is more than one ounce. Under these circumstances, it was proper for the judge to instruct the jury that 59.9 grams was in fact more than one ounce and to remove from the jury's consideration the element of the amount of marijuana possessed. *Cf. State v. Carson*, 296 N.C. 31, 46-57, 249 S.E. 2d 417 (1978) (in which it was held, based upon the evidence, that the jury had not been misled or influenced by an instruction in a first degree rape case to the effect that a knife was a deadly weapon).

The defendant cites *State v. Reese*, 33 N.C. App. 89, 234 S.E. 2d 41 (1977), which also involved a conviction for felonious possession of a controlled substance. However, our opinion in *Reese* does not reveal that the evidence therein included both a qualitative and a quantitative analysis of the controlled substance, unlike the evidence in the present case, thereby creating an issue as to amount. Any error in the instructions could not have been prejudicial in the present case.

[4] By his final assignment of error, the defendant contends that the trial judge violated "the cold neutrality of the law" and conveyed to the jury an antagonistic attitude toward the defense in sustaining objections to various defense questions, in making comments that belittled defense counsel, and in summarily denying a defense motion to dismiss. We have considered the exceptions

cited by the defendant, and we conclude that they do not constitute prejudicial error either individually or collectively.

In the defendant's trial we find

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. RICKIE M. HAMMETTE

No. 8112SC1431

(Filed 3 August 1982)

Conspiracy § 7— no conspiracy between defendant and undercover agent

In a prosecution for conspiracy to sell and deliver over 50 pounds of marijuana, the trial judge erred in instructing that defendant could be convicted if he conspired only with an undercover agent to sell and deliver marijuana since if one person merely feigns acquiescence in the proposed criminal activity, no conspiracy exists between the two since there is no mutual understanding or concert of will.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 4 August 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 June 1982.

Defendant was convicted as charged of conspiracy to sell and deliver over fifty pounds of marijuana. He appeals from the imposition of a sentence of three to five years' imprisonment and a fine of $5,000.00.

At trial State's evidence tended to show that undercover agent Jack Reagan knew defendant and contacted him about buying some marijuana. Defendant said that he knew someone who had a large quantity of marijuana to sell and that he would contact that individual. Defendant acted as go-between with Reagan and the supplier, Burt Spell. Reagan showed defendant $30,000.00 cash with which he planned to buy the drugs. Reagan and Spell met at defendant's house on 29 January 1981, although defendant was not present, to transact the sale of ninety pounds of marijuana at $300.00 per pound. Spell was arrested and the drugs seized pursuant to a search warrant.

Defendant presented evidence which tended to show that Reagan had shown him $30,000.00 cash and told defendant he wanted to buy some marijuana. Defendant told Reagan that he did not know anyone who sold drugs. Spell, who was a friend of defendant's, called defendant, and Reagan insisted that defendant allow him to talk to Spell. Reagan then set up the sale of the drugs with Spell and defendant had nothing further to do with the transaction.

Attorney General Edmisten by Associate Attorney G. Criston Windham for the State.

Vernon F. Daughtridge for defendant appellant.

CLARK, Judge.

Defendant argues that the trial court erred in instructing the jury that defendant would be guilty of conspiracy if he had entered into an agreement with undercover agent Reagan to sell and deliver the marijuana. The judge instructed the jury on this issue as follows:

> "The third element which the State must prove is that the defendant and at least one other person intended that the agreement be carried out at the time it was made.
>
> * * * *
>
> [T]hat if you should find from the evidence and beyond a reasonable doubt that there was *an agreement with either Jack Reagan or Burt Spell,* known as Lamburt Spell, or Johnathan Christopher Norman, known as Chris Norman, that *such an agreement with either one or some or all of such persons would be a fulfillment of proof beyond a reasonable doubt of this element.*
>
> * * * *
>
> So, members of the jury, I charge and instruct you that if you so find from the evidence and beyond a reasonable doubt, with the burden of proof being on the State, that on the 29th of January, 1981, or the days immediately preceding that this *defendant, Rickie M. Hammette, agreed with either Jack Reagan or Lamburt E. 'Burt' Spell or Johnathan Chris Norman, either one, some or all* and that the agreement was

to sell and deliver the controlled substance, marijuana, in excess of fifty pounds; to wit; approximately 86.1 pounds to Jack Reagan and that at the time of this agreement the *defendant and at least one of the other alleged conspirators, Jack Reagan, Lamburt E. Spell or Johnathan C. Norman,* intended that the agreement to sell and deliver marijuana in excess of fifty pounds be carried out. Then it would be your duty to return a verdict of guilty as charged of conspiracy to sell and deliver in excess of fifty pounds of marijuana, a controlled substance. On the other hand, if you do not so find or if you have a reasonable doubt as to any one or more of those things it would be your duty to return a verdict of not guilty." (Emphasis added.)

A conspiracy is any unlawful agreement by two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *State v. Abernathy,* 295 N.C. 147, 244 S.E. 2d 373 (1978). However, if one person merely feigns acquiescence in the proposed criminal activity, no conspiracy exists between the two since there is no mutual understanding or concert of wills. *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied,* 398 U.S. 959, 26 L.Ed. 2d 545, 90 S.Ct. 2175 (1970). Therefore, where one of two persons who allegedly conspired to do an illegal act is an officer of the law acting in discharge of his duties and intends to frustrate the conspiracy, the other person cannot be convicted of conspiracy. *United States v. Chase,* 372 F. 2d 453 (4th Cir.), *cert. denied,* 387 U.S. 913, 18 L.Ed. 2d 635, 87 S.Ct. 1701 (1967); *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61, *cert. denied,* 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45 (1960); *State v. Wilkins,* 34 N.C. App. 392, 238 S.E. 2d 659, *disc. rev. denied,* 294 N.C. 187, 241 S.E. 2d 516 (1977); 15A C.J.S. *Conspiracy* § 37 (1967). This rule applies to an alleged conspiracy between only two persons, one of whom was an undercover agent or law enforcement officer. If an undercover agent acts in conjunction with more than one person to violate the law, his participation will not preclude the conviction of others for conspiracy among themselves. *State v. Wilkins, supra.*

Based upon the foregoing rules of law, we hold that it was error for the trial court to instruct the jury that defendant could be convicted if he conspired only with undercover agent Reagan to sell and deliver marijuana.

Since defendant must be granted a new trial, it is not necessary to decide whether the court should have admitted into evidence a tape-recorded conversation between Reagan and defendant and a conversation between Reagan and Spell. However, it may be appropriate to make several observations in order to avoid error upon retrial.

Defendant contends that the tape recordings were inadmissible because they were incomplete and did not contain the entire conversations. To lay a proper foundation for the admission of a recorded conversation, the State must show to the trial court's satisfaction:

> "(1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) *that defendant's entire statement was recorded and no changes, additions, or deletions have since been made;* and (7) the custody and manner in which the recording has been preserved since it was made. (Citations omitted.)"

State v. Lynch, 279 N.C. 1, 17, 181 S.E. 2d 561, 571 (1971). (Emphasis added.) Item (6) above does not preclude the admission of an incomplete conversation into evidence, however. The general rule is that the fact that a recording may not reproduce an entire conversation or may be indistinct or inaudible in part does not render it inadmissible unless the defects are so substantial as to leave the recording without probative value or to render the recording as a whole untrustworthy. *Searcy v. Justice and Levi v. Justice*, 20 N.C. App. 559, 202 S.E. 2d 314, *cert. denied*, 285 N.C. 235, 204 S.E. 2d 25 (1974); 29 Am. Jur. 2d *Evidence* § 436 (1967); Annot., 57 A.L.R. 3d 746 (1974). If the two tape recordings meet the above criteria, they are admissible as both corroborative and substantive evidence. *State v. Lynch, supra.*

Because of the errors made in the court's charge to the jury, there must be a

New trial.

Judges WEBB and WHICHARD concur.

JAMES FRANKLIN YORK, EMPLOYEE-PLAINTIFF v. UNIONVILLE VOLUNTEER FIRE DEPARTMENT, EMPLOYER-DEFENDANT, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER-DEFENDANT

No. 8110IC682

(Filed 3 August 1982)

Master and Servant § 71.1— workers' compensation—computation of average weekly wage—deductions from farm income

In determining the average weekly wage for workers' compensation purposes of a full-time farmer who lost a leg while on duty as a volunteer fireman, the plaintiff's farm income could not properly be calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. G.S. 97-31 and G.S. 97-2(5).

APPEAL by defendants from order of North Carolina Industrial Commission entered 22 January 1981. Heard in the Court of Appeals 4 March 1982.

This appeal involves the proper amount of workers' compensation to be paid a volunteer fireman. The plaintiff, a full-time farmer, lost his leg in 1978 while on duty as a volunteer fireman for the Unionville Volunteer Fire Department. In determining the average weekly wages of the plaintiff, the Deputy Commissioner considered his 1977 income tax return. He did not consider income tax returns for other years, and he did not consider evidence of what the plaintiff would have had to pay someone else to do his job. The tax return showed the plaintiff had a gross income from farm operations in 1977 of $21,581.64. The Deputy Commissioner ruled that interest, land taxes, license tags, depreciation and tax service were "relatively fixed overhead" expenses of the farm business and not "direct out-of-pocket expenses." He did not deduct these items from gross income in determining net income. The Deputy Commissioner after making some deductions from gross income found the plaintiff had a net income of $10,348.84 from his farm operations in 1977. He held

that the plaintiff had an average weekly wage of $198.47 in 1977. He awarded the plaintiff $132.32 in compensation.

The Full Commission affirmed the opinion and award of the Deputy Commissioner and the defendants appealed.

Jerry M. Trammell for plaintiff appellee.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Hatcher Kincheloe, for defendant appellants.

WEBB, Judge.

The only question brought forward in this appeal is the correctness of the determination of the plaintiff's earnings in setting his compensation. We are guided by the following statutes which provide in pertinent part:

> "§ 97-31. Schedule of injuries; rate and period of compensation.—In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:
>
> * * *
>
> (15) For the loss of a leg, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during 200 weeks."

> "§ 97-2(5) Average Weekly Wages.—'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52 . . . .
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.
>
> * * *

> In case of disabling injury or death to a volunteer fireman . . . under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman . . . was earning in the employment wherein he principally earned his livelihood as of the date of injury."

We believe the legislative intent from these statutes as applied to this case is that the plaintiff who was injured as a volunteer fireman should be compensated based on what he would have earned from his labor as a farmer had he not been injured. The Hearing Commissioner attempted to determine what he would have earned by calculating his previous year's net income as a farmer. In doing so he made certain deductions from gross income and did not make others. We do not believe the plaintiff's farm income can be properly calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. We hold it was error for the Hearing Commissioner not to make these deductions in calculating farm income.

We reverse the award of the Full Commission and remand for further consideration. The Commission may take further evidence if it deems it appropriate. In reaching its decision, we believe the Full Commission should keep in mind that the plaintiff is entitled to compensation based on what he would have earned from his labor had he not been injured. It is difficult to determine what compensation the plaintiff received from his work on the farm since he owned and operated the farm business, thus the profit or loss of the business may not necessarily reflect the value of the plaintiff's services to it. The plaintiff could have made a substantial contribution to the farm operation although the farm might not show a profit. Since the plaintiff owned the farm, the compensation to him for his own labor in working on the farm might be substantial although not reflected in farm profits. It is difficult to determine what the plaintiff would have earned had he not been injured, but this is the job of the Industrial Commission. We believe it should do so with the factors in mind we have just discussed. The Commission might want to consider what the plaintiff would have had to pay someone else to perform his work

or the tax returns of other years in reaching its decision. We do not necessarily believe the result reached in this case is unfair, but we do not believe the calculation of farm income was properly made.

For cases from other jurisdictions dealing with this problem, *see Pettis v. Industrial Commission*, 91 Ariz. 298, 372 P. 2d 72 (1962); *Buhner v. Bowman*, 81 Ind. App. 395, 143 N.E. 366 (1924); *In re Mouradian's Case*, 344 Mass. 753, 182 N.E. 2d 492 (1962); and *Moore v. Fleischman Yeast Company*, 268 Mich. 668, 256 N.W. 589 (1934).

Reversed and remanded.

Judges CLARK and ARNOLD concur.

CAROLINE H. RIDDLE v. J. IVERSON RIDDLE, AND MORGANTON SAVINGS & LOAN ASSOCIATION

No. 8125SC954

(Filed 3 August 1982)

1. Trusts § 3— active trust—burden of proof

In an action alleging that a trust was passive, defendant trustee had the burden of proving the existence of an active trust since defendant was the party having peculiar knowledge of the facts surrounding the creation of the trust and his duties and functions, if any, respecting it.

2. Trusts § 3— passive trust—sufficiency of evidence

The trial court properly determined that a trust was passive and that the beneficiary was entitled to ownership and possession of the trust funds where there was no evidence that the settlor directed the trustee to manage, invest or otherwise perform duties in furtherance of the trust purpose, and the settlor testified that he intended that the trust funds be for the beneficiary's use and benefit.

3. Attorneys at Law § 7.5— action involving trust—trustee's attorney fees—discretion of court

The decision whether to award counsel fees to defendant trustee to be paid out of the trust res pursuant to G.S. 6-21(2) in an action to establish that the trust was passive rested within the sound discretion of the trial court.

Riddle v. Riddle

APPEAL by defendant from *Owens, Judge.* Judgment entered 29 April 1981 in BURKE County Superior Court. Heard in the Court of Appeals 28 April 1982.

This case having been before us on two previous occasions, we by this appeal review only the trial court's decision on plaintiff's remaining claim. Facts necessary for an understanding of this matter are set out below.

Oma H. Hester, Jr., for plaintiff appellee.

Simpson, Aycock, Beyer and Simpson, by Samuel E. Aycock, for defendant appellant.

MORRIS, Chief Judge.

Plaintiff by supplemental and amended complaints alleged

> 8. That the Defendant, as "Trustee for Caroline H. Riddle" ostensibly holds title to principal funds, together with accrued interest, in the sum of Ten Thousand Dollars ($10,000.00) on deposit at Morganton Savings & Loan Association; that the Defendant has no duties or functions as "Trustee" in connection with said funds and performs no fiduciary duties in conjunction therewith; that the purported trust is impassive (sic) and inactive and the legal title and equitable title thereof are, accordingly, merged and the Plaintiff is fully and lawfully entitled to have the ownership and possession of said funds surrendered to her.

Defendant sought to prove that the trust was originally established for the purpose of maintaining, supporting and educating the three children born of the marriage of plaintiff and defendant J. Iverson Riddle and that it is presently being administered for that purpose. The trial judge concluded that the donor intended a gift to plaintiff, that the trust was passive, and that defendant Iverson had "no duties or responsibilities with respect to these funds, except such duty as may be imposed by law to account for the existence and preservation of these funds."

Defendant, by his first assignment of error, contends that the burden was on plaintiff to prove that the trust was passive; and that it was error, because plaintiff failed to prove the absence of duties imposed on the trustee, for the trial court to deny their

motion to dismiss pursuant to Rule 41(b) at the close of plaintiff's evidence.

[1, 2] As a general rule, plaintiff must allege and prove all the essential elements of his cause of action even though stated in negative form, *Wiles v. Mullinax*, 275 N.C. 473, 168 S.E. 2d 366 (1969). Where, however, as in the case sub judice, defendant is the party having peculiar knowledge of the facts surrounding the creation of the trust and his duties and functions, if any, respecting it, the burden is on the party capable of the proof. *Ange v. The Woodmen of the World*, 173 N.C. 33, 91 S.E. 586 (1917); *Home Insurance Co. v. Ingold Tire Co.*, 286 N.C. 282, 210 S.E. 2d 414 (1974). We hold that defendant failed to carry this burden, as his evidence was insufficient to establish the existence of an active trust.

> If the trust is to have permanence, not only must words connoting trust be used but the terms of the trust must give the trustee positive or active duties, the performance of which is necessary to carry out the purpose of the settlor.

Bogert, Trusts and Trustees § 206 (2d Ed. revised 1979).

> [A] trust transfer . . . "in trust for" another, or "for the benefit of" another, without describing any duties to be performed by the trustee in carrying out the use or trust, creates a trust which is clearly passive and which is executed by a transfer of the trustee's interest to the beneficiary who thereafter holds as absolute owner.

Id. at § 207. The record is devoid of indication that the settlor, H. L. Riddle, directed J. Iverson Riddle to manage, invest or otherwise perform duties in furtherance of the trust purpose. Moreover, H. L. Riddle's deposition testimony negates the existence of an active trust. H. L. Riddle describes no management duties and states that he intended that the $10,000 "be for her (plaintiff's) use and benefit." The conclusion that the money was intended for the sole use and benefit of plaintiff and that she is entitled to ownership and possession of the funds was a proper one. See *Pilkington v. West*, 246 N.C. 575, 99 S.E. 2d 798 (1957).

Defendant further alleges that the trial court committed prejudicial error by making findings of fact which were not supported by competent evidence and by reaching conclusions based on

those findings. We deem it unnecessary to speak to each exception addressed in this argument, holding that the court's finding that:

> . . . There has never been an explicit trust arrangement, established by written or parol agreement or evidence, governing or specifying any terms by which J. Iverson Riddle has held in trust any of the funds which have been on deposit in Morganton Savings and Loan Association. . . .

accurately reflected defendant's failure to carry his burden of proof and alone supports the court's conclusions and judgment.

[3] Defendant maintains by his third and final assignment that he is entitled to attorney's fees, to be paid, pursuant to G.S. 6-21(2), out of the trust res. The decision to award counsel fees is within the discretion of the trial court, *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E. 2d 326 (1963), and we will not disturb what we deem to be a sound exercise of that discretion.

The judgment is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

TOWN OF ATLANTIC BEACH v. CECELIA YOUNG

No. 813SC828

(Filed 3 August 1982)

Animals § 8; Municipal Corporations § 8.2— ordinance prohibiting keeping of horses and goats other than house pets—establishing as house pets—summary judgment proper

In an action where plaintiff town sought a permanent injunction "directing defendant to remove all animals other than specified domestic house pets from her premises" pursuant to an ordinance, where defendant demonstrated the facts necessary to make the legal determination that her animals (two goats and a pony) were "house pets" within the meaning of the ordinance and plaintiff failed to show contrary material facts, the trial court properly granted defendant's motion for summary judgment.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 1 June 1981 in Superior Court, CARTERET County. Heard in the Court of Appeals 1 April 1982.

Hamilton, Bailey & Coyne, by Glenn B. Bailey, for plaintiff appellant.

Cooper and Whitford, P.A., by Neil B. Whitford, for defendant appellee.

WHICHARD, Judge.

I.

Plaintiff municipality enacted an ordinance which prohibited the keeping "within the town limits [of] livestock, animals, or poultry other than house pets." The ordinance specified that its prohibition included, *inter alia,* horses and goats.

Defendant, in response to plaintiff's request for admission, acknowledged that she kept two goats and one pony on her premises. While she denied that her premises were within plaintiff's town limits, the only record evidence was to the contrary.

By this action plaintiff sought, pursuant to the above ordinance, a permanent injunction "directing defendant to remove all animals other than specified domestic house pets from her premises." The trial court denied plaintiff's motion for summary judgment, and granted defendant's.

Plaintiff appeals.

II.

One ground for defendant's motion for summary judgment was:

> The animals the defendant keeps on her premises, according to the affidavit attached hereto, are house pets which are permitted under the Town Ordinance. The plaintiff does not allege in its Complaint that the animals are not house pets, and no discovery has indicated they are anything other than house pets.

Whether defendant's animals are "house pets" requires two determinations: (1) the legal question of the meaning of "house pets" as

used in the ordinance, and (2) the specific facts which invoke application of this legal definition.

Absent evidence of a contrary intent, the words of an ordinance are presumed to have their common and ordinary meaning. *See Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E. 2d 770, 774 (1973); *In Re Trucking Co.*, 281 N.C. 242, 252, 188 S.E. 2d 452, 458 (1972). The common meaning of "pet" is "a domesticated animal kept for pleasure rather than utility." *Webster's International Dictionary* 1689 (3d ed. 1968). We thus construe the exception in the ordinance for "house pets" to encompass all domesticated animals kept for pleasure in or around a house.

The facts material to the determination whether defendant's animals are "house pets" are the following: (1) the kind of animals they are, (2) the reason for which they were kept, and (3) the place where they were kept. Defendant has shown by affidavit that (1) her animals are two goats and a pony, which we find are "domesticated" animals, *i.e.*, ones that "live and breed in a tame condition," *Webster's, supra*, at 671; (2) they are kept as "pets," and thus are for pleasure rather than utility; and (3) they are kept within the walls of her house.

G.S. 1A-1, Rule 56(e), in part provides:

> When a motion for summary judgment is made and supported as provided in this rule [*i.e.*, by pleadings, depositions, answers to interrogatories, admissions on file, or affidavits], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Defendant demonstrated the facts necessary to make the legal determination that her animals were "house pets" within the meaning of the ordinance. Plaintiff then had the burden to respond, by affidavit or other evidentiary matter, to show contrary material facts, and that there thus was a genuine issue for trial. "If the moving party files papers, including testimonial affidavits which show there is not a triable issue, the opposing party pur-

suant to Rule 56(e) and (f), must file papers which show there is a triable issue or the moving party will be entitled to summary judgment." *Nye v. Lipton*, 50 N.C. App. 224, 227, 273 S.E. 2d 313, 315, *disc. rev. denied*, 302 N.C. 630, 280 S.E. 2d 441 (1981). *See also Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E. 2d 595, 598 (1980); *Kidd v. Early*, 289 N.C. 343, 365, 222 S.E. 2d 392, 407 (1976); *City of Elizabeth City v. Enterprises, Inc.*, 48 N.C. App. 408, 412, 269 S.E. 2d 260, 262 (1980); *Arnold v. Howard*, 29 N.C. App. 570, 572, 225 S.E. 2d 149, 151 (1976); *Pridgen v. Hughes*, 9 N.C. App. 635, 640, 177 S.E. 2d 425, 428 (1970).

Plaintiff failed to offer any evidentiary matter in opposition to defendant's affidavit. There thus was no genuine issue for trial. A motion for summary judgment must be granted where "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). By applying the legal definition of "house pets" as used in the ordinance to the undisputed facts, we hold that defendant's animals fell within the ordinance's exception for "house pets," and that defendant thus was entitled to judgment as a matter of law.

III.

Defendant's motion also sought summary judgment on the basis that plaintiff's ordinance is unconstitutional on several grounds. "It is an established principle of appellate review that [the] court will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided." *Brooks, Comr. of Labor v. Enterprises, Inc.*, 298 N.C. 759, 761, 260 S.E. 2d 419, 421 (1979). *See also State v. School*, 299 N.C. 351, 359, 261 S.E. 2d 908, 914, *appeal dismissed*, 449 U.S. 807, 66 L.Ed. 2d 11, 101 S.Ct. 55 (1980). Having concluded that defendant's motion for summary judgment was properly granted because plaintiff offered no responsive forecast of evidence which established existence of a genuine issue of fact and that defendant was entitled to judgment as a matter of law, we refrain from passing on the constitutional questions presented.

IV.

In part, this is a case about goats. When confronted with cases concerning various species of the animal kingdom, appellate courts of this jurisdiction historically have yielded to a seemingly

inexorable compulsion to write learned (?) treatises thereon. *See, e.g.*, Justice Brogden's opinion on mules, *Rector v. Coal Co.*, 192 N.C. 804, 806, 136 S.E. 113, 114 (1926) ("A mule is a melancholy creature . . . [which] has neither 'pride of ancestry nor hope of posterity.' "); and Judge (Harry C.) Martin's[1] opinion on dogs, *State v. Wallace*, 49 N.C. App. 475, 477, 271 S.E. 2d 760, 762 (1980) ("The dog is of a noble, free nature, yet is domesticated and dedicated to the well-being of people of all races.").

In the exercise of judicial restraint, attained with difficulty, we resist the temptation presented here to follow, with regard to goats, the example of those opinions. Reference is made, however, to the following: J. Scott, *The Book of the Goat* (1979); and V. Sussman, *Never Kiss a Goat on the Lips* (1981).

V.

Plaintiff commenced this action for the purpose of getting defendant's goats. Defendant's obtaining a summary judgment against plaintiff may, instead, get plaintiff's goat.

We hold the grant of defendant's motion for summary judgment proper. Denial of plaintiff's motion for summary judgment therefore was equally proper. Plaintiff's assignment of error to the grant of defendant's motion and the denial of its motion is overruled, and the judgment is

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

1. As of the filing date of this opinion, *Justice* Harry C. Martin.

Baldwin v. Piedmont Woodyards, Inc.

CALLIE MAE BALDWIN, WIDOW, WILLIE BALDWIN, DECEASED, EMPLOYEE, PLAINTIFF v. PIEDMONT WOODYARDS, INC., EMPLOYER; AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC1116

(Filed 3 August 1982)

1. **Master and Servant § 69— agreement for compensation signed by parties—not binding on commission**

In a workers' compensation proceeding, the Industrial Commission did not err in failing to give effect to an agreement for compensation signed by the parties where the agreement was not approved by the Industrial Commission pursuant to G.S. 97-17 and therefore was not binding.

2. **Master and Servant § 71.1— computation of average weekly wages—selling pulpwood—wages equals income minus certain expenses**

In a workers' compensation proceeding where the decedent did not receive wages from defendant but sold pulpwood to defendant for a certain price per cord, decedent's average weekly wages should have been computed by determining the income received from defendant minus certain expenses incurred in producing revenue including depreciation on business equipment, interest on business debts and the purchase price of a saw. G.S. 97-2 and G.S. 97-38.

APPEAL by defendants from order of North Carolina Industrial Commission entered 30 March 1981. Heard in the Court of Appeals 28 May 1982.

This appeal involves the proper amount of workers' compensation to be paid the plaintiff, whose husband was killed on 1 November 1978. The parties made an agreement dated 6 February 1979 as to the amount that would be paid. This agreement was not approved by the Industrial Commission. After a hearing the Deputy Commissioner who heard the case found, based on a stipulation of the parties, that the decedent was employed by Piedmont Woodyards and was killed in an accident arising out of and in the course of his employment. The decedent was not paid a salary or wages, but received a certain amount for each cord of pulpwood delivered to Piedmont Woodyards. The decedent owned a truck and other equipment which he used in his business of cutting and preparing pulpwood for sale. The Deputy Commissioner found that the money paid by Piedmont to the decedent in 1978 for pulpwood was the sum upon which his average weekly wage would be calculated in determining the com-

pensation to be paid to the plaintiff. The Deputy Commissioner did not deduct from the money paid to decedent any of his expenses in producing the pulpwood.

The defendants appealed to the Full Commission. In its opinion and award, the Full Commission struck the award of the Deputy Commissioner. It calculated the decedent's average weekly wages by deducting from the sum he received from Piedmont certain expenses he had incurred in producing the pulpwood including insurance and license plates for his truck; gas and oil for his truck; and saws, repairs to his equipment and the purchase price of supplies. The Full Commission did not deduct depreciation on the decedent's truck and loader, interest charges on business debts or the purchase price of a saw from the gross receipts of the decedent in calculating his average weekly wages.

The defendants appealed from the opinion and award of the Full Commission.

Paul S. Messick, Jr. for plaintiff appellee.

Teague, Campbell, Conely and Dennis, by G. Woodrow Teague and George W. Dennis, III, for defendant appellants.

WEBB, Judge.

[1] The defendants' first assignment of error is to the Commission's failure to give effect to the agreement for compensation dated 6 February 1979 which was signed by the parties. This agreement was not approved by the Industrial Commission pursuant to G.S. 97-17 and it is not binding.

[2] The only other question involved in this appeal is the correctness of the determination of the decedent's earnings in setting compensation. G.S. 97-38 provides that death benefits shall be based on the decedent's average weekly wages. G.S. 97-2 provides in part:

> "(5) Average Weekly Wages.—'Average weekly wages' shall mean the earnings of the employee in the employment in which he was working at the time of the injury . . . divided by 52 . . . .
>
> * * *

> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The calculation of compensation is difficult in this case. G.S. 97-38 provides compensation will be based on average weekly wages. The decedent did not receive wages from Piedmont Woodyards but sold pulpwood to Piedmont for a certain price per cord. The Deputy Commissioner treated the entire sum received by the decedent in 1978 as wages. The Full Commission calculated the income of decedent by deducting certain expenses from what he received from Piedmont. We agree with the Full Commission that by the method it used in determining income from Piedmont, expenses incurred in producing revenue should be deducted. We believe, however, that depreciation on business equipment, interest on business debts and the purchase price of a saw should have been included as business expenses. We note that depreciation as allowed by the Internal Revenue Service might not coincide with actual depreciation and that if the interest paid is on a business debt incurred during a previous year, it would not be deductible from the current year's income. If the saw were to last for more than one year, its cost could be amortized rather than the entire price being deducted in the current year. We reverse and remand for further consideration.

We have filed today *York v. Unionville Fire Department*, 58 N.C. App. 591, 293 S.E. 2d 812 (1982) in which a problem was faced similar to the one in this case. We point out, as in that case, that if the Commission does not feel the method it first used produces a result fair to the employer and employee, it may use an alternate method in determining compensation. Since the decedent in this case operated his own business, the return to him for his work would not necessarily coincide with the profit and loss statement. The return to the decedent might, in operating his own business, be substantially more than is reflected in the profit and loss statement. The Commission might also want to consider what it would have cost the decedent to hire someone to have done his job.

The defendants also contend the Industrial Commission erred in its mathematical calculations in fixing compensation. We do not discuss this assignment of error as the matter upon which it is based may not recur.

Reversed and remanded.

Judges CLARK and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 AUGUST 1982

CONNOLLY v. SHARPE No. 8122SC1123	Alexander (79CVS98)	Affirmed
PAYNE v. PAYNE No. 8122DC1406	Iredell (80CVD1263)	Affirmed
PERRY v. PERRY No. 821DC63	Perquimans (80CVD134)	Affirmed
PIERCE v. HAYES No. 8223DC62	Wilkes (80CVM997-A)	No Error
STATE v. AUSTIN No. 8218SC84	Guilford (81CRS16174)	Affirmed
STATE v. BARRETT No. 8227SC93	Gaston (81CRS18388)	No Error
STATE v. BROWN No. 8110SC883	Wake (80CRS24566) (80CRS24567)	No Error
STATE v. CLARK No. 824SC31	Onslow (80CRS19713) (80CRS19714) (80CRS19715) (80CRS19716)	No Error
STATE v. DAVIS No. 823SC2	Carteret (81CRS2649)	No Error
STATE v. EVANS No. 8119SC1345	Cabarrus (81CRS7207)	No Error
STATE v. HANNAH No. 8227SC82	Gaston (81CRS20557)	No Error
STATE v. HAYWOOD No. 8210SC8	Wake (81CRS39355)	No Error
STATE v. HINTON No. 827SC59	Edgecombe (79CRS8814)	Affirmed
STATE v. KRUWELL No. 8216SC67	Robeson (81CRS10680)	No Error
STATE v. LINDSEY No. 8129SC1338	Polk (80CRS89) (80CRS90) (80CRS91) (80CRS93)	No Error
STATE v. LINGERFELT No. 8124SC907	Mitchell (81CRS227)	No Error

STATE v. LOFTIN No. 824SC48	Sampson (81CRS4268)	No Error
STATE v. THOMAS No. 8214SC49	Durham (80CRS24782)	No Error
STATE v. WILLIAMS & GRIFFIN No. 811SC1400	Perquimans (81CRS541) (81CRS542) (81CRS543) (81CRS544) (81CRS545) (81CRS546) (81CRS547)	No Error
STATE v. WILSON No. 8217SC41	Rockingham (81CR6252)	No Error
STEVENS v. STEVENS No. 824DC54	Onslow (78CVD262)	Affirmed

Stines v. Satterwhite

PAUL V. STINES AND WIFE, PEGGY P. STINES v. JESSE W. SATTERWHITE

JESSE W. SATTERWHITE v. PAUL V. STINES AND WIFE, PEGGY P. STINES

GODWIN BUILDING SUPPLY COMPANY, INC. v. JESSE W. SATTERWHITE, PAUL V. STINES AND WIFE, PEGGY P. STINES

No. 8110SC1029

(Filed 17 August 1982)

1. **Rules of Civil Procedure § 13— failure to assert claim as compulsory counterclaim — proper**

In an action between a builder and property owners where the builder sued the owners for materials furnished and labor performed, the property owners did not err in failing to assert the discovery of "numerous defects" in the construction of their home as a compulsory counterclaim rather than as another action since the defects were not discovered at the time of the serving of the builder's pleading. G.S. 1A-1, Rule 13(a).

2. **Courts § 9.4— no jurisdiction in judge to review rulings of another superior court judge**

In actions between a builder and property owners where a superior court judge denied the builder's motion to dismiss the property owner's complaint while treating it as a motion for summary judgment, it was error for a subsequent judge to reconsider this matter and grant summary judgment in favor of the builder since alleged errors by one trial judge should be corrected by appellate review and not by relitigation of the same issues by another trial judge.

Judge HEDRICK concurs in the result only.

Judge BECTON concurring in the result.

APPEAL by plaintiffs, Paul V. Stines and wife, Peggy P. Stines, and defendant, Jesse W. Satterwhite, from *Preston, Judge.* Judgment entered 18 June 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1982.

These cases involve property owners, the Stines, who contracted with a builder, Satterwhite, to construct a house on the Stines' property, and a building supply company, Godwin Building Supply. The facts necessary to the disposition of the Stines' and Satterwhite's arguments will be stated in the body of this opinion.

Satisky & Silverstein, by John M. Silverstein, for plaintiff-appellants.

Johnson, Gamble & Shearon, by David R. Shearon and Richard J. Vinegar, for defendant-appellee-appellant Jesse W. Satterwhite.

HILL, Judge.

A calendar of events involving the building of the Stines' house reveals the following facts:

Godwin Building Supply Company, Inc. [hereinafter referred to as Godwin] furnished materials for the construction of the house, but did so only with the understanding that the materials were charged to both Satterwhite and the Stines. The bills for materials furnished were not paid. On 11 April 1979, Satterwhite brought an action, case No. 79CVS2219, against the Stines for materials and labor totaling $22,267.80. The Stines answered with a general denial, but admitted the contract between themselves and Satterwhite.

Thereafter, on 24 May 1979, Godwin brought an action, case No. 79CVS3172, against both the Stines and Satterwhite for $15,726.19 in building materials furnished for the construction of the house, filed a materialman's lien, and sought foreclosure. The Stines filed an answer which denied the debt. Satterwhite's answer alleged that he was agent for the Stines in purchasing the materials and denied personal liability. In the same action, Satterwhite filed a cross-claim against the Stines for a $4,500 supervision fee due him under the construction contract. The Stines denied liability to Satterwhite.

On 21 May 1980, the Stines brought an action, case No. 80CVS3121, against Satterwhite alleging breach of contract and negligence in the construction of the house, seeking $25,000 in damages. In his answer, Satterwhite denied the Stines' allegations and moved to dismiss the action on two grounds: (1) that the complaint failed to state a claim upon which relief can be granted, pursuant to G.S. 1A-1, Rule 12(b)(6), and (2) for failure to bring the action as a compulsory counterclaim in either case No. 79CVS2219 or case No. 79CVS3172.

Satterwhite moved to consolidate case No. 79CVS2219 and case No. 79CVS3172 on 5 March 1980. Judge Farmer allowed the motion on 26 November 1980. Thereafter, on 5 December 1980, the Stines moved to amend their answer in case No. 79CVS2219 to add a counterclaim seeking damages. The Stines then alleged major defects in the house which were not known to them, and which could not have been known to them, at the time they filed their original answer in case No. 79CVS2219. The motion to amend was supported by the Stines' affidavit.

Judge Godwin denied Satterwhite's motion to dismiss the Stines' complaint in case No. 80CVS3121 on 27 January 1981, and on the same day, consolidated case No. 79CVS2219 with case No. 80CVS3121. Also, on 28 January, the Stines withdrew their motion in case No. 79CVS2219 to amend and add a counterclaim, which would allege substantially the same facts as did their action against Satterwhite, case No. 80CVS3121. Thereafter, on 3 June 1981, Satterwhite moved for summary judgment against the Stines in case No. 80CVS3121.

On 23 February 1981, Satterwhite moved for summary judgment in case No. 79CVS3172, supporting his motion with an affidavit to establish that he acted as the Stines' agent in the purchasing of building materials from Godwin. An affidavit in opposition to the motion was filed by Godwin which established that Satterwhite advised Godwin to charge materials he purchased to both the Stines and him. Judge Hobgood denied Satterwhite's motion for summary judgment on 26 May 1981.

At the 15 June 1981 term of the superior court, a consent judgment was entered by Judge Preston in case No. 79CVS3172, which involved a claim by Godwin in the sum of $15,726.19, plus interest, for building supplies furnished for the job. In that case, Satterwhite had filed an answer and crossclaim setting out the contract between the Stines and Satterwhite, alleging agency for the Stines by him in the purchase of building supplies, and claiming $4,500 for services rendered by him in supervising the construction of the house. Judge Preston made findings of fact that all matters in controversy among Godwin, Satterwhite, and the Stines "*raised by the complaint*" in case No. 79CVS3172 have been compromised and settled by the parties. (Emphasis added.) Thereafter, the judge awarded judgment to Godwin against Sat-

terwhite and the Stines jointly and severally in the sum of $15,726.19, and decreed the sum to be a lien upon the real estate in question. No disposition was made of the $4,500 claim by Satterwhite against the Stines.

Also during the 15 June 1981 term of superior court, the Stines made an oral motion to amend their answer in case No. 79CVS2219 and to allege a counterclaim. However, after reviewing the pleadings and hearing argument of counsel, Judge Preston, in his discretion, denied the Stines' motion.

In the judgment entered on 18 June 1981, Judge Preston found (1) that all matters in controversy among Godwin, Satterwhite, and the Stines in case No. 79CVS3172 were settled in the consent judgment filed on 15 June 1981, (2) that no genuine issue of material fact existed with respect to the liability of Satterwhite to the Stines in case No. 80CVS3121, and with respect to the liability of the Stines to indemnify Satterwhite in case No. 79CVS3172 and case No. 79CVS2219, (3) that Satterwhite is thereby entitled to summary judgment in those cases, and (4) that "no just reason" exists for delaying entry of final judgment in each of the three cases. Thus, Judge Preston disposed of the three cases as follows: in case No. 80CVS3121, summary judgment was granted in favor of Satterwhite and against the Stines; in case No. 79CVS2219 and case No. 79CVS3172, summary judgment was granted in favor of Satterwhite against the Stines on the issue of indemnification and contribution among the parties for payment as provided in the consent judgment, and that Satterwhite recover of the Stines any sums which may be recovered against them by Godwin.

In summary, then, the three cases and other matters before us were disposed of as follows:

(1) A portion of case No. 79CVS3172 was settled by consent with both the Stines and Satterwhite jointly liable on any claim by Godwin, but leaving to be litigated the $4,500 claim by Satterwhite against the Stines for his supervision fee.

(2) In case No. 79CVS2219, such sums, if any, as may be recovered by Godwin against Satterwhite shall be recovered by Satterwhite from the Stines. That portion of

the action dealing with labor performed and materials furnished by Satterwhite yet must be litigated, this being only a partial summary judgment.

(3) In case No. 80CVS3121, summary judgment was granted in favor of Satterwhite against the Stines dismissing the Stines' claim for negligent construction and supervision by Satterwhite.

(4) All of the Stines' motions to amend their answer in case No. 79CVS2219 to allege a counterclaim containing substantially the same facts as did their action against Satterwhite, case No. 80CVS3121, have been denied.

Both the Stines and Satterwhite appeal.

[1] We first address Satterwhite's contention that Judge Godwin erred in denying his motion to dismiss the Stines' action in case No. 80CVS3121 for failure to assert the claim as a compulsory counterclaim.

Rule 13(a) of the North Carolina Rules of Civil Procedure states, in pertinent part, as follows:

> A pleading shall state as a counterclaim any claim *which at the time of serving the pleading the pleader has against any opposing party,* if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .

G.S. 1A-1, Rule 13(a) (emphasis added). In *Gardner v. Gardner,* 294 N.C. 172, 176-77, 240 S.E. 2d 399, 403 (1978), our Supreme Court stated that

> [t]he purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve "all related claims in one action thereby avoiding a wasteful multiplicity of litigation . . . ." [Citations omitted.]
>
> . . . [I]n order to give effect to the purpose of Rule 13(a) once its applicability to a second independent action has been determined, this second action must on motion be either (1) dismissed with leave to file it in the former case or (2) stayed until the former case has been finally determined.

Case No. 80CVS3121 was filed by the Stines on 21 May 1980. The basis of that action is the Stines' discovery of "numerous defects" in the construction of their house, "many of which were hidden from a reasonable inspection by the methods of construction, which problems developed and been [sic] discovered subsequent to the alleged completion of construction of the residence." The Stines further alleged that they "have now been forced to have substantial additional work done upon their residence to correct faulty, defective and [negligent] work . . . ." As noted above, Satterwhite moved to dismiss the complaint for failure to state a claim and for failure by the Stines to assert the action as a compulsory counterclaim in either case No. 79CVS2219 or case No. 79CVS3172. The Stines supported their verified complaint with an affidavit showing that they were not aware of the defects which had come to light since the filing of the "original lawsuit." The affidavit was served on opposing counsel on the date of trial. G.S. 1A-1, Rule 56(c) states that "[t]he adverse party prior to the day of hearing may serve opposing affidavits." We note that the Stines' affidavit supported the verified complaint and in no way surprised Satterwhite. Hence, we find no prejudice.

The record does not reveal whether Judge Godwin treated Satterwhite's motion to dismiss the Stines' complaint for failure to state a claim by merely reviewing the pleadings, as is contemplated by G.S. 1A-1, Rule 12(b). *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). However, it is obvious from a reading of the total record that Judge Godwin also considered the Stines' affidavit. G.S. 1A-1, Rule 12(b) further provides as follows:

> If, on a motion asserting the defense, numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Therefore, we find that Judge Godwin treated Satterwhite's motion as a motion for summary judgment. Since the affidavit simply supported the Stines' complaint and offered nothing as a surprise to Satterwhite, we find no error in treating the motion as one for summary judgment.

Satterwhite argues that case No. 80CVS3121 should have been dismissed since it constituted a compulsory counterclaim in one of the previous cases. We do not agree.

> Where a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, matures or is acquired by a pleader *after* he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim. Although G.S. 1A-1, Rule 13(e), permits the court to allow such supplemental pleading to assert a counterclaim, such supplemental pleading is not mandated and failure to do so will not bar the claim.

Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 564, 230 S.E. 2d 201, 203 (1976) (emphasis added). *See also* 3 Moore's Federal Practice § 13.32.

The verified complaint and supporting affidavit in case No. 80CVS3121 both assert that the defects in construction were hidden from a reasonable inspection by the methods of construction, and such defects had been discovered subsequent to the alleged completion of construction. Although the response to interrogatories reveals that the Stines may have known, or with diligence could have discovered, some of the defects, there were allegations of additional defective construction to substantiate the Stines' complaint found *after* the institution of the previous cases. The Stines cannot be expected to plead that which they did not know, nor that which they were not able to reasonably ascertain with diligent inquiry. Hence, we find no error in the ruling by Judge Godwin denying Satterwhite's motion to dismiss the Stines' complaint.

We note that on two occasions the Stines moved to amend their answer in case No. 79CVS2219 and allege a counterclaim. In one instance, the Stines withdrew their motion after the judge refused to dismiss case No. 80CVS3121, and in another instance, they withdrew their motion when the judge refused to permit them to amend case No. 79CVS2219 to allege a counterclaim. Since Judge Godwin properly denied Satterwhite's motion to dismiss case No. 80CVS3121 for the reasons set out above, the Stines properly withdrew their motion to amend their answer in case No. 79CVS2219 to allege a counterclaim.

[2] The same question is addressed by Judge Preston as a part of the judgment entered on 18 June 1981, wherein he acknowledged a review of the pleadings, affidavits, and interrogatories, and granted summary judgment in favor of Satterwhite and against the Stines in case No. 80CVS3121. Alleged errors by one trial judge should be corrected by appellate review and not by relitigation of the same issues by another trial judge. *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981). For the reasons set out above, we conclude that Judge Godwin committed no error in apparently treating Satterwhite's motion to dismiss as a motion for summary judgment in case No. 80CVS3121 and in denying the motion on 27 January 1981. It was error for Judge Preston to reconsider this matter again on 18 June 1981.

However, the Stines may not complain that summary judgment was granted thereby compelling the Stines to indemnify Satterwhite for any sums recovered against Satterwhite by Godwin because no prayer for relief is made by Satterwhite. The consent judgment established the amount due Godwin by the Stines and Satterwhite for materials delivered and used on the Stines' property and on which property a materialman's lien was created. The contract between the Stines and Satterwhite required the Stines to pay for material in construction Satterwhite had been compelled to permit billing in both his name and the Stines' name in order to secure the materials for the Stines' house. It is well established that the nature of the action and the relief to which the parties are entitled are to be determined by the facts alleged in the pleadings and established by the evidence, not by a prayer for relief. *See generally* 10 Strong's N.C. Index 3d, Pleadings § 7, pp. 217-18.

Therefore, we reverse that portion of the judgment entered by Judge Preston on 18 June 1981 which granted summary judgment in favor of Satterwhite and against the Stines in case No. 80CVS3121, wherein Stines alleged breach of contract and negligence in performing the contract. We affirm that portion of Judge Preston's judgment dated 18 June 1981 in case No. 79CVS2219 and case No. 79CVS3172 granting partial summary judgment in favor of Satterwhite and against the Stines on the issue of indemnification and contribution between the parties for

the payment of the consent judgment entered on 15 June 1981 against both parties in favor of Godwin, and further ordering that Satterwhite shall have and recover of the Stines the full amount of any sums recovered against him by Godwin. After entry of judgment, there remains for disposition the following matters: (1) Satterwhite's action against the Stines, case No. 79CVS2219, for (a) the cost of material and labor furnished by Satterwhite to the Stines in excess of the $15,726.19 covered in the consent judgment, and (b) the $4,500 fee for Satterwhite's supervision of the construction of the Stines' house, and (2) the Stines' action against Satterwhite, case No. 80CVS3121, for negligence and breach of contract.

Our disposition of these cases is as follows:

As to Case No. 80CVS3121, reversed.

As to Case No. 79CVS2219 and Case No. 79CVS3172, affirmed in part as set out herein.

The cases are remanded for further disposition in accordance with this opinion.

Judge HEDRICK concurs in the result only.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

With regard to the appeal of the property owners (Stines), I concur because:

(a) Judge Godwin obviously considered matters outside the pleadings in ruling on the builder's (Satterwhite's) Rule 12(b)(6) motion, and therefore, treated the motion "as one for summary judgment and disposed of [it] as provided in Rule 56." G.S. 1A-1, Rule 12(b);

(b) The averments in the affidavit of the property owners set forth genuine issues of material fact whether the defects in construction were hidden by the methods of construction from a reasonable inspection; and

(c) Judge Preston had no jurisdiction to grant summary judgment in favor of the builder since another superior court judge, Judge Godwin, had already denied the builder's motion for summary judgment.

With regard to the appeal of the builder, Satterwhite, I agree that no dismissal was warranted based on the failure of the homeowner to file a compulsory counterclaim, and I concur because:

(a) The subject matter of the counterclaim was acquired by the homeowner after he had served his initial pleading. *See Driggers v. Commercial Credit Corp.*, 31 N.C. App. 561, 230 S.E. 2d 201 (1976); and

(b) The property owners sought, on different occasions, to amend their pleadings to allege a counterclaim but withdrew their motions as a result of action taken by the trial court.

STATE OF NORTH CAROLINA v. ANTHONY EDELL WILLIS

No. 8110SC1289

(Filed 17 August 1982)

1. Searches and Seizures § 23— validity of warrant—sufficient to establish probable cause

In a prosecution for trafficking in heroin, a warrant authorizing a search was based upon an affidavit that was sufficient to establish probable cause for the issuance of the warrant where the application contained a statement of probable cause; the information upon which the application was based was received on the very day the application was made; the informant had stated that he had seen a quantity of heroin at 526 South Person Street, the place to be searched; and the defendant had been seen selling heroin within the past 72 hours. G.S. 15A-244(2) and (3).

2. Searches and Seizures § 41— execution of search warrant—inappropriate notice by police officers—failures not requiring exclusion of evidence

In a prosecution for trafficking in heroin, officers violated the statutory requirements for execution of a search warrant, G.S. §§ 15A-249 and 15A-251(1) and (2), when, at best, an officer announced his identity as he entered the front door to the house to be searched, and he did not state his purpose for being there. The violation was not substantial enough to require suppression under G.S. 15A-974, however, since (1) there was evidence that the

entry was effected to prevent destruction of contraband, and (2) the police officers' deviation from lawful conduct was not extensive or willful.

Judge BECTON dissenting.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 3 July 1981, in Superior Court, WAKE County. Heard in the Court of Appeals 24 May 1982.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Associate Attorneys Jane P. Gray and Emily R. Copeland, for the State.

Van Camp, Gill & Crumpler, by William B. Crumpler, and Loflin & Loflin, by Thomas F. Loflin III and Robert S. Mahler, for defendant appellant.

MORRIS, Chief Judge.

Defendant was indicted for trafficking in heroin, a violation of G.S. 90-95(h)(4)(a). After the denial of his motion to suppress evidence seized during a search of his premises, defendant entered a plea of guilty to the lesser included offense of simple possession of heroin. In his plea, defendant preserved the right to appeal the denial of his motion to suppress, G.S. 15A-979. His appeal consists of two arguments supporting his contention that the motion to suppress should have been allowed. For the reasons stated below, we reject defendant's arguments and affirm the denial of his motion to suppress evidence seized during a search of his home.

I

On 5 August 1980, Raleigh Police Detective Glover filed an application for a warrant to search a house at 526 S. Person Street. He swore to the following statement to establish probable cause for issuance of the warrant:

> On 8/5/80 this investigator received information from a reliable informant who stated that Anthony Willis has a quantity of Heroin at 526 S. Person Street, Raleigh, North Carolina. This informant stated that he had seen a quantity of Heroin at 526 S. Person Street, also he saw Anthony Willis sale (*sic*) a spoon of Heroin to a Black Male within the past 72 hours. This informant has proven to be reliable on 2 different

> occasions in the past 2 years. This informant has made a controll (*sic*) buy of Heroin for Det. A. C. Munday and this Investigator. One person has been arrested for drug violation from this informants' information.

Having obtained the warrant, he and eight other officers proceeded to 526 S. Person Street. According to State's evidence at the hearing on defendant's motion to suppress, when the officers were approaching the address, they observed defendant's father and others standing in front of the house. Police Sergeant Peoples jumped from his automobile, ran to the house, and, as soon as he made entry to the house, shouted, "Police." Detective O'Shields, who followed Sergeant Peoples into the house, testified that the main wooden door was completely open and the outer screen door was ajar. The officers found defendant and a woman in the second room of the house. After the people outside the house were brought in, Detective Glover read the search warrant, and a search was initiated. Fifty-eight grams of heroin were found.

Defendant's cross-examination of State's witnesses, as well as affidavits and a transcript from his probable cause hearing, tended to show that the house at 526 S. Person was a shotgun house with three rooms; that, upon the officers' arrival at the house in unmarked cars, some officers went to the backdoor; that none of the officers had on police uniforms; that the officers heard no commotion before entering the house, and that Sergeant Peoples was in the living room of the dwelling when he shouted, "Police."

The trial court found, among other things, that defendant lived at the residence at 526 S. Person Street, and that he, therefore, had an expectation of privacy in the premises. The court also found that the search was conducted pursuant to a valid search warrant and that Sergeant Peoples announced, "Police" at the same time as he was crossing the threshold and entering the premises. The court concluded that any violation of G.S. 15A-241 through G.S. 15A-259 was "merely technical in nature and effect" and was not substantial enough to require exclusion pursuant to G.S. 15A-974.

II

[1] Defendant's first argument is that the trial court erred in denying his motion to suppress evidence seized during the search

because the warrant authorizing the search was based upon an affidavit that was insufficient to establish probable cause for issuance of the warrant. This argument is, of course, grounded in the Fourth Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), the Supreme Court dealt with constitutional requirements for obtaining a state search warrant. It emphasized that the protection guaranteed by the 4th Amendment consists in requiring that inferences drawn to support the issuance of a search warrant be drawn by a "neutral and detached" magistrate, not by police officers "engaged in the often competitive enterprise of ferreting out crime." *Id.* at 111, 84 S.Ct. at 1513, 12 L.Ed. 2d at 727, quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440 (1948). The application for the warrant must allege facts by which the magistrate can determine whether there is probable cause to support the warrant. Mere conclusions of the officer applying for the warrant or of the informant are not sufficient.

North Carolina has statutorily set forth requirements for the contents of the application for a search warrant, the pertinent ones of which are:

. . . .

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched;

. . . .

G.S. 15A-244(2) and (3).

Based on this statute and on *Aguilar v. Texas, supra*, defendant contends that the application in the present case fails to establish that contraband was, at the time of the application, in the place to be searched, fails to link defendant's sale of heroin to the residence at 526 S. Person Street, and fails to provide any connection between defendant and the premises. We concede that the affidavit of Detective Glover was not artfully drawn. We do not, however, believe that applications for search warrants, written by police officers often in haste, must be drawn with syntactical precision which would try even our more learned grammarians.

A reasonable reading of the application for the search warrant in the case *sub judice* leads this Court to conclude that it did contain sufficient facts to allow issuance of the search warrant. The application contains a statement of probable cause; the information upon which the application was based was received on the very day the application was made; the informant had stated that he had seen a quantity of heroin at 526 S. Person Street, the place to be searched; and the defendant had been seen selling heroin within the past 72 hours. There is a further statement supporting the reliability of the informant. This case is clearly distinguishable from *State v. Armstrong*, 33 N.C. App. 52, 234 S.E. 2d 197 (1977), which defendant cites in support of his argument. Unlike the affidavit before this Court now, *Armstrong* dealt with an affidavit which utterly failed to connect contraband to the premises for which the warrant was obtained.

III

[2] Defendant further argues that the motion to suppress evidence should have been allowed because, in announcing their identity and purpose and in entering defendant's premises, the police officers failed to comply with statutory requisites. G.S. 15A-249 requires a police officer executing a search warrant to give appropriate notice of his identity and purpose before entering the premises. G.S. 15A-251 allows an officer to enter premises by force when necessary to execute the warrant if:

. . . .

(1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes

either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or

(2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.

G.S. 15A-251(1) and (2).

In the instant case, the facts show that the police officer, at best, announced his identity as he entered the front door to the house. He did not state his purpose for being there. It is clear from the findings of fact made in the order denying defendant's motion that the officer had no probable cause to believe that the giving of notice would endanger the life or safety of any person. Hence, in our view, the officers violated the statutory requirements for execution of the search warrant.

The question now becomes whether the failures of the police officers to follow statutory procedures in entering and searching defendant's premises require the exclusion of evidence seized during the search. G.S. 15A-974 requires suppression of evidence "if it is obtained as a result of a substantial violation" of the Criminal Procedure Act. Determination of whether a violation is substantial is made upon consideration of all the circumstances, including:

. . . .

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter.

G.S. 15A-974(2) a.-d.

While we are mindful of the extreme importance of the right of the individual to be secure against unlawful searches of his home, we are also aware that, in *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), the Supreme Court refused to find unconstitutional the officers' entry, without warrant, notice, or permission, where there was evidence that such entry was effected to prevent destruction of contraband. While this holding was based upon California law governing forcible entries, we find

it significant in measuring, in our case, the importance of the particular interest violated.

Furthermore, we cannot find that the police officers' deviation from lawful conduct was extensive or willful. Upon reaching the premises, the officers observed three persons, including defendant's father, near an automobile. Although the officers heard no warning given by these persons, the officers feared that persons inside the house might destroy the contraband for which they were to search. They raced to the house where they found the main front door open and the screen door ajar. Sergeant Peoples yelled, "Police" as he was moving through the open door. In our minds, exclusion of evidence seized under these circumstances will do little, if anything, to deter future violations of G.S. 15A-249 and G.S. 15A-251.

The scenario in the instant case was considerably different from that in *State v. Brown*, 35 N.C. App. 634, 242 S.E. 2d 184 (1978), cited by defendant. In that case police officers staged a mock car chase to lure defendant from his home and attempted, by deceitful means, to gain access to that home. This Court properly held that the motion to suppress in *Brown* should have been allowed.

In deciding that the violation of G.S. 15A-249 and G.S. 15A-251 was not substantial, we do not intend to obviate the clear mandate of those statutes. In the instant case, we simply do not find violation of the statutes governing warrant execution to be substantial enough to require suppression of evidence seized during the search.

The order denying defendant's motion to suppress is

Affirmed.

Judge MARTIN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The majority correctly concludes that "the officers violated the statutory requirements for execution of the search warrant,"

ante, p. 7, but then holds that "the violation of G.S. 15A-249 and G.S. 15A-251 was not substantial," ante, p. 9. From that holding, I dissent.

The police clearly failed to give appropriate notice of their identity and purpose before entering the premises in question. And, as stated by the majority, "the officer had no probable cause to believe the giving of notice would endanger the life or safety of any person." Ante, p. 7. The officers' fear "that persons inside the house might destroy the contraband," ante, p. 8, is not sufficient, standing alone, to justify a forced entry. As stated by this Court in *State v. Brown*, 35 N.C. App. 634, 636, 242 S.E. 2d 184, 186 (1978), we do not "read the statute so broadly as to justify its violation when the destruction of contraband is probable."

Considering (1) the facts of this case; (2) the fundamental right of an individual to be secure against unlawful searches of his home; and (3) the incidents of assaults[1] on officers who fail to give appropriate notice of their identity and purpose before entering premises, I believe the evidence seized during the search should have been suppressed. I vote to reverse the conviction.

EULA WILKIE v. ROBERT HAROLD WILKIE, BETTY FOWLER AND MILDRED McFALLS

No. 8129SC1118

(Filed 17 August 1982)

1. Evidence § 11.8— Dead Man's Statute—waiver of statute to matters inquired about in answers to interrogatories

In an action to have a resulting trust declared in property which allegedly was inadvertently deeded solely to plaintiff's husband during their marriage, the trial court correctly concluded that the "filing and service of . . . interrogatories upon (plaintiff) and her answers thereto constitute[d] a waiver" by defendants of the incompetency of plaintiff's testimony under G.S. 8-51 to the extent of the matters inquired about in the interrogatories. The defendants

1. *See State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979) in which a City of Durham Narcotics Officer was killed after entering defendant's apartment to search for marijuana. Defendant testified that he "never heard anyone identify himself as a policeman until after he had fired the shot." *Id.* at 153, 253 S.E. 2d at 908. *See also State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973).

were not required to introduce the answers into evidence before a waiver would exist.

2. Trusts § 19— resulting trust—sufficiency of evidence

The evidence of a resulting trust was sufficient to survive defendants' motion for a directed verdict where the evidence tended to show that plaintiff and decedent were married in 1965; that in 1968 they discussed buying a piece of property; that plaintiff furnished $1,800 towards the purchase price of $4,000; that decedent furnished only $200; that plaintiff and decedent agreed that the deed would be made to both of them; that they later moved onto the property and built a residence thereon; that plaintiff put in excess of $7,000 in the land and improvements; that at the time of plaintiff's marriage to decedent she had approximately $16,000 in cash; and that after decedent's death, plaintiff saw that the deed to the property had been placed in decedent's name alone.

APPEAL by defendants from *Howell, Judge.* Judgment entered 21 May 1981 in Superior Court, HENDERSON County. Heard in the Court of Appeals on 7 June 1982.

Plaintiff initiated this action to have a resulting trust declared in property which she alleged was inadvertently deeded solely to her husband during their marriage. Plaintiff's husband (hereinafter decedent) died intestate on 21 September 1978. Plaintiff alleged in her Complaint that she and decedent agreed to purchase the property as tenants by the entirety and that she paid at least half of the purchase price of the lot and half of the cost of constructing the residence thereon. The defendants, decedent's children by a prior marriage, filed an answer claiming an interest in the property and disputing plaintiff's claim for a resulting trust. After considering plaintiff's evidence, the defendants choosing to present none, the jury found that defendants were trustees of a resulting trust in the property for plaintiff.

Defendants have appealed and have assigned error (1) to the admission of the plaintiff's testimony concerning her personal transactions and conversations with the decedent; (2) to the denial of their motion for a directed verdict; and (3) to the charge.

Redden, Redden & Redden, by M. M. Redden, for plaintiff appellee.

Herbert L. Hyde for defendants appellants.

BECTON, Judge.

[1] By Assignments of Error Nos. 1, 2, 7, 8, 9, 10 and 12, defendants argue that the admission of plaintiff's testimony regarding transactions and communications with the decedent violated G.S. 8-51, the dead man's statute. G.S. 8-51 precludes an interested witness from testifying at trial about personal transactions or communications between the witness and a deceased person when either the witness or the person he is testifying against derives his interest or title from, through or under the deceased person.

In ruling on the admissibility of plaintiff's testimony concerning transactions and communications with decedent, the trial court examined the file and heard arguments of counsel. The trial court found that defendants had submitted interrogatories to plaintiff pursuant to Rule 33 of the North Carolina Rules of Civil Procedure; that plaintiff answered the interrogatories; and that these answers were filed by the defendants. The trial court further found:

> 2. . . . That beginning with interrogatory No. 7, the questions propounded related, at least, in part to "personal transactions" with the deceased, C. D. Wilkie; and related specifically to subject matter of this lawsuit. That plaintiff answered the interrogatories, and the answers contained statements by the plaintiff, which in part, are "personal transactions" with the decedent, C. D. Wilkie. That there was no objection by the plaintiff to the interrogatories or any one of them; and that there was no objection by the defendants to the answer of any of the interrogatories.

The trial court concluded that the "filing and service of these interrogatories upon Mrs. Wilkie and her answers thereto constitute[d] a waiver" by defendants of the incompetency of plaintiff under G.S. 8-51 to the extent of the matters inquired about in the interrogatories.

Defendants argue in their brief that since they did not offer the answers to the interrogatories into evidence, the dead man's statute was not waived. We agree with the trial court that, under the prevailing view set forth in North Carolina cases, the defendants were not required to introduce the answers into evidence before a waiver would exist. In *Hayes v. Ricard*, 244 N.C. 313, 93

S.E. 2d 540 (1956), the plaintiffs adversely examined the defendant to obtain evidence for use at trial as provided by the discovery statutes existing at that time. The *Hayes* Court concluded "that '[t]hat examination is a waiver of the protection afforded by G.S. 8-51 to the extent that either party may use it upon the trial.' " *Id.* at 324, 93 S.E. 2d at 549. The Court further indicated that a waiver at one stage of the trial would continue throughout the proceedings. *See* Brandis, North Carolina Evidence § 75 (2nd Rev. Ed. 1982). The reasoning in *Hayes* would also apply to the filing of interrogatories and their answers.

A decision by this Court further supports our conclusion that defendants waived the dead man's statute by filing the pertinent interrogatories and answers. In *Stone v. Homes, Inc.*, 37 N.C. App. 97, 102, 245 S.E. 2d 801, 805, *disc. review denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978), we concluded that "waiver of an exception to incompetent evidence under G.S. 8-51 occurs when the objecting party *first succeeds* in eliciting the incompetent evidence." In the case before us the defendants succeeded in eliciting incompetent evidence under G.S. 8-51 after they served interrogatories upon plaintiff and filed the answers thereto.[1] By so doing, defendants waived the protection afforded by G.S. 8-51.

[2] Defendants next assign error to the trial court's denial of their motion for directed verdict. They contend that even assuming *arguendo* that the dead man's statute was waived and the plaintiff's testimony of her transactions and conversations with the decedent was admissible, the evidence still would not support the finding of a resulting trust in the property in plaintiff's favor. We disagree.

On a motion for a directed verdict, the trial court must consider whether the evidence presented is sufficient to go to the jury. In passing upon this motion, the evidence must be considered in the light most favorable to the non-movant. "That is, 'the evidence in favor of the non-movant must be deemed true, all

1. We note, as did the trial court below, that in Annot., 23 A.L.R. 3d 394 (1969), *Hayes, supra* was cited as supporting the view that a waiver is effected once the deposition is voluntarily taken or interrogatories served upon one who would otherwise have been incompetent as a witness. The foundation for this view rests upon the rule that it would be unfair to permit a party to obtain the benefits of discovery and then to reject the information elicited if it should be unfavorable to him.

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.' (Citation omitted.)" *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979).

The evidence in the case *sub judice* when viewed in the light most favorable to the plaintiff shows the following: Plaintiff and decedent were married on 5 August 1965. Both parties had children by prior marriages. In 1968 plaintiff and decedent discussed buying the property at issue from Robert Reese. Decedent told plaintiff that he did not have the money and she thereafter furnished $1,800 towards the purchase price of $4,000. Decedent furnished only $200. Plaintiff and decedent agreed that the deed would be made to both of them. They later moved onto the property and built a residence thereon. Plaintiff continues to live on the property. She testified that she put in excess of $7,000 in the land and improvements. At the time of plaintiff's marriage to decedent she had approximately $16,000 in cash. On 21 September 1978 decedent died intestate. After his death plaintiff saw the deed to the property for the first time. The deed had been recorded in March 1968 and had been placed in decedent's name alone. Plaintiff indicated that she had never been to the office of the attorney who allegedly drafted this deed.

In further support of her allegation that decedent intended the deed to be in his and plaintiff's names and that she is therefore entitled to a resulting trust in the property as the surviving tenant by the entirety, plaintiff introduced into evidence county tax listings and tax receipts mailed to both her and decedent which showed taxes were paid on the property at issue. Additionally, other witnesses testified that decedent had told them that the property belonged to him and plaintiff. One of these witnesses testified that decedent told him he was glad plaintiff had bought this property. C. F. Dockins, an accountant who had known decedent, testified that decedent came to him and indicated that plaintiff wanted Dockins to draft a statement showing her investment in the property.

We believe the foregoing evidence was sufficient for the jury to find a resulting trust in the property in plaintiff's favor. "Resulting trusts relate to the situation where equity will raise a trust by reason of the nature of a transaction which indicates that

the parties would have intended a trust to be created although none was declared." Webster's Real Estate Law in North Carolina § 507 (Rev. Ed. 1981).

> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes. (Citations omitted.)

Cline v. Cline, 297 N.C. 336, 344-345, 255 S.E. 2d 399, 404-405 (1979). The *Cline* Court extended the application of the resulting trust doctrine to the situation in which the person claiming the trust "proves a payment on the purchase price made to the grantee or grantor after the delivery of the deed but pursuant to a *promise made to the grantee* before the deed was delivered." *Id.* at 345, 255 S.E. 2d at 405. The Court explained, "There is no difference in principle between paying money toward the purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised." *Id.* at 346, 255 S.E. 2d at 406.

In *Cline* the Court found that there was sufficient evidence to establish either a constructive or resulting trust in plaintiff wife's favor in the land at issue.[2] In *Cline* the evidence tended to show that defendant husband had breached the husband-wife confidential relationship when he took title to his mother's farm in his name alone after representing to plaintiff that the land would be theirs after the mortgage thereon was paid. Relying upon this promise, plaintiff moved onto the property and contributed her money and labor toward payment of at least one-half of the mortgage. We believe that *Cline* is analogous to the case now before us. The evidence in the case *sub judice* tended to show that plaintiff promised to pay part of the purchase price of the property in return for a promise that the deed would be made to her and

2. The Court however indicated that the jury's finding, that a resulting trust was established, must be vacated because of the trial court's insufficient and confusing application of the applicable law in the charge.

decedent as tenants by the entirety; and that plaintiff thereafter made contributions toward the purchase price and improvements to the property. Again, this evidence was sufficient for the jury to find a resulting trust in plaintiff's favor.

Defendants' argument that a directed verdict should have been granted in their favor is grounded upon their contention that there was no evidence of any agreement between plaintiff and decedent made prior to the passage of title wherein plaintiff agreed to pay a portion of the purchase price of the property. They cite plaintiff's testimony on cross-examination where she indicated that Charles Fender was present when she made the arrangements with decedent "about the money being provided and how the deed would be made." She "guessed" this date was July 1968. The deed to the property was dated February 1968. Other evidence shows, however, that plaintiff and decedent discussed buying the property and agreed before the property was bought that the deed would be in both their names. Furthermore, Fender's testimony was that during hay season he saw plaintiff give some money to decedent who in turn gave the money to the grantor of the property. The next day decedent told him plaintiff had purchased the property. Fender's testimony merely shows that an exchange of money was made in his presence. Although the evidence was not entirely consistent, the jury reconciled the difference in plaintiff's favor. A directed verdict in defendants' favor was properly denied.

Defendants' other assignments of error concern alleged errors in the charge to the jury. They first argue that the court did not explain to the jury that a resulting trust could arise only when the person seeking the trust paid consideration before title passed or made an agreement to pay consideration before title passed. Upon examining the charge, we find it sufficient to refute this allegation. We also find no merit to defendants' argument that the court charged on irrelevant matters as well as matters which were unsupported by the evidence. Assuming, *arguendo*, that these violations did occur, defendants have failed to show any prejudicial error.

Having concluded that the trial court properly ruled on defendants' motions and properly charged the jury, we hold that the judgment in plaintiff's favor must be

Affirmed.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. TRAVIS HICKS PROCTOR

No. 817SC1264

(Filed 17 August 1982)

1. Narcotics § 1; Statutes § 5.4— trafficking in cocaine—"derivative of coca leaves"—inclusion in statutes—statutes not unconstitutionally vague

Where an indictment charged defendant with trafficking in cocaine in violation of G.S. 90-95(h)(3), and the State filed a bill of particulars in response to a request by defendant which stated that the substance was "cocaine which is a derivative of coca leaves," the trial court did not err in failing to grant defendant's motion to dismiss on the grounds that "a derivative of coca leaves" is not included within the language of G.S. 90-95(h)(3) since the full definition of cocaine in G.S. 90-90(a)4 may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3) and defendant was provided with sufficient notice for him to determine that the conduct which the State's evidence tended to show was proscribed.

2. Narcotics § 3.1— defense curing deficiency in State's proof—eliciting testimony on cross-examination

The trial judge did not err in admitting cocaine into evidence where an SBI chemist failed to identify the cocaine as a derivative of coca leaves as it was identified in the bill of particulars which the State filed since the defense elicited the necessary information on cross-examination by having the chemist state that he "identified the compound cocaine, which is extracted from, or in a broad sense a derivative of coca leaves."

3. Criminal Law § 102.5— improper question on cross-examination of defense witness—new trial not required

Although the trial judge erred in overruling an objection to a question of a defense witness in which the district attorney asked, "Well, the truth of the matter is that you take the Fifth Amendment because you know that in some way your testimony will show to the ladies and gentlemen of the jury what they already know, that Travis Hicks Proctor is one of the biggest drug dealers in Wilson County . . . isn't that it, Mr. Hinnant?", the defendant did not move for a mistrial on the basis of the question, and the question did not reach the level of gross impropriety or the level of inflammatory impact that would require an award of a new trial.

State v. Proctor

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 19 June 1981 in Superior Court, WILSON County. Heard in the Court of Appeals 5 May 1982.

Defendant was indicted for trafficking in cocaine. He pleaded not guilty and was tried before a jury.

The evidence for the State tended to show that S.B.I. Agent Irvin Lee Allcox met the defendant through Huley Hinnant, Jr., and Albert Junior Jones while Allcox was working in an undercover capacity. Allcox discussed purchasing large amounts of cocaine from the defendant, and a sale was arranged for 12 August 1980. On the morning of that date, Allcox and another S.B.I. agent met the defendant at a motel outside Wilson and followed defendant to his mother's house. There the defendant made a telephone call and stated that his source would deliver the cocaine at noon; that he would take part of the money to his source, who would wait outside in his car, and bring the cocaine inside to be weighed and tested; and that he would then take the rest of the money to the source. A man in a Mercedes automobile arrived about noon, and defendant took part of the money to him. When defendant returned with the cocaine, he was arrested. The Mercedes sped away, but it was stopped and its driver, Gordon Dildy, was arrested. S.B.I. chemist Neil Evans identified the material submitted to him for analysis as 458.2 grams of white powder containing cocaine and dextrose.

The defendant testified and presented Hinnant and Jones as witnesses. Defense evidence tended to show that defendant knew Allcox was an undercover agent, that defendant was helping him set up Gordon Dildy for arrest and had been promised protection, and that defendant was arrested only when the plan went awry and Dildy fled from the scene.

Defendant was found guilty as charged, and a sentence of imprisonment and a fine were imposed. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Abrams & Clark, by John E. Clark, for defendant appellant.

MORRIS, Chief Judge.

[1] The indictment charged defendant with trafficking in cocaine in violation of G.S. 90-95(h)(3). The defendant moved for a bill of particulars asking the State to identify more specifically the controlled substance involved. The State filed a bill of particulars stating that the substance was "cocaine which is a derivative of coca leaves." Thereafter, the defendant moved to dismiss on grounds that "a derivative of coca leaves" is not included within the language of G.S. 90-95(h)(3) and, alternatively, on grounds that the statute is unconstitutionally vague as to whether "a derivative of coca leaves" is included within its terms. This motion was denied. At various times during trial, the defendant again moved to dismiss on these same grounds. These motions were denied, and all of these rulings are included in the defendant's first assignment of error. The defendant argues that "a derivative of coca leaves" is not included in G.S. 90-95(h)(3) as a substance that will support the crime of trafficking in cocaine and, alternatively, that the statute is unconstitutionally vague.

G.S. 90-89 through 90-94 list various controlled substances. Cocaine is a Schedule II controlled substance defined by the following language of G.S. 90-90(a)4:

> Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

G.S. 90-95 declares various crimes relating to controlled substances. G.S. 90-95(b) and (d), the subsections dealing with possession, manufacture, sale, delivery, and possession with intent to manufacture, sell or deliver, rely upon the schedules of controlled substances contained in G.S. 90-89 through 90-94. G.S. 90-95(h) deals with trafficking in controlled substances. It does not refer to the schedules set by the earlier statutes. G.S. 90-95(h)(3), the subdivision dealing with cocaine, reads as follows:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, com-

> pound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved . . . .

It is at once apparent that G.S. 90-95(h)(3) omits certain language included in the G.S. 90-90(a)4 definition of cocaine. G.S. 90-90(a)4 includes three groups: (1) coca leaves; (2) any salts, compound, derivative or preparation of coca leaves; and (3) any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine. G.S. 90-95(h)(3) includes the first and third groups but not the second. The omission of the second group creates uncertainty as to what is included in the third group. For example, the meaning of the term "these substances" in the third group is clear when the second group is included but unclear when the second group is omitted. It is apparent to us that the omission of the second group listed in G.S. 90-90(a)4 from the language of G.S. 90-95(h)(3) was not a deliberate choice by the legislature since it results in an incomplete and confusing definition for the crime of trafficking in cocaine. We must determine the legal effect of this omission.

A criminal statute must be strictly construed, but the statute must be construed with regard to the evil which it is intended to suppress. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978) and cases cited therein. The intent of the legislature controls interpretation of the statute, and when the statute is unclear in its meaning, the courts will interpret it to give effect to the legislative intent. *Id.* The legislative intent will be ascertained by such *indicia* as

> "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. . . ."

Id. at 239, 244 S.E. 2d at 389, *quoting State v. Partlow*, 91 N.C. 550 (1884). Further, it is well established that "where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." *Id.* at 240, 244 S.E. 2d at 389. With the foregoing principles in mind, we turn to interpretation of G.S. 90-95(h)(3).

Subsection (h) was added to G.S. 90-95 in response "to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." *State v. Anderson*, 57 N.C. App. 602, 606, 292 S.E. 2d 163, 165 (1982). The purpose behind G.S. 90-95(h) is to deter trafficking in large amounts of certain controlled substances.

> Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under G.S. 90-95(a)(1).

State v. Tyndall, 55 N.C. App. 57, 60-61, 284 S.E. 2d 575, 577 (1981). Subdivision (3) deals with the controlled substance cocaine. The felony created is referred to as "trafficking in cocaine." Thus the purpose of G.S. 90-95(h)(3) would not be served—indeed, it would be thwarted—by a more restrictive definition of cocaine than that in G.S. 90-90(a)4. Under these circumstances, we believe that the purpose of the trafficking statute must be given effect even if the strict letter thereof must be disregarded in order to do so. The schedules of controlled substances set forth in G.S. 90-89 through 90-94 and all the subsections of G.S. 90-95 deal with the same subject matter, violations of the Controlled Substances Act. Statutes dealing with the same subject matter are to be construed *in pari materia*. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980); *State v. White*, 58 N.C. App. 558, 294 S.E. 2d 1 (1982). Thus, we believe that the full definition of cocaine in G.S. 90-90(a)4 may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3).

G.S. 90-95(h)(3), so construed, is not unconstitutionally vague.

> The standard is whether the statutory language gives a person of ordinary intelligence fair notice of what is forbidden by the statute. (Citations omitted.) A statute which does not involve First Amendment freedoms must be examined in light of the facts of the particular case when challenged as unconstitutionally vague. (Citations omitted.) The statute is not to be weighed in the delicate scales required where First Amendment freedoms are at stake. (Citation omitted.)

State v. White, 58 N.C. App. at 563, 294 S.E. 2d at 4. We conclude that the defendant was provided with sufficient notice for him to determine that the conduct which the State's evidence tended to show was proscribed. Thus, we hold that the defendant's motions to dismiss were properly denied and that his first assignment of error is overruled.

[2] By his second assignment of error, the defendant argues that the trial judge erred in admitting the cocaine into evidence since the S.B.I. chemist failed to identify the cocaine as a derivative of coca leaves. The State filed a bill of particulars identifying the controlled substance involved in the charge as "cocaine which is a derivative of coca leaves." A bill of particulars limits the evidence of the State to the items set forth in the bill. G.S. 15A-925(e); *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964). Although chemist Evans only identified the controlled substance as cocaine during direct examination, he stated during cross examination by defense counsel that he "identified the compound cocaine, which is extracted from, or in a broad sense a derivative of coca leaves." The defense cured any deficiency in the State's proof by eliciting this testimony on cross examination. The second assignment of error is overruled.

[3] Defendant's final assignment of error deals with a question asked during cross-examination of defense witness Huley Hinnant, Jr. After Hinnant had repeatedly asserted his right against self-incrimination, the district attorney asked, "Well, the truth of the matter is that you take the Fifth Amendment because you know that in some way your testimony will show to the ladies and gentlemen of the jury what they already know, that Travis Hicks Proctor is one of the biggest drug dealers in Wilson County . . . isn't that it, Mr. Hinnant?" Objection to the form of the question was overruled, and Hinnant answered, "I don't know that, I

wouldn't know." Defendant now argues that this question so prejudiced his case that he could not thereafter receive a fair trial. We do not approve either the question or the trial judge's overruling objection to it. "[C]ounsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E. 2d 65, 69 (1978). However, in the present case defendant only objected "to the form of the question." He did not allege such prejudice as denied him a fair trial, and he did not move for a mistrial on the basis of the question. We do not believe that this question reached the level of gross impropriety or the level of inflammatory impact that would require us to award a new trial. *See State v. Jordan*, 49 N.C. App. 561, 272 S.E. 2d 405 (1980); *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980), *disc. review denied*, 301 N.C. 723, 276 S.E. 2d 288 (1981). The assignment is overruled.

In defendant's trial we find

No error.

Judges CLARK and MARTIN (Harry C.) concurred prior to 2 August 1982.

JOHNNY CALVIN SHEW AND JUNIOR BROTHERTON v. SOUTHERN FIRE & CASUALTY COMPANY AND IREDELL COUNTY

No. 8122SC1000

(Filed 17 August 1982)

Insurance § 105— insured hitting police car after high speed chase—duty of insured to reimburse county as condition of suspended sentence—insurance company's refusal to reimburse—summary judgment for insurance company improper

In an action arising from an insured's collision with a police automobile after a high speed chase wherein the insured pleaded guilty to driving 130 miles per hour in a 55 miles per hour zone to elude an officer, among other things, where the insured was given a suspended sentence on the condition, among other things, that he reimburse the county for damages to its automobile, and where the insurance company refused to reimburse the in-

sured for damages paid by the insured to the county, the trial judge erred in entering summary judgment for the insurer since plaintiffs stand in the shoes of the county prior to recovery of the damages with the same rights and subject to the same defenses and since the purpose of liability insurance would be fulfilled by allowing coverage under the policy.

Judge HEDRICK concurs in the result only.

Judge BECTON dissenting.

APPEAL by plaintiffs from *Collier, Judge.* Judgment entered 8 July 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 4 May 1982.

Johnny Calvin Shew is the stepson of Junior Brotherton and a member of his household. On 7 May 1978, Junior Brotherton owned a 1978 Dodge automobile insured by Southern Fire & Casualty Company and operated by Shew, who was 17 years old. Shew had been drinking beer at the time. A member of the sheriff's department tried to stop Shew, and Shew panicked. For a considerable period of time, Shew led the law enforcement officers on a chase throughout the territory at speeds of approximately 130 miles per hour. Shew believed that he had eluded the officers and resumed his driving. However, he suddenly was confronted by a roadblock of cars from the sheriff's department and crashed into them.

Shew pleaded guilty to driving 130 miles per hour in a 55 miles per hour zone to elude an officer, misdemeanor assault with a deadly weapon; to wit, an automobile, and injury to personal property. The judgment of the court was that Shew be imprisoned in the county jail for 18 months. This sentence was suspended, and Shew was placed on probation for a period of two years upon the condition, among other things, that he reimburse Iredell County for damages to its automobile. The probation judgment stated that this restitution was to be "an addition to what insurance coverage fails to pay as a result of liability damages or if insurance refuses to pay such damages."

The insurance company refused to pay anything, and Shew paid damages for the automobile totalling $5,748.00. Thereafter, Shew and Brotherton brought suit against Southern Fire & Casualty Company for the sum paid, and Iredell County was joined as a party defendant as the recipient of the sums paid by Shew and in order to assert its claims. Southern Fire & Casualty

Company moved the court for summary judgment, which was granted. Plaintiffs appeal.

McElwee, Hall, McElwee & Cannon, by John E. Hall and William F. Brooks, for plaintiff-appellants.

Farthing & Cheshire, by Edwin G. Farthing, for defendant-appellee Southern Fire & Casualty Company.

HILL, Judge.

We first note that this case is before us upon the granting of Southern Fire & Casualty Company's motion for summary judgment. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

An examination of the policy in the present case reveals the following provision:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence and arising out of garage operations, including only the automobile hazard for which insurance is afforded as indicated in the schedule . . . .

The briefs of both parties argue, and Southern Fire & Casualty Company's brief concedes, that Shew was an insured under the policy. Southern Fire & Casualty Company simply denies liability under the policy, contending that Shew was not legally obligated to pay Iredell County, but rather volunteered to pay under the conditions of the probation judgment to avoid imprisonment. We conclude the argument of Southern Fire & Casualty Company is misplaced.

In their verified complaint, plaintiffs allege, among other things, as follows:

4. On the 7th day of May, 1978, at approximately 12:25 A.M., the plaintiff, Johnny Calvin Shew, was operating a 1978 Dodge automobile, which automobile was owned by and registered to Junior Brotherton, with whom the plaintiff, Johnny Calvin Shew, resided and was a member of his household and was operating said vehicle on the Jennings Road in Iredell County, State of North Carolina. The plaintiff, Johnny Calvin Shew, was attempting to evade officers of the Sheriff's Department of Iredell County and also the officers of the City Police Department of the City of Statesville, North Carolina, and was driving the said Dodge vehicle at a high and unlawful rate of speed and entered a plea of guilty to speeding in excess of 130 m.p.h. and he struck a vehicle owned by the County of Iredell while in said chase and the plaintiff, Johnny Calvin Shew, also entered a plea of guilty to assault with said vehicle, that is, said Dodge vehicle which he was driving.

5. The said Dodge vehicle, which is owned by and registered to Junior Brotherton, was insured by a policy of liability insurance issued by the defendant, Southern Fire and Casualty Company, insuring the plaintiffs as insureds, and the plaintiff, Johnny Calvin Shew, and the plaintiff, Junior Brotherton, were covered under said policy of insurance, which provided that each was an insured, the plaintiff, Johnny Calvin Shew, being insured because he was a member of the household of Junior Brotherton and was driving said vehicle as the agent and servant of the said Junior Brotherton under the family-purpose doctrine, the plaintiff, Johnny Calvin Shew, being a member of the household of Junior Brotherton, and the said vehicle was furnished to the said Johnny Calvin Shew as a mutual convenience of the members of the family of Junior Brotherton and his household, the said Junior Brotherton being the stepfather of the said Johnny Calvin Shew.

6. The said Johnny Calvin Shew entered a plea of guilty to various charges growing out of the chase by the officers of he and the vehicle he was driving, namely driving in excess of 130 m.p.h. and attempting to evade an officer and assault with a deadly weapon, namely an automobile, the said assault occurring when the plaintiff, Johnny Calvin Shew,

drove the Dodge vehicle into the Sheriff's Department vehicle.

7. As a part of the criminal judgment against the said Johnny Calvin Shew, he was ordered to pay the sum of $275.00 per month into the office of the Clerk of Superior Court of Iredell County for damages to the vehicle that he struck with his Dodge vehicle, which was the assault on the officer with his Dodge automobile, until he has paid the sum of $5,748.00, being the damage owing and due to the Iredell County Sheriff's Department.

8. The plaintiffs have made demand upon the defendant, Southern Fire and Casualty Company, to pay the damages to the Iredell County Sheriff's Department by reason of the plaintiffs being insureds of the defendant, Southern Fire and Casualty Company, under the terms of said policy of liability insurance but the defendant, Southern Fire and Casualty Company has wilfully failed to pay said damages.

In the answer filed by Southern Fire & Casualty Company, it admits paragraphs 4, 6 and 7. As to paragraph 5, Southern Fire & Casualty Company denies coverage but admits the remainder of the paragraph. As to paragraph 8, it admits demand upon it for payment of damages, but denies the remainder of the paragraph.

In his deposition taken 15 May 1981, Shew established substantially the allegations alleged in the complaint, and reviewed the proceedings at the trial of his criminal case. In addition, he testified that he borrowed money and paid the entire debt to Iredell County. Appended to the motion for summary judgment was an affidavit of the finance officer of Iredell County which verified that the debt had been paid in full. Also by affidavit, a vice-president of Southern Fire & Casualty Company identified a copy of the insurance policy. The trial judge concluded that all parties were in agreement as to the facts and circumstances, and that the case was appropriate for summary judgment, which he granted for Southern Fire & Casualty Company.

We conclude that the trial judge erred. A careful reading of the record reveals that the action is between Brotherton, owner

of the automobile, and Shew, who was covered under the policy, as plaintiffs, and Southern Fire & Casualty Company as defendant, for restitution paid by plaintiffs for damages suffered by Iredell County when Shew droved the automobile into the vehicle owned by Iredell County. We note that this is not a suit brought by plaintiffs for recovery of damages to their vehicle, but is for restitution to plaintiffs under a policy of public liability. The other allegations concerning Shew's criminal trial and judgment are immaterial to our decision.

Without question, had Iredell County chosen to sue Shew and Brotherton using the substance of the paragraphs quoted above, among other necessary matters, Southern Fire & Casualty Company would have assumed its responsibility to defend the suit and would have paid any judgment rendered against Shew and Brotherton. Here, plaintiffs simply elected to pay damages to Iredell County when Southern Fire & Casualty Company elected not to do so and to sue for reimbursement. For practical purposes, plaintiffs stand in the shoes of Iredell County prior to recovery of the damages with the same rights and subject to the same defenses. Under these circumstances, the purpose of liability insurance, to protect those damaged by the negligent operation of an automobile, is fulfilled by allowing coverage under the policy. *See Harrelson v. State Farm Mutual Automobile Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968); *see also* G.S. 20-309 to -319.

There are questions of fact as to the amount of damages to be recovered, if any. The trial judge erred in granting the motion for summary judgment.

Reversed.

Judge HEDRICK concurs in result only.

Judge BECTON dissents.

Judge BECTON dissenting.

The majority opinion allows the insured, Johnny Calvin Shew, to sue his insurance company and force it to pay restitution which was assessed as a result of a criminal judgment against

Shew. Believing that public liability insurance is designed to protect one from civil liability only, and believing that a contract insuring one against criminal liability would be void as against public policy,[1] I dissent.

With his consent, Shew's 18-month prison sentence was suspended and a probationary judgment was entered on nine specified conditions and on the further condition that Shew

> (j) . . . [r]eimburse the county for property which was damaged or lost due to this offense in the amount of _____. This restitution shall be an [sic] addition to what insurance coverage fails to pay as a result of liability damage or if insurance refuses to pay such damages. In the event that restitution is made by this individual for the loss of this vehicle, two (2) estimates are to be given to the Probation Officer subject to approval by the Court for payment by this individual under his direction. All bills, either covered or otherwise by insurance are to be filed with the Probation Officer to demonstrate compliance with this restitution.

The relevant policy provision regarding property damage reads: "The Company will pay on behalf of the *insured* all sums which the insured shall become legally obligated to pay as damages because of . . . *property damage* to which this insurance applies, caused by an *occurrence* . . . " (Emphasis in the original.) I am not convinced that Shew was "legally obligated to pay as damages" the $5,748 he paid to the Sheriff's Department. He consented to the imposition of a suspended sentence on conditions and opted voluntarily to pay the restitution. In short, he was not *ordered* to pay restitution; he was *allowed* to pay restitution.

Further, in my view, the property damage sustained by the Sheriff's Department was not "caused by an occurrence" as defined in the policy. The policy defines occurrence as "an accident, including continuous or repeated exposure to conditions, which result in *bodily injury or property damage* neither expected nor intended from the standpoint of the *insured*." (Emphasis in original.) It is not disputed that Shew's action, resulting in property damage to the Sheriff's Department car, was intentional.

1. *See generally* Couch on Insurance 2d (Rev. ed.) § 45:2.

Shew cannot, under the definition of occurrence, be indemnified for his own intentional acts. *Cf. Insurance Company v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964) (the purpose of voluntary insurance is to save harmless the tortfeasor himself whereas the primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims, who have been injured by financially irresponsible motorists. Therefore, an assault is an accident when viewed from the viewpoint of the injured person, and there is no reason why the victim's right to recover from the insurance carrier should depend upon whether conduct of its insured was intentional or negligent).

The majority's resolution of this appeal overshadows several practical problems. First, the insurance company is not a party to the criminal action and, even if it knew about the criminal action, it could not participate. Second, although the burden of proof is more onerous in criminal cases than in civil cases (and that was not a factor here, since Shew pleaded guilty), there is usually no defense (or not as vigorous a defense) on the issue of damages at criminal trials since the criminal defendant is naturally more concerned about guilt or innocence. Third, restitution is completely within the discretion of the trial court. Defendant may be correct when it argues: "If criminal restitution is covered by insurance, . . . a Homeowner's Liability Insurance Policy could be called upon to pay restitution when an insured homeowner intentionally and criminally shoots someone on his property and restitution is provided for the victim or the victim's family." Fourth, although contributory negligence on the part of the Sheriff's Department could be raised in Shew's lawsuit against the insurance company, the insurance company's suggestion which follows, that the Sheriff's Department was not acting reasonably and prudently, graphically shows why the resolution of the contributory negligence issue should be made in a civil trial *prior* to any judgment of restitution in a criminal action.

> The Keystone Comedy Routine, which would be funny on a movie screen but which had all the potential in the world for tragedy on the highways of Iredell County, North Carolina, all started over a minor traffic violation. Cars bumping bumpers traveling down the highway at extremely high rates of speed, cars crashing into each other in service station driveways, running road blocks attempting to be set up, and

vehicles attempting to cut off other vehicles entering Interstate Highways, all at extremely high rates of speed, topped of [sic] by a violent crash on a narrow bridge in rural Iredell County makes most mandatory chase scenes in comedy movies pale by comparison. Yes, the Plaintiff was negligent, yes the conduct was outrageous, yes, it was willful and wanton. However, based on the Plaintiffs' testimony, and based on the light most favorable to him, the conduct of Iredell County Sheriff's Department was equally as willful and wanton. That, under the laws of the State of North Carolina, would constitute a good defense to a civil lawsuit if any such lawsuit had ever been instituted by the Sheriff's Department of Iredell County.

For the foregoing reasons I vote to affirm the trial court's Order granting summary judgment in favor of the defendant.

CATHRINE LINTON STICKEL v. DELFORD LEFEW STICKEL

No. 8114DC1022

(Filed 17 August 1982)

1. **Divorce and Alimony § 18.8; Evidence § 31— introduction into evidence of financial list showing past and future living expenses—proper**

In an action for divorce and alimony, the trial court did not violate the best evidence rule by allowing plaintiff to introduce into evidence financial lists, or summaries, prepared from checks and itemized expenditures, which she used to show her past and future living expenses. Plaintiff's living expenses were a matter within her knowledge, and the contents of the checks or receipts were not at issue; therefore, the lists of estimated expenses were admissible to illustrate plaintiff's testimony as to the amount of her expenses.

2. **Divorce and Alimony § 17.3— award of permanent alimony—lump sum payment—proper**

In an action for alimony and divorce, a $30,000 lump sum award, representing the wife's recoupment of alimony that should have been paid prior to the hearing, when viewed in light of plaintiff's needs, and diminished by the amount defendant paid during the period in question, was supported by the findings and was not unreasonable. Furthermore, it was clear from the record and judgment that defendant, a surgeon, was able to pay the alimony awarded since the court plainly found that the defendant's income was $74,500, $84,000 and $92,000 for the years 1978, 1979 and 1980, respectively, and that his monthly expenditures were $4,160.

3. Divorce and Alimony § 17.8— order to pay real estate taxes and insurance on home and medical insurance for plaintiff proper

In an action for alimony and divorce, the trial court did not err by ordering defendant to pay all real estate taxes and insurance on the house and medical insurance for plaintiff where the trial court made findings regarding the amounts paid by defendant, since the couple's separation, for real estate taxes on their house, referred in his findings to exhibits at trial revealing the cost of insurance and other expenses in the minutest details, and made findings of fact as to defendant's earnings, expenses, and plaintiff's needs.

APPEAL by defendant from *LaBarre, Judge.* Judgment entered 3 August 1981, in District Court, DURHAM County. Heard in the Court of Appeals 5 May 1982.

Plaintiff and defendant husband were married 13 September 1952. One child, Nancy Leigh Stickel, was born to them in 1959 and is emancipated. Defendant left the marital home on 1 December 1979. Plaintiff sued for alimony 12 November of that year. The parties stipulated before trial that plaintiff had grounds for alimony pursuant to G.S. 50-16.2. The trial court overruled defendant's request for a jury trial and ordered defendant to pay lump sum alimony to plaintiff in the amount of $30,000 and $2,750 per month permanent alimony. Plaintiff was also awarded possession of the marital home, a continuation of medical insurance benefits, possession of an automobile, and $3,350 to assist in the payment of her attorney's fees. All other facts necessary for an understanding of this matter are set forth below.

Defendant appeals, bringing forward six assignments of error.

Maxwell, Freeman and Beason, by James B. Maxwell, for plaintiff appellee.

Hunter, Wharton and Howell, by John V. Hunter, III, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant argues by his first assignment that the trial court violated the best evidence rule by allowing plaintiff to introduce into evidence financial lists, or summaries, prepared from checks and itemized expenditures, which she used to show her past and future living expenses. Defendant contends that since there was no showing that the records upon which the summaries were

based were so voluminous as to make it impracticable to examine them in court, plaintiff should have been required to introduce the checks, receipts and other underlying documents, rather than summaries thereof. We disagree, holding that defendant has misapprehended the purpose of the best evidence rule.

The rule exists to ensure that originals of documents are introduced *into* evidence where their contents are in issue. Plaintiff did not testify directly to what the records revealed, however, but used the summaries merely to illustrate testimony given from her own knowledge regarding expenses. In *Chambless v. Chambless*, 34 N.C. App. 720, 239 S.E. 2d 624 (1977), we held that lists of estimated expenses were admissible to illustrate a plaintiff's testimony as to the amount of her expenses. Here, as in *Chambless*, plaintiff testified, prior to the introduction of the lists, regarding her expenses. " '[I]f a fact has an existence independent of the terms of any writing, the best evidence rule does not prevent proof of such fact by the oral testimony of a witness having knowledge of it or by any other acceptable method of proof not involving use of the writing.' " *Cleary v. Cleary*, 37 N.C. App. 272, 275, 245 S.E. 2d 824, 826 (1978), quoting 2 Stansbury's N.C. Evidence, § 191, at 103, n. 24 (Brandis Rev. 1973). Plaintiff's living expenses were a matter within her knowledge, and the contents of checks or receipts were not at issue. This assignment of error is overruled.

[2] Defendant next attacks the court's lump sum award to plaintiff of $30,000. He argues that the court made no findings or conclusions pertaining to the necessity of the award or his ability to pay it. He complains of the court's alleged failure to make findings and conclusions as to his reasonable living expenses, debts, and overall ability to pay alimony as ordered. Defendant further asserts that the court erred by ordering him to pay all real estate taxes and insurance on the marital home, and to provide medical insurance for plaintiff.

The court determined by its sixth conclusion

> That in addition to permanent alimony, the plaintiff is entitled to a lump-sum alimony representing the differences in what the defendant should have provided to the plaintiff during the eighteen-month period of separation and what he has

> presently actually paid, both direct (sic) and indirect (sic), to the plaintiff.

Defendant maintains that the judgment contains no findings pertaining to plaintiff's reasonable needs during the 18 months that elapsed between defendant's leave taking in December 1979 and the hearing in May 1981, or about plaintiff's standard of living during that period.

On the contrary, the record is replete with evidence of plaintiff's needs, and the court, based on that evidence, found

> [t]hat the monthly expenses of the wife, according to the standard of living that had been maintained for her and the family unit by defendant prior to his separation, . . . approximates $3,000.00 per month, and that such monthly expenses are reasonable in light of the standard of living to which the parties had become accustomed during their marriage.

The trial judge also found that plaintiff spent approximately $2,850 per month in the year 1979, and awarded her $2,750 per month permanent alimony. Yet plaintiff is also "entitled to subsistence in keeping with defendant-husband's means and ability and standard of living, not only from the time she instituted her action, but from the time her husband wrongfully separated himself from her." *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E. 2d 428, 430 (1971). A $30,000 lump sum award, representing the wife's recoupment of alimony that should have been paid prior to the hearing, when viewed in light of plaintiff's needs, and diminished by the amounts defendant paid during the period in question, is supported by the findings and is not unreasonable. Furthermore, it is quite clear from the record and judgment that defendant, a surgeon, is able to pay the alimony awarded. The court plainly found that defendant's income was $74,500, $84,000, and $92,000 for the years 1978, 1979 and 1980, respectively, and that his monthly expenditures were $4,160.

Counsel's reliance on *Taylor v. Taylor*, 46 N.C. App. 438, 265 S.E. 2d 626 (1980), for the proposition that the court's order of payment of the $30,000 lump sum amount, which would force him "to liquidate, by sale or mortgage, his only remaining assets . . . to effect a division of his estate" with plaintiff was error, results from a mistaken application of the holding in that case. The lump

sum amount discussed in *Taylor v. Taylor, supra,* was deemed to be a division of defendant's estate rather than an award of alimony, and for that reason was vacated. The payment ordered by the court in the instant case was, on the other hand, designated to cover arrearages in alimony, as is proper. *Gardner v. Gardner,* 40 N.C. App. 334, 252 S.E. 2d 867, *cert. den.* 297 N.C. 299, 254 S.E. 2d 917 (1979). Moreover, there was no requirement of time within which the sum was to be paid. The court's order merely provided that a lien be placed on defendant's interest in the Stickel's house in the amount of $30,000.

[3] Defendant invokes the case of *Tan v. Tan,* 49 N.C. App. 516, 272 S.E. 2d 11 (1980), *cert. den.* 302 N.C. 402, 279 S.E. 2d 356 (1981), to bolster his assertion that the trial court erred by ordering defendant to pay all real estate taxes and insurance on the house and medical insurance for plaintiff without a finding as to the actual amount defendant would have to pay. He says that the actual alimony payments are so "shrouded in mystery" as to make it impossible to determine the fairness to the parties of the judgment. The *Tan* case, however, does not require that the monthly alimony payments be designated to the penny. The holding only denounces findings made by the trial judge that "are too meager to enable the reviewing court to determine whether the trial judge exercised proper discretion in deciding what defendant was to pay plaintiff. . . ." The trial court in this case made findings regarding the amounts paid by defendant since the couple's separation for real estate taxes on their house, referred in his findings to exhibits introduced at trial revealing the costs of insurance and other expenses in the minutest detail, and made findings of fact as to defendant's earnings, expenses, and plaintiff's needs. The order contains sufficient information for us to review it, and to determine that it is supported by competent and uncontradicted evidence. Compare *Quick v. Quick,* --- N.C. App. ---, 290 S.E. 2d 653 (1982). We perceive nothing less than a sound exercise of discretion by the trial court in entering the award.

Although he does not dispute defendant's entitlement to attorney's fees, defendant argues that the trial court improperly awarded counsel's fees to plaintiff for the services of two attorneys. If counsel fees are properly awarded, the amount of an award of attorney's fees in an alimony case is within the discretion of the trial judge, and is reviewable only for abuse of discre-

tion. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). We find no evidence that the trial judge attached an unreasonable value to these services, or that defendant was forced to pay for a duplication of services. The assignment of error is overruled.

Defendant, by his final assignment of error, maintains that he was erroneously denied a jury trial on the issues of plaintiff's dependency and the amount of alimony. The issue of dependency is for the trial judge, the case of *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E. 2d 243, *cert. den.*, 302 N.C. 634, 280 S.E. 2d 449 (1981), being dispositive.

The judgment of the trial court is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concurred prior to 31 July 1982.

STATE OF NORTH CAROLINA v. DOC BREWINGTON

No. 818SC1286

(Filed 17 August 1982)

1. Larceny § 7.6— misdemeanor larceny—sufficiency of evidence of identity

In a prosecution for misdemeanor larceny, the evidence was sufficient to establish defendant's identity as the perpetrator of the crime where four witnesses offered testimony describing a person who was seen taking several packages of meat from a store, one witness followed the man, calling him to stop, and after losing sight of him for a few seconds, discovered him under a car. Although defendant offered testimony which did not place him in the store, whatever discrepancies and uncertainness existed in the witness's description of the defendant were matters properly presented for jury resolution.

2. Criminal Law § 33— misdemeanor larceny—relative of defendant offering to pay amount of larceny in defendant's presence

The making of an offer to compromise may be considered as substantive evidence of guilt if the offer was made by the defendant, at his request, or with his authorization; therefore, where on the evening after defendant's arrest for larceny of meat from a store, he and his aunt returned to the store, and, in the presence of the defendant, his aunt offered to pay for the meat if

the store manager would drop the charges, the trial court properly permitted the store manager to testify concerning the conversation.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 2 July 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 24 May 1982.

Attorney General Edmisten by Assistant Attorney General James Peeler Smith, for the State.

Barnes, Braswell & Haithcock by Tom Barwick, for the defendant.

MARTIN (Robert M.), Judge.

Defendant appeals his conviction of misdemeanor larceny, assigning as error the trial court's denial of his motion to dismiss based on insufficiency of the evidence. Defendant also assigns as error the admission of what he styles as hearsay testimony concerning an offer by his aunt to make restitution, and the denial of his motion for mistrial upon the admission of this testimony. For the reasons set forth below, we find no error.

[1] Defendant contends that there was insufficient evidence upon which to establish his identity as the perpetrator of the crime. Four witnesses offered testimony describing a person who was seen taking several packages of meat from a Goldsboro Safeway Store. Mr. Boyd, an eyewitness to the theft, watched as a man wearing a brown coat, jeans, and tennis shoes, entered the store, placed the meat inside his coat, and attempted to leave without paying for the items. Mr. Boyd followed the man, calling to him to stop, and after losing sight of him for a few seconds, discovered him under a car. Three Safeway employees also witnessed the "exit" of the thief. None of the descriptions given was detailed, although each noted that the thief was wearing a dark brown or maroon jacket.

The defendant testified that he had parked his car in the Safeway parking lot to repair the muffler; that while waiting for the muffler to cool, he asked a Mr. Bishop for a light for his cigarette; that Mr. Boyd arrived just as he finished wiring the muffler up. Mr. Bishop verified that he had given the defendant a

light and that defendant was then wearing a burgundy coat with a black fur collar, brown pants, black shoes and a brown and beige checked shirt. Mr. Bishop was sitting in his car when the thief ran from the store. He testified that he thought the man who ran from the store was dressed differently from the man to whom he had given a light, but he could not be sure.

Whatever discrepancies and uncertainness existed in the witness's descriptions of the defendant were matters properly presented for jury resolution. Mr. Boyd had an opportunity to view the thief in a well-lighted store. He testified that when the defendant came out from under the car he "knew it was him (the thief) . . . I recognized his face and his coat and jeans and tennis shoes." The trial court did not err in submitting the case to the jury where there was substantial competent evidence to identify the defendant as the perpetrator of the crime. *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981).

[2] On the evening after defendant's arrest, he and his aunt returned to the Safeway store. In the presence of the defendant, his aunt offered to pay for the meat if Mr. Burnette, the store manager, would drop the charges. After Mr. Burnette refused to accept the offer, defendant denied the theft. At trial, Mr. Burnette was permitted, over objection, to testify concerning this conversation. Defendant contends the admission of the testimony was error as inadmissible hearsay. The State argues that the testimony was properly admitted as an admission by silence, or under the theory of a compromise offer, thereby excepting it from the hearsay rule.

"In *criminal cases* there is no policy favoring compromises, hence no rule excluding offers of compromise." 2 Stansbury's N.C. Evidence § 180 (Brandis Rev. 1973). Thus the making of the offer to compromise may be considered as substantive evidence of guilt if the offer was made by the defendant, at his request, or with his authorization. *State v. Lunsford*, 177 N.C. 117, 97 S.E. 682 (1919). *See generally* 79 A.L.R. 3d 1156. Since direct evidence of a defendant's authorization of an attempt by a third person to make an offer to compromise or influence a witness not to testify is rarely available, circumstantial evidence may be sufficient to establish the fact. *Id.* Under the facts of this case, we find the evidence sufficient to show that defendant authorized his aunt to

make the offer. We consider the family relationship between the two, the fact that defendant's aunt posted bond for him, that she took him to the Safeway store, that the offer was made in his presence, and that he remained silent while the offer was made.

No error.

Chief Judge MORRIS concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON, concurring in part and dissenting in part.

I concur in the majority's resolution of all issues in this case except the "compromise offer" issue. In my view, the majority treats as insignificant the following exchange between Mr. Burnette, the store employee, and the Court:

> THE COURT: Did [defendant] make any statement at all to you or any of the other individuals present at that particular point?
>
> A. Just, you know, he tried to deny it the whole time, is what he was doing but—
>
> THE COURT: Well, how did he deny it, sir? Make any statement?
>
> A. He just said, "You know it wasn't me. You've got the wrong guy," is what he was saying. But then we all, we got right there and we were kind of in a circle and just, you know, his aunt made . . . the statement.

This colloquy suggests neither an admission by silence nor the authorization, by this nineteen-year-old defendant, that defendant's aunt make an offer of compromise. The trial court's reasoning, which follows, was, in my view, faulty:

> THE COURT: Okay, the State would show the defendant was in a position to hear and understand what was said, and the source and circumstances of the statement and the circumstances under which it was made, and that he was in a position to be expected to deny it if it weren't true. The Court will allow the evidence to come in and be for the Jury

to determine . . . whether or not he acquiesced in that statement.

Believing it was error to admit testimony that, about one hour after defendant's arrest, defendant's aunt accompanied defendant to the Safeway Store, introduced herself as defendant's aunt, and offered to pay for the meat if Mr. Burnette, the store manager, would drop the charge, I vote for a new trial.

STATE OF NORTH CAROLINA v. BENNIE CARSELL WILHITE

STATE OF NORTH CAROLINA v. JOHN EDGAR RANKIN

STATE OF NORTH CAROLINA v. RALPH WAYNE RANKIN

No. 8118SC1236

(Filed 7 September 1982)

1. **Criminal Law § 43.4— photographs—wounds inflicted by third party—absence of prejudice**

In a prosecution for rape and kidnapping, defendants were not prejudiced by the admission of three irrelevant photographs depicting minor cuts inflicted on the prosecutrix by a third party. G.S. 15A-1443(a).

2. **Criminal Law § 169.6— failure of record to show excluded testimony**

When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal.

3. **Rape and Allied Offenses § 4.3— rape victim shield statute—prostitution and other acts by prosecutrix**

Evidence tending to show that the prosecutrix in a rape case had worked as a prostitute and that a witness had made the statement that eighteen men were seen waiting on a stairwell to visit the prosecutrix in her room was inadmissible under the rape victim shield statute, G.S. 8-58.6. Furthermore, testimony by a witness that he had seen the prosecutrix at a bar around 2:00 a.m. and that she left the bar with a "perfect stranger" was not evidence of behavior so distinctive and closely resembling defendants' version of their encounter with the prosecutrix so as to be admissible under G.S. 8-58.6(3) to prove consent.

4. **Criminal Law § 158— omission of matter from record—assignment of error not considered on appeal**

An assignment of error to the trial court's refusal to allow defendant to examine a detective's handwritten statement taken during an interview of a rape victim will not be considered on appeal where defendant failed to have this statement placed in the record on appeal.

5. Rape and Allied Offenses § 5— first degree rape—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of first degree rape where the prosecutrix testified that she was taken to an apartment and had sexual intercourse against her will with two codefendants; defendant then took her into the living room of the apartment and placed his gun on the window ledge near the couch; defendant then pushed her back on the couch and had intercourse with her; and she did not consent to have intercourse with defendant but did so because he had a gun and she was scared.

6. Kidnapping § 1.1; Rape and Allied Offenses § 4.3— rape victim shield statute—inapplicability in kidnapping case

A trial on a charge of kidnapping the prosecutrix for the purpose of committing the felony of rape is not a trial regarding a sex offense and therefore is not subject to the rape victim shield statute.

7. Criminal Law § 86.8; Kidnapping § 1.1— kidnapping case—impeachment of victim—acts of prostitution

The defendant in a prosecution for kidnapping for the purpose of committing the felony of rape was prejudiced when the trial court refused to permit defendant to impeach the credibility of the prosecutrix by cross-examining her about alleged acts of prostitution.

8. Criminal Law § 92.1— defenses not antagonistic—consolidation of charges against multiple defendants

The defenses of defendant and his two codefendants were not antagonistic because defendant testified at the trial and the two codefendants did not testify, and charges against the three defendants for kidnapping and rape were properly consolidated for trial in accordance with G.S. 15A-926(b)(2).

9. Criminal Law § 73.2— testimony not hearsay

A witness's testimony concerning statements allegedly made to her by the prosecuting witness was not inadmissible hearsay where the testimony was admitted solely to prove that the statements were made and not to prove the truth of the matters asserted.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by defendants from *Rousseau, Judge.* Judgments entered 2 April 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 May 1982.

The defendants Bennie Carsell Wilhite, John Edgar Rankin and Ralph Wayne Rankin were indicted on charges of first degree rape and kidnapping. From verdicts of guilty of first degree rape and kidnapping, and judgments imposing sixty to seventy year prison sentences, the defendants John and Ralph Rankin appeal. From a verdict of guilty of first degree rape and a judgment of imprisonment, defendant Bennie Wilhite appeals.

Attorney General Edmisten, by Michael Rivers Morgan, Associate Attorney; Thomas B. Wood, Assistant Attorney General; John R. B. Matthis, Special Deputy Attorney General; and John F. Maddrey, Associate Attorney, for the State.

Alexander, Moore, Nicholson & Baynes, by E. Raymond Alexander, Jr., for defendant appellant Wilhite.

Moses & Murphy, by Pinkney J. Moses, for defendant appellant John Rankin.

Bowden & Bowden, by Joel G. Bowden, for defendant appellant Ralph Rankin.

BECTON, Judge.

STATE'S EVIDENCE

On the evening of 30 November 1980, the prosecuting witness, age 16, was accompanied by Deborah Wilson, Kenny Birch and a man named Greg to the H & H Grill in Greensboro. The three defendants later entered the Grill. As the prosecuting witness was returning from the restroom, the defendant John Rankin touched her private parts. Defendant Ralph Rankin then grabbed her, kissed her, pulled a gun out, and asked if he could go home with her. The prosecuting witness said: "I told him I didn't care." Ralph then pointed the gun at her and threatened to harm her and her friends if she told any of them about their conversation. Fearing for the safety of her friends, the prosecuting witness returned to the booth and told her friends to leave. She then left the Grill with Ralph because he had threatened her with the gun.

The three defendants placed the prosecuting witness in the back of a car and drove to an apartment. Ralph took her into the apartment and told John to return in thirty minutes. Ralph then had sexual intercourse with her. When John Rankin returned to the apartment, he had intercourse with the prosecuting witness. Later defendant Wilhite knocked on the door of the bedroom at the apartment. He ordered the prosecuting witness into the living room and had sexual intercourse with her. John, who was still in the bedroom, then called the prosecuting witness. He threatened to shoot her in the head if she did not stop crying. John then had intercourse with her a second time in the bedroom.

Afterwards, the prosecuting witness either passed out or fell asleep. She was awakened when Gwendolyn Boswell entered the room and demanded to know what she was doing there. Ms. Boswell lunged toward the prosecuting witness with what appeared to be a razor. The prosecuting witness fled from the room to a nearby store where Ms. Boswell cut the prosecuting witness on her arm and legs. The prosecuting witness was taken to the hospital by the police, treated for her wounds, and released the same day. She testified that she did not consent to having sex with any of the defendants.

DEFENDANT'S EVIDENCE

The defendants John Rankin and Bennie Wilhite did not testify. Defendant Ralph Rankin testified that he saw the prosecuting witness at the H & H Grill during the early morning hours of 1 December 1980. He was acquainted with her prior to this date. Ralph further testified that he gave the prosecuting witness, his brother, John, and Bennie Wilhite a ride to the apartment on Asheboro Street. Ralph went home after dropping them off. He denied having sexual intercourse with the prosecuting witness or threatening her in any way.

The three defendants were represented by separate counsel, both at trial and on appeal. Their assignments of error are not the same in all respects, and each has filed a separate brief. We shall therefore discuss their appeals separately.

DEFENDANT WILHITE'S APPEAL

I

[1] During the presentation of the State's evidence, the trial court allowed the jury to view three photographs of the prosecuting witness. Defendant Wilhite argues in Assignment of Error No. 2 that these photographs were prejudicial and irrelevant since the wounds depicted therein were not inflicted by the defendants, but were rather inflicted by Gwendolyn Boswell. Assuming for purposes of discussion that the photographs were irrelevant, we conclude that their admission was harmless error. Further, the Court has examined these photographs and disagrees with defendant's contentions that they are highly inflammatory and prejudicial. These photographs depict only minor cuts. Pursuant to G.S. 15A-1443(a), defendant is required to show

prejudice by proving that 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." Without the photographs, there was still sufficient evidence of each and every element of the crimes charged to support the jury's verdict. Defendant Wilhite's Assignment of Error No. 2 is without merit.

(The two co-defendants have also assigned error to the admission of these photographs. Our rationale for rejecting defendant Wilhite's assignment of error applies equally to the two co-defendants.)

II

By Assignment of Error No. 3, defendant Wilhite argues that the trial court erred in failing to admit evidence of the prosecuting witness' living conditions, past conduct, and general reputation and character. By this evidence, the defendant sought to attack the prosecuting witness' credibility and character. A close examination of the exceptions noted under this assignment of error reveals no error in the exclusion of such evidence.

[2] We first examine the cross-examination of the prosecuting witness during which the trial court sustained objections to the following questions: "Do you live with your mother, . . . ? When did you leave Deborah Wilson's house, . . . ? Did the State take you away from Miss Wilson's house, . . . ? Is your mother in court with you today?" The trial court also sustained an objection to the question posed to Detective Powell concerning whether the prosecuting witness worked. After each of these questions, the defendant failed to request that the prosecuting witness be allowed to answer for the record in the absence of the jury. "When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal." *State v. Price*, 301 N.C. 437, 450, 272 S.E. 2d 103, 112 (1980). We do not speculate as to what the prosecuting witness' answers would have been. Nor do we perceive any error in the trial court's decision to sustain objections to the questions asked.

The remaining exceptions under Assignment of Error No. 3 relate to evidence of the prosecuting witness' sexual behavior.

Pursuant to G.S. 8-58.6, North Carolina's rape victim shield statute, the sexual behavior[1] of the victim of a rape or other sex offense is generally irrelevant and therefore inadmissible. The statute, however, lists four exceptions to this general rule. The third exception allows the admission of sexual behavior which

> [i]s evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented.

G.S. 8-58.6(b)(3). Evidence of sexual behavior cannot be introduced at trial until the trial court determines its relevancy. G.S. 8-58.6(c).

[3] Defendant Wilhite sought to present evidence which he contends falls under this third exception to the rape victim shield statute. First, defendant sought to question the prosecuting witness about her alleged relationship with a Mr. Marshall as his prostitute. Second, Deborah Wilson was cross-examined and asked about a statement she had allegedly made that, at one time, 18 men were seen waiting on the stairwell to visit the prosecuting witness in her room. The trial court sustained the State's objections to both questions. The defense later sought to present the testimony of Thomas Braswell. His testimony would have allegedly shown that he met the prosecuting witness at a bar, and

> [t]hat on the occasion he met this young lady, she left with a perfect stranger at 2:00 or 3:00 a.m. and that at a later point he had sex with the lady, and she made statements to him that she had sex for hire.

According to Braswell, the prosecuting witness also allegedly said "that she was put out of the house by her mother and had to live with Deborah Wilson for having sex with her stepfather." The trial court refused to allow Braswell to testify.

1. "As used in this section, the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." G.S. 8-58.6(a).

We find no error in the exclusion of this evidence of the prosecuting witness' sexual behavior, because such evidence does not satisfy the requirements of G.S. 8-58.6(b)(3). Further, Braswell's statement that he had seen the prosecuting witness at a bar around 2:00 a.m. and that she left the bar with a "perfect stranger," is not evidence of behavior so distinctive and so closely resembling the defendants' version of the prosecuting witness' encounter with them as to prove consent. The defendants sought to persuade the jury that she met them at a bar early on the morning of 1 December 1980; and that she *willingly* left with them. However, there was uncontroverted evidence that the prosecuting witness was acquainted with at least two of the three defendants, and that at least one of them threatened her with a gun at the Grill. That the prosecuting witness may have been a prostitute or easy prey for Mr. Braswell does not prove she consented or that defendant Wilhite could have reasonably believed she consented to the encounter with him. In other cases this Court has upheld the trial court's exclusion of testimony showing a pattern of the prosecuting witness' sexual behavior which was merely similar to the defendant's alleged encounter with the prosecuting witness. *See State v. White*, 48 N.C. App. 589, 269 S.E. 2d 323 (1980), *State v. Smith*, 45 N.C. App. 501, 263 S.E. 2d 371, *disc. rev. denied*, 301 N.C. 104, --- S.E. 2d --- (1980). We find no error in the exclusion of the testimony assigned as error in Assignment of Error No. 3.

III

[4] Detective Powell testified from a statement taken during an interview of the prosecuting witness. The statement was initially taken in longhand by Detective Powell and was later typed. Detective Powell used the typed statement at trial. Defendant Wilhite requested to see the handwritten statement, and the trial court denied the request. He now assigns error to the trial court's action denying his request and cites *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978) as supporting authority. The *McLean* Court held that the trial court's refusal to allow the defendant to examine the rape victim's handwritten statement was harmless error. In the case *sub judice* we can only speculate whether the trial court's refusal to allow defendant to examine Detective Powell's handwritten statement was prejudicial error, since defendant failed to have this statement placed in the record for

appellate review. Therefore, we shall not consider this assignment of error.

IV

[5] Defendant Wilhite also assigns error to the failure of the court to grant his motion to dismiss the charge of first degree rape. This error is based upon the State's alleged failure to show two essential elements of first degree rape. Wilhite argues that there was no showing that the prosecuting witness was forced into the act of intercourse or that his display of a gun at the time of the alleged intercourse placed her in fear. The trial court properly denied the motion to dismiss since there was sufficient evidence of these essential elements. The prosecuting witness testified that after she was taken to the apartment and after she had sexual intercourse against her will with defendants Ralph and John Rankin, defendant Wilhite began kissing her. He took her into the living room of the apartment and placed his gun on the window ledge near the couch. Wilhite then pushed her back on the couch and had intercourse with her. The prosecuting witness stated: "I didn't consent to have intercourse with him. I had intercourse with him at that time because he had a gun and I was scared." Her testimony compelled submission of the first degree rape charge to the jury.

DEFENDANT JOHN RANKIN'S APPEAL

I

The defendant John Rankin also assigned error to the trial court's failure to admit testimony of alleged acts of misconduct by the prosecuting witness. During the trial the defendant requested the court's permission to cross-examine the prosecuting witness about alleged acts of prostitution. In response to the trial court's inquiry about the specific acts of misconduct alleged, defense counsel said "she used to live with Mr. Marshall and . . . worked for Mr. Marshall as a prostitute." Defense counsel also told the trial court that "Mr. Marshall is in the Department of Corrections and will come and testify that he pimped her." Defendant later sought, through witness Thomas Braswell, to present other evidence suggesting that the prosecuting witness was a prostitute.

Defendant conceded that, pursuant to the rape victim shield statute, this evidence was inadmissible in the rape case. He argued, however, that evidence of acts of prostitution would be admissible for the purpose of impeaching the prosecuting witness' credibility in the kidnapping case. The State argued that this evidence was inadmissible under the rape victim shield statute. In denying the defendant's request, the trial court noted that the kidnapping was alleged to have been committed for the purpose of facilitating rape. We agree with defendant that he was prejudiced by the trial court's refusal to allow this cross-examination.

[6] North Carolina's rape victim shield statute does not exclude evidence that is otherwise admissible. The statute is merely a codification of this jurisdiction's rule of relevance as it applies to the sexual behavior of rape victims. *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980). It declares that in a trial on charges of rape or other sex offenses[2] the "sexual behavior" of the complainant is irrelevant. A trial on the charge of kidnapping the prosecuting witness for the purpose of committing the felony of rape is not a trial regarding a sex offense and therefore is not subject to the rape victim shield statute.

[7] Evidence of acts of prostitution allegedly committed by the prosecuting witness was clearly relevant to impeach her credibility as to the kidnapping charge.

> The law is that a witness, including the defendant, in a criminal case, may be *cross-examined for purposes of impeachment* with respect to prior convictions of crime. (Citations omitted.) Under the general principle the witness may also be cross-examined about specific acts of misconduct and may be asked disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.)

State v. Monk, 286 N.C. 509, 517, 212 S.E. 2d 125, 132 (1975). The fact that the evidence of prostitution was inadmissible as to the rape charge would not prevent its admission for purposes of impeaching the prosecuting witness' credibility as to the kidnapping charge. The general rule is that "the incompetency for one pur-

2. The statute, itself, is captioned: "Restrictions on evidence in rape or sex offenses cases."

pose will not prevent its admission for other and proper purposes." Brandis On North Carolina Evidence, § 79 (Second Revised Edition 1982). We therefore hold that the defendant John Rankin was prejudiced when the trial court deprived him of his right to cross-examine the prosecuting witness about alleged acts of prostitution for Mr. Marshall.

The defendant further argues that he should have been allowed to place Thomas Braswell on the stand for purposes of impeaching the prosecuting witness' credibility. As previously noted, Braswell would have allegedly testified to the following:

> That on the occasion he met this young lady (the prosecuting witness), she left (the bar) with a perfect stranger at 2:00 or 3:00 a.m. and that at a later point he had sex with the lady, and she made statements to him that she had sex for hire.

From this testimony it is unclear whether Braswell himself paid the prosecuting witness for sex or whether he merely saw her leave the bar with a stranger and was later told that she had sex with this stranger. If the latter is the case, then Braswell's testimony was properly excluded because part of it is irrelevant and part calls for hearsay. If, however, Braswell's testimony would have been that he had sex with the prosecuting witness in exchange for money, then his testimony would have been admissible to impeach her credibility in the kidnapping case.

We take note of the rule which prohibits a party from contradicting a witness' prior denial of misconduct by introducing testimony of other witnesses. *State v. Monk.* The *Monk* Court, in explaining this rule, emphasized that the purpose of such cross-examination was to impeach the credibility of the witness and not to prove prior offenses.

Finally the defendant argues that he was deprived of his right to impeach the prosecuting witness' credibility when he was not allowed to question the witness Deborah Wilson as to whether she had become concerned when the prosecuting witness "had approximately 18 men waiting on the stairwell to visit her in her room." We hold that the court properly sustained the State's objection to this question since the question was not directed to, nor did it refer to an act of misconduct by, the prosecuting wit-

ness. *See State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied* 440 U.S. 984, 60 L.Ed. 2d 249, 99 S.Ct. 1797 (1979). The prosecuting witness had previously testified that some men had come to the house. She denied that she was "selling sex" to them.

For the failure of the trial court to allow the defendant John Rankin to impeach the prosecuting witness' credibility, by evidence of acts of prostitution allegedly committed by her, the defendant John Rankin is awarded a new trial on the kidnapping charge. We deem it unnecessary to discuss defendant's remaining assignments of error.

DEFENDANT RALPH RANKIN'S APPEAL

I

[8] Prior to trial the defendant Ralph Rankin objected to the joinder of the three defendants' cases for purposes of trial. He now argues that he was prejudiced by the joinder since his defense was antagonistic to, and different from, that of the other two defendants. At trial Ralph testified that he did not threaten the prosecuting witness nor have sexual intercourse with her on or about 1 December 1980. The other defendants chose not to testify. We disagree with defendant's contention that he was prejudiced by the other defendants' failure to take the stand. The defendants' cases were properly joined for trial in accordance with G.S. 15A-926(b)(2). Each defendant was charged with accountability for the offense of kidnapping, and the separate offenses of rape were part of a common scheme or plan. The fact that Ralph Rankin chose to testify and the other defendants did not, does not amount to antagonistic defenses. Assuming there were antagonistic defenses, severance still was not warranted.

> The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. G.S. 15A-927(c)(2). In a case where antagonistic defenses were urged as a ground for severance this Court said long ago, "Unless the accused suffered some apparent and palpable injustice in the trial below, this court will not interfere with the decision of the court on the motion for a severance." *State v. Finley*, 118 N.C. 1162, 1163, 24 S.E. 495, 496 (1896).

State v. Nelson, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979). The defendant has failed to show that he was denied a fair trial because of the consolidation. There was ample evidence offered by the State to support the convictions against all three defendants.

II

[9] By Assignment of Error No. 4 defendant Ralph Rankin argues that the trial court erred in allowing the State's witness Deborah Wilson to give testimony concerning statements the prosecuting witness allegedly made to her. This evidence was not inadmissible hearsay. It was admitted solely to prove that the statements were made and not to prove the truth of the matters asserted. Ms. Wilson's testimony was also admissible for the purpose of corroborating the prior testimony of the prosecuting witness. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975).

III

Defendant Ralph Rankin next argues, as did defendant Wilhite, that the trial court erroneously excluded the testimony of Thomas Braswell which allegedly tended to show a pattern of sexual behavior so distinctive and so closely resembling the defendants' version of the alleged encounter with the prosecuting witness as to prove that she consented to intercourse. This testimony was inadmissible for the reasons given in our discussion of defendant Wilhite's appeal. Furthermore, even had this testimony fallen under an exception to the rape victim shield statute, it would not have been admissible to bolster defendant Ralph Rankin's case. This defendant specifically denied that any act of intercourse took place. "Whether [the victim] lived in an 'environment of sexual immorality' or in a cloistered convent has no relevance to the issues in a case . . . where defendant denies that any act of intercourse or other assault took place. (Citations omitted.)" *State v. McLean*, 294 N.C. 623, 632, 242 S.E. 2d 814, 820 (1978).[3]

3. *McLean* was decided prior to the effective date of North Carolina's rape victim shield statute (G.S. 8-58.6), but has been cited with approval in the North Carolina Supreme Court's decision interpreting the statute. *See State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980).

IV

Ralph Rankin's final assignment of error goes to the trial court's instructions on the elements of first degree rape. We have carefully examined this portion of the charge and find no error.

Defendant Ralph Rankin does not argue on appeal, as did defendant John Rankin, that the trial court erred in excluding evidence of prior acts of misconduct—prostitution—as they relate specifically to the kidnapping charge. "To prevent manifest injustice" to defendant Ralph Rankin, we, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rules 10 and 28 and, for the reasons set forth in our discussion of John Rankin's pertinent assignment of error, award Ralph Rankin a new trial on the kidnapping charge.

The defendant Bennie Carsell Wilhite had a trial free of prejudicial error. The defendants John Rankin and Ralph Rankin are awarded new trials based on the trial court's failure to allow them to impeach the prosecuting witness' credibility in the kidnapping case.

As to defendant Bennie Carsell Wilhite

No error.

As to defendants John Rankin and Ralph Rankin

New trial on the kidnapping charges.

No error on the rape charges.

Judge HILL concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK, concurring in part and dissenting in part.

As to the defendant Wilhite, I concur; as to the defendants John Rankin and Ralph Rankin, with respect to the charge of first degree rape, I concur; however, as to defendants John Rankin and Ralph Rankin, with respect to the charge of kidnapping, I dissent.

SOUTHERN RAILWAY COMPANY, A CORPORATION v. ADM MILLING COMPANY, A CORPORATION

No. 8126SC992

(Filed 7 September 1982)

1. **Indemnity § 2; Master and Servant § 38— liability under Federal Employers' Liability Act—duty to indemnify under contract**

Where (1) plaintiff was obligated under the FELA to provide for its employees a safe place to work; (2) plaintiff obligated itself by contract to perform acts and render services in connection with defendant's privately owned railroad tracks and right-of-way which it was not obligated to perform for the public generally; and (3) as part of the consideration for plaintiff's incurring the obligation, defendant promised to "indemnify and save harmless" the plaintiff "against any and all damage" resulting from defendant's negligence, and where plaintiff's employee was injured while working on a spur track serving defendant's Mecklenburg plant, the trial court erroneously entered summary judgment for defendant since there were issues as to plaintiff's negligence and subsequent liability to its employee as determined by the standards imposed by the FELA; as to whether plaintiff's liability was occasioned by defendant's negligence; and as to defendant's liability, if so, to plaintiff, pursuant to the indemnity agreement.

2. **Negligence § 53.1— duty of reasonable care for protection of invitee—knowledge of dangerous condition by invitee—summary judgment improper**

In an action where plaintiff's employee was injured while working on a spur track serving defendant's Mecklenburg plant, the case should have been allowed to proceed to the jury on the theory of common law negligence since the injured person, as an employee of plaintiff working on defendant's property, was an invitee of defendant, and since defendant was required to exercise reasonable care for the protection of its invitees under the circumstances; and the circumstances here included defendant's knowledge that plaintiff's employee, despite his knowledge of a slippery condition caused by defendant's feed being on tracks, had no choice but to encounter the dangerous condition in the fulfillment of the duties of his employment.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 18 June 1981, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 April 1982.

Jones, Hewson & Woolard, by Hunter M. Jones and Harry C. Hewson, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins, III, for defendant appellee.

WHICHARD, Judge.

Plaintiff instituted this action to collect from defendant $52,987.53 which plaintiff had paid to its employee who was injured while working on a spur track serving defendant's Mecklenburg County plant. The basis of the action was an indemnity provision of contracts in which plaintiff and defendant's predecessor in title agreed on the terms and conditions for the location and operation of the spur track on which the employee was injured.

The trial court granted defendant's motion for summary judgment. Plaintiff appealed, raising as issues (1) whether the court correctly interpreted the indemnity agreement, and (2) whether it properly withheld from the jury the question of defendant's negligence.

We find that summary judgment was improperly entered, and accordingly reverse.

I.

Plaintiff and Interstate Milling Company (Interstate) entered a contract under which plaintiff agreed to relocate, reconstruct, and operate two industrial railroad tracks (spur tracks) to serve Interstate. Interstate agreed, among other things, to the following indemnity clause:

> 5. That it [Interstate] will indemnify and save harmless the Railroad [plaintiff] against any and all damage resulting from negligence of the party of the second part [Interstate], its servants and employees, in and about said industrial tracks and the right of way therefor . . . .

Subsequently the parties entered a second contract in which plaintiff agreed to construct and operate an extension to one of the two spur tracks. The second contract contained an indemnity clause identical to that in the first except that it related to the spur track extension.

Interstate thereafter deeded to defendant the property on which the spur tracks were located. It also transferred to defendant the business it had operated. Defendant continued operation of the business under the name Interstate Milling Company, a subsidiary of ADM Milling Company. Plaintiff alleged that defend-

ant succeeded to the benefits of the spur track contracts; and that by contract, express or implied, or by operation of law, it assumed the obligations set forth in those contracts.

Lloyd L. Whitson, an employee of plaintiff, was injured on defendant's spur tracks while switching railroad cars. Plaintiff paid Whitson's medical and hospital expenses and made a compromise settlement of its potential liability to him under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* While negotiating the settlement, plaintiff sought from defendant indemnification pursuant to the indemnity clauses of the two contracts. Defendant refused to extend any authority to plaintiff's agents in the negotiations and to consent to any reimbursement.

After settlement with Whitson plaintiff instituted this action against defendant for indemnification under the terms of the contracts. Defendant answered, denying its negligence; denying that its negligence, if any, was the proximate cause of Whitson's injuries; and asserting the affirmative defense of contributory negligence. After extensive discovery, defendant's motion for summary judgment was granted.

Plaintiff appealed.

II.

The purpose of summary judgment under G.S. 1A-1, Rule 56, is to bring litigation to an early decision on the merits, without the delay and expense of trial, where it can be readily shown that no material facts are in issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that one of the parties is entitled to judgment as a matter of law. *Id. See also Treadway v. Railroad Co.*, 53 N.C. App. 759, 762-63, 281 S.E. 2d 707, 710 (1981). The court here determined, pursuant to this standard, that only a question of law on undisputed facts was in controversy; and that the question could be resolved without "the delay and expense of a trial." *Id.* at 533, 180 S.E. 2d at 829.

III.

[1] Plaintiff first argues that the intent of the parties to the contracts was that defendant would indemnify plaintiff against

liabilities under the Federal Employers' Liability Act (FELA), and that the question of defendant's negligence under FELA standards thus should have been submitted to the jury. Under the FELA, a common carrier, including a railroad, is liable to its employees for injury or death resulting in whole or in part from the negligence of its officers, agents, or employees, or "by reason of any defect or insufficiency, due to its negligence, in its cars, engines . . . , track, [or] roadbed." 45 U.S.C. § 51. What constitutes negligence under the FELA is a federal question. *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282, 1295 (1949); *see also Treadway*, 53 N.C. App. at 760, 281 S.E. 2d at 709. The United States Supreme Court has defined negligence as "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610, 617 (1943). Although contributory negligence by an employee may diminish his damages in proportion to his negligence, it is not a defense to the action. 45 U.S.C. § 53. Further, the carrier-employer is barred from defending on the basis of assumption of risk. 45 U.S.C. § 54. The burden of establishing liability for negligence thus is considerably less imposing under the FELA than under the common law of North Carolina.

The sections of the parties' contracts which pertain to indemnification control whether defendant's potential liability is to be judged by FELA standards. A contract of indemnity should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties. 42 C.J.S., Indemnity, § 12(a), p. 579. The intent of the parties to the contract is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624 (1973).

The contracts here do not specifically refer to the FELA. Such omission, however, has not been determinative in similar cases in other jurisdictions. In *Chicago, R.I. & P.R. Co. v. Dobry Flour Mills*, 211 F. 2d 785 (10th Cir.), *cert. denied*, 348 U.S. 832, 75 S.Ct. 55, 99 L.Ed. 656 (1954), *e.g.*, the relevant contract clause stated that the defendant agreed "to indemnify and hold harmless

the Trustees for loss, damage or injury from *any act or omission* of the [defendant], its employees or agents." (Emphasis supplied.) The court construed "act or omission" to allow a determination of liability based upon the law making plaintiff liable to its injured employee, *viz.*, the FELA, rather than upon defendant's common law liability. Similarly, in *Steed v. Central of Georgia Ry. Co.*, 529 F. 2d 833 (5th Cir.), *cert. denied*, 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed. 2d 334 (1976), the phrase "act or omission" in an indemnity clause was interpreted to mean liability for the indemnitor under the law which would make the railroad liable to its injured employee, again the FELA. Finally, in *Georgia Ports Auth. v. Cent. of Georgia Ry.*, 135 Ga. App. 859, 219 S.E. 2d 467 (1975), the court held that the phrase "negligence or other causes" in the indemnity clause of a contract included any of the indemnitor's wrongful or negligent acts which would impose liability upon the railroad under FELA standards as well as under common law negligence standards. The court noted that it was not necessary for the indemnity clause to refer expressly to the FELA because "[t]he parties to such an agreement are held to have known of the existence of the federal statute at the time they executed their agreement." *Id.* at 862, 219 S.E. 2d at 470.

In *Beachboard v. Railway Co.*, 16 N.C. App. 671, 193 S.E. 2d 577 (1972), *cert. denied*, 283 N.C. 106, 194 S.E. 2d 633 (1973), this Court reviewed an indemnity agreement identical to those here. Plaintiff there, an employee of Southern Railway Company, sued Southern for damages from injuries sustained while he was working on a side track owned by the third-party defendant, Champion Papers, Inc. Employees of Champion shoved five railroad cars onto the track where plaintiff was working. Those cars hit two cars on which plaintiff was opening the knuckles. Plaintiff was dragged beneath these cars, and the wheels severed his legs. The jury found Champion negligent; and Champion appealed, contending, *inter alia*, that the court should have submitted to the jury the issue of plaintiff's contributory negligence. In rejecting this contention, this Court, per Judge Parker, stated:

> Southern's third-party action against Champion was not predicated upon Champion's liability to plaintiff under the general law of torts, under which plaintiff's contributory negligence would have been a defense, but upon the indemnity contract under which Champion became obligated to in-

> demnify and save harmless Southern "against any and all damage resulting from the negligence" of Champion. The jury determined that plaintiff's injuries did result from Champion's negligence. As a consequence of that negligence, Southern became obligated to plaintiff under F.E.L.A. for its failure to furnish him a safe place to work, and Champion in turn by contract became obligated to indemnify and save harmless Southern. Under these circumstances the contributory negligence of plaintiff, if any existed, would not have been a defense to Southern's contract action against Champion to enforce the indemnity agreement. *Chicago, R.I. & P.R. Co. v. Dobry Flour Mills*, 211 F. 2d 785 (10th Cir. 1954), cert. denied, 348 U.S. 832; Annotation: "Claim, for Contribution or Indemnity Against Joint Tortfeasor, of Employer Liable to Employee under Federal Employer's [sic] Liability Act, As Affected by Contributory Negligence of Employee," 6 A.L.R. 3d 1307. Plaintiff's contributory negligence, if any, was available in mitigation of damages in plaintiff's F.E.L.A. action against Southern, but . . . in this case the amount of plaintiff's recovery was ultimately settled by the consent judgment . . . in which all parties, including Champion, joined.

Id. at 681-82, 193 S.E. 2d at 584.

This case is identical to *Beachboard* in the following respects: (1) plaintiff was obligated under the FELA to provide for its employees a safe place to work; (2) plaintiff obligated itself by contract to perform acts and render services in connection with defendant's privately owned railroad tracks and right-of-way which it was not obligated to perform for the public generally, *see id.* at 680, 193 S.E. 2d at 583; and (3) as part of the consideration for plaintiff's incurring that obligation, defendant promised to "indemnify and save harmless" the plaintiff "against any and all damage" resulting from defendant's negligence. The court in *Beachboard* obviously believed the FELA determinative of Southern's liability to its employee, and believed Champion to be liable to Southern pursuant to the indemnity agreement for any liability Southern incurred to its employees under the FELA on account of Champion's negligence.

Such must equally be the case here. The record raises an issue as to plaintiff's negligence and consequent liability to its

employee, Whitson, as determined by the standards imposed by the FELA, discussed *supra*; as to whether plaintiff's liability was occasioned by defendant's negligence, again as determined by the FELA standard, *see Chicago, R.I. & P.R. Co., Steed*, and *Beachboard, supra*; and as to defendant's liability, if so, to plaintiff, pursuant to the indemnity agreement. The granting of defendant's motion for summary judgment thus was error.

IV.

[2] We further agree with plaintiff's second contention, *viz.*, that even if FELA standards were not implicated, the case should have been allowed to proceed on the theory of common law negligence. Whitson, as an employee of plaintiff working on defendant's property, was an invitee of defendant. *Cf. Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965) (employee of independent contractor, who had undertaken to install plumbing fixtures on defendant's premises, was an invitee of defendant). Defendant's duty to Whitson, therefore, was to exercise ordinary care to keep the premises in a reasonably safe condition so as not to expose him unnecessarily to danger, and to give warning of hidden conditions and dangers of which it had express or implied knowledge. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967).

An owner or occupier of land ordinarily has no duty to warn of an obvious condition of which its invitee has equal or superior knowledge. *Id.*

> But this is certainly not a fixed rule, and *all of the circumstances must be taken into account.* In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee *notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required.* . . . It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, *it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.*

W. Prosser, *Handbook of the Law of Torts*, § 61, pp. 394-95 (4th Ed. 1971) (emphasis supplied).

The undisputed facts of the accident here are set forth in Whitson's deposition as follows: Whitson was working as a switchman for plaintiff on defendant's property when he slipped from a railroad car and injured himself. He attributed his fall to slippery conditions caused by feed from defendant's plant. He stated that when "you get [feed] on your feet it's just like being on ice." He had been aware of the danger for many years. He stated: "From 1968 up until 1977 I was working at Interstate and during all that time of nine years I was slipping from time to time. . . . For the nine years I saw the same conditions over there and slipped time after time." Defendant never swept the area clean in response to complaints about the condition of the tracks.

While the deposition clearly establishes that Whitson had knowledge of the obvious condition equal or superior to that of defendant, under the particular facts there was nevertheless a jury question as to whether defendant fulfilled its responsibility to keep the premises in a reasonably safe condition so as not to expose Whitson to unnecessary dangers. The cases cited by plaintiff, *Long v. Methodist Home*, 281 N.C. 137, 187 S.E. 2d 718 (1972); *Wrenn v. Convalescent Home, supra; Little v. Oil Corp.*, 249 N.C. 773, 107 S.E. 2d 729 (1959); *Phillips v. Industries, Inc.*, 44 N.C. App. 66, 259 S.E. 2d 769 (1979); and *Brady v. Coach Co.*, 2 N.C. App. 174, 162 S.E. 2d 514 (1968), all involved situations in which the injured person recognized or should have recognized a one-time danger, and nevertheless elected to proceed. Here, by contrast, the record permits a finding that Whitson's job required that he work on the spur tracks on defendant's property and encounter the problem of slipping on the feed "time after time"; and that defendant was cognizant of that requirement. The slippery tracks could not "be negotiated with reasonable safety even though" Whitson was fully aware of the condition; and, because defendant's spur tracks were "held open to [Whitson] for his use," defendant should have expected that Whitson would "proceed to encounter" the slippery tracks. W. Prosser, *supra*, at pp. 394-95. Under these circumstances, reasonable care may have required more than a warning of the danger.

In *Peterson v. W. T. Rawleigh Co.*, 274 Minn. 495, 144 N.W. 2d 555 (1966), the court allowed recovery to an employee who was

injured when he slipped and fell on ice. At the time of his injury, the employee was picking up an order of household goods to deliver for defendant. The Minnesota Supreme Court adopted the following from the *Restatement (Second) of Torts* § 343A(1) (1965):

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.* [Emphasis supplied.]

Comment f under this section states:

> There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> . . . Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of the risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Defendant was not required to take extraordinary precautions for the safety of its invitees, *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 694, 171 S.E. 2d 95, 97 (1969), or to take precautions that would render the operation of its business impractical, *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E. 2d 550, 554 (1966). It was, however, required to exercise reasonable care for the protection of its invitees under the circumstances; and the circumstances here included defendant's knowledge that plaintiff's

employee, despite his knowledge of the obvious dangerous condition, had no choice but to encounter it in the fulfillment of the duties of his employment. Whether defendant's failure to take additional precautions for the employee's safety was reasonable under these circumstances was for the jury to determine.

Reversed and remanded.

Judges WEBB and WELLS concur.

ORANGE WATER AND SEWER AUTHORITY v. TOWN OF CARRBORO

No. 8115SC1003

(Filed 7 September 1982)

Municipal Corporations § 22— fire hydrant rental charges—implied contract

In an action instituted by plaintiff to recover fire hydrant rental charges in arrears, defendant was not obligated by statute or by written contract to pay for fire protection; however, competent evidence at trial supported the view that an implied agreement existed beween plaintiff and defendant for the provision of, and payment for, fire protection capability and for the reimbursement of the costs of the fire hydrants.

APPEAL by defendant from *Martin, Judge.* Judgment entered 22 May 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 4 May 1982.

Claude V. Jones for plaintiff-appellee.

Michael B. Brough for defendant-appellant.

MARTIN (Robert M.), Judge.

Plaintiff initiated this action to recover from defendant $20,124.00 for fire hydrant rental charges in arrears at the time of the complaint, plus additional rental charges which would accrue before trial. The case was tried before a judge. From judgment for the plaintiff, defendant appealed raising questions as to the legal basis for its liability for the fire hydrant rental charges. For the reasons set forth below, we affirm the judgment of Superior Court.

I

The underlying facts of this conflict appear to be undisputed: Plaintiff is a water and sewer utility authority created and existing under the provisions of Chapter 162A of the North Carolina General Statutes. Its governing board consists of nine members, five appointed by the Town of Chapel Hill, two appointed by Orange County, and two appointed by defendant.

In August 1976, plaintiff entered into a contract with defendant whereby defendant agreed to sell and plaintiff agreed to purchase the water and sewer utility systems and properties which had theretofore belonged to and been operated by defendant.[1] The water system conveyed included fire hydrants installed and located within the boundaries of the defendant. The primary purpose of the hydrants was to enable defendant's Fire Department to provide fire fighting services to the citizens of defendant; the hydrants were also used for flushing and cleaning defendant's streets and for fire fighting personnel drills and training.

The Agreement of Sale and Purchase, the contract by which plaintiff bought and defendant sold the systems, contained no specific reference to charges for maintaining and operating the fire hydrants. The agreement did state, however, that:

> The initial rates for water services shall be as set forth in Exhibit F. Such initial rates shall be subject to increase, decrease, and revision in accordance with and pursuant to the Bond Order from time to time and without limitation to the extent that any such increase, decrease, or revision shall be required in order to comply with the covenants contained in the Bond Order with respect to the generation of Revenues or Net Revenues of the Authority and the rates, fees and charges to be levied by the Authority in order to comply with such covenants and further to the extent such increase or decrease or revision shall be deemed necessary or appropriate by the Authority.

Furthermore, plaintiff agreed that, in maintaining the water and sewer systems, it would "charge reasonable rates based on cost of

1. Plaintiff also purchased the water and sewer systems of the Town of Chapel Hill and the University of North Carolina, but that fact is only peripherally involved in this lawsuit.

service to all classes of users of the water and sewer system impartially and without discrimination. . . ."

The ordinance and resolution granting plaintiff a sixty-year franchise to conduct a water distribution system within defendant's limits contained an agreement that plaintiff install and maintain, under the supervision of defendant's Department of Public Works and Fire, hydrants for use and at places designated by the defendant.

In January 1977, plaintiff adopted a Bond Order, Section 502 of which stated:

> *No Free Service.* The Authority covenants that there will be no free services rendered by the Water and Sewer System and that all users, including political subdivisions and public bodies (state and federal), will pay therefor at the established rates, fees and charges; provided, however, that water for the prevention and extinguishment of fires and the flushing of streets and water reasonably necessary for the testing of fire hydrants, the practice of municipal firemen and the flushing and testing of components of the Water and Sewer System may be provided by the Authority without charge.

A similar covenant by plaintiff was included in the Bond Prospectus.

When plaintiff assumed control of the water and sewer systems, it established a $5 a month charge on the fire hydrants.[2] This charge was established after review of available past records. Defendant paid the charge until July 1979. At that time, as a result of a rate study by Camp, Dresser and McKee of Boston, the monthly fee was raised to $13.70 per hydrant. The increased charge reflected the cost to plaintiff of providing greater capability necessitated by fire protection services. Later the rate was adjusted, retroactive to July 1979, to $12.00 in order to re-

2. In its answer to plaintiff's complaint, defendant admitted that plaintiff had at one time established a "hydrant rental fee" of $5.00 but denied that the fee related to rental or maintenance of the fire hydrants. Defendant's evidence at trial, however, showed that the $5.00 charge, and later adjustments, were hydrant fees designed to pay for additional costs necessitated by plaintiff's provision of fire protection capacity.

flect more accurately the number of hydrants within defendant's territorial limits.

Defendant refused to pay the increased fee or the adjustment.[3] Consequently, plaintiff sued for payment. Defendant counterclaimed alleging that plaintiff was refusing to install hydrants at its request and seeking an order enjoining plaintiff to comply with its agreement to install hydrants.

After hearing the evidence, the trial court found, among other things, the following:

. . . .

(14) When OWASA first began operations after acquiring the water utility system, it adopted an interim rate schedule whereby a charge of $5.00 per month per fire hydrant was made for what was referred to as fire hydrant rental, but what was actually a monthly charge for public fire protection service, i.e., a portion of the increased costs incurred by OWASA in providing water capacity for fire protection service over and above costs incurred in providing water for domestic consumption. Thereafter, OWASA engaged Camp, Dresser & McKee, a nationally known and approved firm of consultants, to make a study of the system and recommend an appropriate schedule of rates, including appropriate charges for fire protection services (expressed as fire hydrant rental charges). Such a study was conducted by the consultants, using accepted methodology and standards, including those of the American Waterworks Association; using available operational cost information; and using operational information as to the relationship between domestic water needs and fire service needs, which information had been developed by Pitometer Associates in a previous study of the system. Camp, Dresser & McKee recommended . . . [a] charge of $13.70 per hydrant per month. This rate was adopted by OWASA to become effective July 1, 1979, but on March 5, 1980, after further consideration and study, the rate was reduced to $12.00 per hydrant per month retroactive to July 1, 1979. Sums over the $12.00 rate which had been col-

3. According to the record, the Town of Chapel Hill and the University of North Carolina continued to pay the fees.

lected were refunded or credited on subsequent bills so that as a practical matter the $13.70 rate was superceded by the $12.00 per month rate. The Court finds that in adopting the rates for fire protection, the governing body of OWASA acted prudently with deliberation and care and gave serious and meaningful study and consideration to the subject, and that the rates so determined and charged for fire protection or fire hydrant rental were determined after taking into consideration the cost of such service and other pertinent factors.

(15) At and prior to the conveyance and transfer of its water utility system to OWASA, the governing body of the Town of Carrboro had been advised and knew that OWASA intended to make a monthly charge in its rate schedule for fire hydrant rental or fire protection service, and actually agreed to pay such charges which at that time would have been $5.00 per month per hydrant.

(16) The Town of Carrboro did pay the monthly fire hydrant charges from February 1977 until June 1979, during which time the rate was $5.00 per month per hydrant; but since the month of June 1979, it has refused to pay said fire hydrant charges.

. . . .

(18) As of the date of the hearing, April, 1981, the total amount of fire hydrant rental or fire protection charges accrued and unpaid by the Town of Carrboro was $33,216.00.

. . .

Among the court's conclusions of law were:

. . . .

(4) Within the legal power possessed by the Town of Carrboro to furnish fire protection is the authority to use the public fire hydrants owned by OWASA upon payment of the reasonable fees and charges established by OWASA, as revised from time to time, for such use.

(5) Section 7 of the Franchise Ordinance obligates OWASA to install and maintain under the supervision of the Department of Public Works and Fire of the Town of Carr-

boro fire hydrants and to locate such fire hydrants at all points designated by the Town. OWASA is not obligated to furnish such service free of charge, rather, OWASA is obligated and empowered to charge the Town of Carrboro for the installation and maintenance of such hydrants.

(6) The Town of Carrboro has no legal authority to use the public fire hydrants owned by OWASA free of charge.

(7) While the Agreement of Sale and Purchase did not specifically use the word "hydrant" in describing the services for which the Town was to pay OWASA, the terms and provisions thereof are broad enough to require the reasonable interpretation which the Court makes that fire hydrant services were understood and agreed to be services to be rendered by OWASA to the Town on a Not for Free basis, and that reasonable charges would be billed by OWASA therefor and paid by the Town on a non-discriminatory basis. Furthermore, in the contract of purchase and sale executed by the Town and OWASA, the Town has agreed (Section 7 Rates) that OWASA may, in accordance with the bond order, establish and revise from time to time its rates for services rendered.

(8) Under G.S. 162A-6(9) and G.S. 162A-9 . . . and the bond order, OWASA has the authority and responsibility to charge those who use its services the costs of providing those services.

(9) The Court further concludes that as long as the Town elects to use such public fire hydrant[s] and fire protection services provided by OWASA, it has a legal obligation to pay reasonable charges therefor.

(10) The furnishing of fire hydrant service by OWASA to the Town of Carrboro free of charge would be in violation of the provisions of Section 502 of the Bond Order, as well as constituting impermissible discrimination against the Town of Chapel Hill and the University of North Carolina at Chapel Hill, in conflict with the provisions of the Sale and Purchase Agreement, which requires OWASA to serve and charge reasonable rates based on cost of service to all classes of users of water and sewer system impartially and without unjust discrimination.

. . . .

(12) The establishment of rates and charges for public fire protection and billing the Town of Carrboro for such service is not an unlawful delegation of authority to OWASA.

Additionally, the court concluded that plaintiff was entitled to $33,216 plus interest. The court ordered recovery of such sum by plaintiff and denied defendant any relief based on its counterclaim.

II

Under the provisions of Chapter 162A of the General Statutes, water and sewer authorities are authorized to acquire, to lease as lessor, and to operate any water system or part thereof. G.S. 162A-6(5). The term *water system* is defined to include hydrants. G.S. 162A-2(12). Authorities are further empowered to fix, to revise, and to collect "rates, fees and other charges for the use of or for the services and facilities furnished by any system operated by the authority." G.S. 162A-6(9).

By various assignments of error based upon numerous exceptions to the lower court's findings of fact and conclusions of law, defendant makes three related arguments contesting its obligation to pay for the fire protection capability provided by plaintiff. Two of these arguments are that defendant is not obligated (1) by statute or (2) by written contract to pay for the fire protection. With these arguments we agree. While defendant is allowed to provide fire protection as a municipal service, G.S. 160A-291, it is not required by statute to provide such protection or to pay another for the provision of fire protection.

As to express contractual liability, we find none. There is no merit in plaintiff's argument that the Sale and Purchase Agreement is the basis for such liability. The rates to which reference was made in that agreement did not contain fire hydrant fees.

We agree, however, with the trial court's Conclusion 7 which interprets the language of the agreement to be broad enough to imply an agreement by the defendant to make reasonable payment for the hydrants. Competent evidence at the trial supports the view that an implied agreement existed between plaintiff and defendant for the provision of, and payment for, fire protection capability.

An implied contract rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of the other and on the principle that what one ought to do, the law supposes him to have promised to do. *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). It is apparent from the record that, from its inception, plaintiff intended to maintain the fire hydrants for defendant's use. Equally apparent is that defendant intended to continue its fire protection services by use of the hydrants. The ordinance and resolution of defendant granting plaintiff a sixty-year franchise contained the agreement that plaintiff install and maintain, under defendant's supervision, fire hydrants for defendant's use. The Bond Order adopted by plaintiff was explicit in proscribing free service, and the earlier Agreement of Sale and Purchase made rates subject to the Order. From the minutes of an 11 February 1977 special meeting of defendant's Board of Aldermen, it is clear that defendant knew of the $5.00 per hydrant charge. At the September 1977 meeting of the Board, transfer of money for hydrant rental was approved. Until the rate was increased, defendant paid it without protest.

We feel that under the foregoing circumstances justice and equity require defendant to pay for the cost of providing fire protection capability, and the law implies a promise on defendant's part to do so. Otherwise, defendant will have been unjustly enriched at plaintiff's expense. *See Arcade County Water District v. Arcade Fire District*, 6 Cal. App. 3d 232, 85 Cal. Rptr. 737 (1970); *Riverside, Inc. v. Gulf States Utilities Company*, 289 S.W. 2d 945 (Texas 1956).

Defendant's fourth and final argument, that it was not legally obligated to reimburse plaintiff for costs incurred in purchasing and installing hydrants under the franchise, is rejected on the same basis. While no cost agreement was contained in the franchise, equity requires that we find implied in the agreement reimbursement of the reasonable costs of such hydrants. Defendant could not reasonably have believed that it had blanket authority to direct plaintiff to install hydrants without incurring the reasonable costs of such hydrants. In reaching this conclusion as well as the conclusion that defendant must pay the hydrant charge, it has not been necessary to address the question of the reasonableness of plaintiff's charges. The issue of reasonableness was not raised by defendant on this appeal.

In reviewing the entire record of this case, we find that the court's findings of fact are supported by competent evidence and are, therefore, conclusive on appeal. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). The findings of fact support the conclusions of law, and in those conclusions and in the judgment, we find no error.

Affirmed.

Judges VAUGHN and ARNOLD concur.

AMERICAN MOTORS SALES CORPORATION AND HUBERT VICKERS D/B/A 421 MOTOR SALES, PETITIONERS v. ELBERT L. PETERS, COMMISSIONER OF MOTOR VEHICLES, RESPONDENT AND JAMES WILSON PENNELL D/B/A PENNELL MOTOR COMPANY, INTERVENOR-RESPONDENT

No. 8110SC514

(Filed 7 September 1982)

1. **Appeal and Error § 6.2; Injunctions § 8— appeal from order denying stay of order revoking franchise—substantial right affected**

The petitioners' appeal from an order denying a stay of the Commissioner of Motor Vehicles' order which revoked a franchise that American Motors had given 421 Motor Sales to sell Jeeps was interlocutory; however, a substantial right of the petitioners was affected by the refusal to stay the court's order which will work an injury to the petitioners if not corrected before an appeal from the final judgment. G.S. 1-277.

2. **Automobiles and Other Vehicles § 5; Monopolies § 2; Unfair Competition § 1— Commissioner of Motor Vehicles having power to prevent "unfair . . . acts or practices"**

G.S. 20-301 gives the Commissioner of Motor Vehicles the power to prevent "unfair . . . acts or practices" and granting a franchise in violation of G.S. 20-305(5) would be an unfair act or practice which the Commissioner has the power to prevent.

3. **Automobiles and Other Vehicles § 5; Monopolies § 2; Unfair Competition § 1— Commissioner of Motor Vehicles' order finding unfair act or practice—no error not to stay order pending outcome of review**

The superior court did not err in failing to stay the Commissioner of Motor Vehicles' order revoking an agreement granting an additional Jeep franchise in a certain trade area pursuant to G.S. 20-305(5) where (1) G.S. 20-305(5) does not violate Article I, § 34 of the Constitution of North Carolina, (2) the clean hands doctrine did not apply to the original franchisee because it had not

reached its potential for Jeep sales, and (3) written notice was not given to the original franchisee before a new franchise was granted as prescribed by G.S. 20-305(5). G.S. 150A-48.

Judge MARTIN (R. M.) dissenting.

APPEAL by petitioners from *Hobgood, Judge.* Order entered 2 April 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 12 January 1982.

This appeal arises from the revocation by the Commissioner of Motor Vehicles of a franchise to sell Jeeps granted by American Motors Sales Corporation to Hubert Vickers, doing business as 421 Motor Sales. James Wilson Pennell, doing business as Pennell Motor Company, has been licensed to sell Jeeps in North Wilkesboro since 1960. His franchise has been extended several times, the last time being on 27 February 1976 for a period of five years. For several years prior to 1979, Pennell had not sold the number of Jeeps which American Motors felt he should sell. On 12 June 1979, Mr. Pennell was present at a sales meeting at which time a Mr. Ellison, representing American Motors, told him that American Motors would grant an additional Jeep franchise in Pennell's trade area. In the fall of 1979, Mr. Pennell determined that American Motors had granted a Jeep franchise to 421 Motor Sales. He requested the Commissioner of Motor Vehicles to hold a hearing pursuant to Article 12, Chapter 20 of the General Statutes. The Commissioner conducted a hearing on 9 March 1981. The Commissioner made findings of fact in accordance with the evidence and ordered that American Motors' grant of a Jeep franchise to 421 Motor Sales be enjoined, invalidated and revoked. The Commissioner further ordered that American Motors be enjoined from granting Jeep franchises in the North Wilkesboro area without first complying with the procedure set forth in G.S. 20-305(5).

On 11 March 1981, Judge Godwin stayed the order of the Commissioner pending a determination of the matter by the Superior Court of Wake County, to which American Motors and 421 Motor Sales had appealed. This stay order was issued *ex parte* upon a motion by the appellants. On 2 April 1981, Judge Hobgood signed an order denying a motion by the appellants that the stay order be continued pending the outcome of a hearing in

superior court on the Commissioner's order. The petitioners appealed from this order by Judge Hobgood.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, for respondent appellee Commissioner of Motor Vehicles.

Womble, Carlyle, Sandridge and Rice, by James M. Stanley, Jr., for petitioner appellants American Motors Sales Corporation and 421 Motor Sales.

White and Crumpler, by Robert B. Womble, for intervenor respondent appellee Pennell Motor Company.

Johnson, Gamble and Shearon, by Samuel H. Johnson and Richard J. Vinegar, for North Carolina Automobile Dealers Association, amicus curiae.

WEBB, Judge.

[1] The first question we face is whether the appeal should be dismissed as premature. The petitioners appeal from an order denying a stay of the Commissioner of Motor Vehicles' order which revoked the franchise that American Motors had given 421 Motor Sales to sell Jeeps. This order denying a stay did not dispose of the case and is interlocutory. *Setzer v. Annas*, 286 N.C. 534, 212 S.E. 2d 154 (1975) held the granting of a preliminary injunction requiring the defendant to remove a gate on a private road in which the plaintiff claimed a right of way affected a substantial right and was appealable under G.S. 1-277. In this case, as in *Setzer*, the petitioners were required to give up a right pending a hearing. We hold pursuant to *Setzer* a substantial right of the petitioners was affected by the refusal to stay the court's order which will work an injury to the petitioners if not corrected before an appeal from the final judgment. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). We shall consider the appeal.

[2] The Commissioner of Motor Vehicles acted under Article 12, Chapter 20 of the General Statutes in revoking the franchise of 421 Motor Sales. This Article provides in pertinent part:

> "§ 20-305. *Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer*

of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.— It shall be unlawful for any manufacturer . . .

* * *

(5) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; trade areas are those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board.

§ 20-301. *Powers of Commissioner.*

* * *

(b) The Commissioner shall have power to prevent unfair methods of competition and unfair or deceptive acts or practices.

(c) The Commissioner shall have the power in hearings arising under this Article to determine the place where they shall be held; to subpoena witnesses; to take depositions of witnesses; and to administer oaths.

* * *

§ 20-305.3. *Hearing notice.*—In every case of a hearing before the Commissioner authorized under this Article, the Commissioner shall give reasonable notice of each such hearing to all interested parties, and the Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and appeal as provided in Chapter 150A of the General Statutes . . . ."

We believe G.S. 20-301 gives the Commissioner the power to prevent "unfair . . . acts or practices" and that granting a franchise in violation of G.S. 20-305(5) would be an unfair act or practice. The Commissioner has held a hearing and determined that the granting of the franchise by American Motors to 421 Motor Sales violated G.S. 20-305(5).

[3] The petitioners contend the Superior Court of Wake County was in error for not staying the Commissioner's order pending the outcome of the review. G.S. 150A-48 provides:

> "At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the agency decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the terms of G.S. 1A-1, Rule 65."

The petitioners argue the court abused its discretion in not staying the order for several reasons. They say first that the Commissioner does not have the power to issue an injunction. We find no merit in this argument because we do not believe the Commissioner issued an injunction. It is true that in the decretal portion of his order, he used the word "enjoin." The order was not treated by any of the parties as an injunction, but as an order revoking the franchise agreement. The order was appealed to the Superior Court of Wake County for review as an order by a state agency.

The petitioners next contend that G.S. 20-305(5) violates Article I, Section 34 of the Constitution of North Carolina which provides:

> "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

The petitioners argue that G.S. 20-305(5) is unconstitutional on its face as allowing monopolies, or unconstitutional as applied in this case because it granted a monopoly to Pennell. We cannot so hold. We believe American Motors could, without violating Article I, Section 34 of the North Carolina Constitution, give Pennell the exclusive right to sell Jeeps in the North Wilkesboro trade area. We do not believe it is granting a monopoly for the General Assembly to require American Motors to do what it could bargain

to do if it desires to execute a contract. *See Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 243 S.E. 2d 793 (1978), *modified in part on other grounds*, 296 N.C. 357, 250 S.E. 2d 250 (1979) for a discussion of the unequal bargaining power between manufacturers and automobile dealers and the necessity for the General Assembly to aid the dealers. We are not dealing with an agreement between competitors not to compete. We are dealing with a contract between a manufacturer and a dealer. The State has enacted legislation which gives automobile dealers some protection after they have made investments and taken other action, relying on contracts they have made. We believe the State has the power to do this.

We do not believe *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973) and *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949) relied on by the petitioners are applicable. Our Supreme Court held in *Hospital* that the State did not have the power acting through a commission to deny a private corporation the right to build a hospital. In *Ballance* our Supreme Court held that the State could not under the police power require a license to engage in the business of photography. Neither of these cases deal with the situation we face in this case. We hold that the State can require that if an automobile manufacturer gives a franchise to a dealer to sell automobiles, that the manufacturer include in the terms of the franchise agreement the right that the dealer have an exclusive franchise in a certain trade area so long as the dealer abides by the terms of the franchise agreement.

The petitioners also contend the court erred in not granting a stay because Pennell had unclean hands. They say this is so because Pennell had not reached its potential for Jeep sales and the Commissioner so found and concluded that American Motors had reason to terminate its franchise. Assuming the clean hands doctrine applies to this case, we do not believe Pennell had unclean hands. The fact that Pennell may not have been as competent in business as it could have been does not show he had engaged in any sharp practice or inequitable conduct which would give rise to a holding that he had unclean hands.

The petitioners argue further that the court erred in not granting the stay because the record shows that the Commissioner erred in finding that American Motors did not give Pennell

timely notice of its intention to grant an additional franchise in Pennell's trade area. They argue that the fact that Mr. Pennell was told by Mr. Ellison that an additional Jeep franchise would be granted in Pennell's trade area complied with the notice requirement of G.S. 20-305(5). G.S. 20-305(5) requires that written notice be given to a franchisee before a new franchise may be granted. We do not believe the verbal notice given by Mr. Ellison complies with the statute.

We hold that Judge Hobgood did not abuse his discretion by refusing to stay the order of the Commissioner of Motor Vehicles.

Affirmed.

Judge WELLS concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting.

I dissent from the majority opinion and find support for my dissent in *Georgia Franchise Practices v. Massey-Ferguson*, 244 Ga. 800, 262 S.E. 2d 106 (1979).

In that case, the Georgia Supreme Court considered the constitutionality of certain provisions of the Motor Vehicle, Farm Machinery and Construction Equipment Franchise Act. It found Ga. Code § 84-6610(a)(4) (Supp. 1979), very similar to our N.C. Gen. Stat. § 20-305(5) (1978), unconstitutional, as it violated the Georgia Constitution's prohibition against contracts and agreements which diminish competition or encourage monopolies. Ga. Const., Art. III, § 8, par. 8. The Georgia court recognized that "the clear purpose of these sections is to permit franchised dealers to restrict competition and create a monopoly in the retail sale of motor vehicles. The provisions permit the establishment of a market allocation among franchised dealers and thereby prevent any competition between dealers and companies in the sale of the same line-make equipment." 244 Ga. at 801, 262 S.E. 2d at 107-08.

Because the North Carolina Constitution also contains an anti-monopoly clause, this court, like the Georgia Supreme Court, should find N.C. Gen. Stat. § 20-305(5) unconstitutional, as it encourages monopolies "contrary to the genius of a free state." N.C.

Const., Art. I, § 34. The curtailment of monopolies created by statute is not new to North Carolina. In 1972 our Supreme Court held unconstitutional a North Carolina statute requiring a certificate of need in order to construct and operate a private hospital, because it encouraged the creation of monopolies in the medical facilities industry. *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1979). I see no reason why the analysis of the automobile dealership industry should be treated any differently than the analysis of "the practice of the healing arts and . . . operation of institutions for that purpose." 282 N.C. at 549, 193 S.E. 2d at 734. The fact that it is "the common experience in America that competition is an incentive to lower prices, better service and more efficient management" applies equally to private automobile dealerships and private hospitals. 282 N.C. at 549, 193 S.E. 2d at 734. The court in *In re Hospital* recognized this similarity stating that "[w]hile in many respects a hospital is not comparable to an ordinary business establishment, we know of no reason to doubt its similarity thereto in response to the spur of competition." 282 N.C. at 549, 193 S.E. 2d at 734.

While the majority is correct in pointing out that "[w]e are not dealing with an agreement between competitors not to compete" but are instead concerned only with the manufacturer-dealer contract, it is difficult to discern how the resulting monopolies can be distinguished. Both are equally injurious to competition and its resulting consumer benefits, and the discouragement of intrabrand, as well as interbrand, competition has been prohibited by N.C. Const., Art. I, § 34.

I, like the Georgia Supreme Court, have been unable to discover the public interest being protected by § 20-305(5) and justifying this exercise of the State's police power. See 244 Ga. at 802, 262 S.E. 2d at 108. But I am content to rest my dissent on the thesis that the "laws may not be procured by men already engaged in an occupation in order to keep others out. The exclusion of others from a common right is a prominent feature of monopolistic action forbidden by our fundamental law." *State v. Warren*, 252 N.C. 690, 693, 114 S.E. 2d 660, 664 (1960).

State v. Fox

STATE OF NORTH CAROLINA v. JOHN HEYWOOD FOX

No. 8126SC1367

(Filed 7 September 1982)

1. **Searches and Seizures § 44— motion to suppress—incompetent evidence at voir dire—presumption that court disregarded**

Even if an officer was improperly permitted to express his opinion in a hearing on a motion to suppress that he had articulated his suspicions which warranted an investigatory stop of defendant, defendant was not prejudiced thereby where there was nothing in the record to rebut the presumption that incompetent evidence was disregarded by the trial judge.

2. **Searches and Seizures § 12— investigatory stop of vehicle**

An officer had an articulable and reasonable suspicion that defendant might be engaged in criminal activity so as to justify an investigatory stop of defendant's vehicle where the officer observed defendant at 12:50 a.m. driving slowly down a dead-end street of locked businesses previously fraught with property crime; one of the businesses had been broken into that very night; defendant was dressed shabbily but drove a "real nice" 1981 Chevrolet; and although defendant drove within two feet of the officer, defendant did not stop to ask directions or otherwise communicate with the officer but appeared to avoid his gaze.

Judge BECTON dissenting.

APPEAL by defendant from *Grist, Judge.* Judgment entered 21 October 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 June 1982.

Officer R. L. Bryant of the Charlotte Police Department on 1 August 1981, at approximately 12:50 a.m. observed a green 1981 Chevrolet moving south on North Tryon Street. The automobile turned left onto a dead end of Twenty-Seventh Street, where several padlocked businesses were located. Several break-ins had occurred in the area, and Officer Bryant had taken a report of a break-in from one of the businesses that evening. There was no residential housing on that part of the street.

Officer Bryant watched the Chevrolet move very slowly to a gate at the end of the street, stop, turn around, and proceed out of the dead end. Defendant's vehicle passed within two feet of Officer Bryant's patrol car, but defendant "cocked" his head away from the officer. Officer Bryant testified that he believed defendant was avoiding eye contact, and that although he thought de-

fendant may have simply been lost, defendant did not stop to speak to him. He was also of the opinion that defendant did not "fit in the area", his hair being styled into "forty or fifty" shoulder length braids, and that he was made suspicious by defendant's attire. Officer Bryant followed and stopped defendant. He did not observe any traffic or equipment violations. He discovered upon making a license check that defendant did not have a driver's license, that the Chevrolet automobile was stolen, and that defendant was a prison escapee.

Defendant was indicted for felonious possession of a stolen vehicle, and, preserving his right of appeal, pled guilty to the charge upon denial of his motion to suppress. He appeals from an order of imprisonment.

Attorney General Edmisten, by Associate Attorney William H. Borden, for the State.

Ellis M. Bragg for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant argues that the court erred by permitting Officer Bryant to testify at the pretrial hearing on defendant's motion to suppress that he "expressed an articulated basis" for stopping defendant, and that it was error to deny defendant's motion to suppress evidence obtained pursuant to the stop and detention.

The following exchange took place on recross examination of Officer Bryant:

> I did not arrest the defendant solely because of his appearance, that was not my sole basis. I took into consideration all of the things that I observed with respect to the defendant and the car he was in.
>
> Q. It would be fair to say that based upon everything you observed about him you had a reasonable suspicion that he was engaged in some illegal activity at that time?
>
> MR. BRAGG: Objection.
>
> THE COURT: Overruled. Well, that's calling for a conclusion, though.

Q. You have expressed an articulated basis for your suspicions here today?

MR. BRAGG: Objection.

THE COURT: Overruled.

A. Yes, sir.

MR. BRAGG: Move to strike the answer.

THE COURT: Overruled. Any other questions?

Defendant contends that the witness should not have been allowed to express his opinion regarding whether he had articulated his suspicions in view of the mandate of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), that an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts," *id.* at 906, warrant an investigatory stop, on the grounds that a nonexpert may not testify as to a question of law. Though it is not apparent to us that the officer's answer was any more than a statement that he had articulated the facts known to him preceding his stop of the green Chevrolet, we hold that any error that may have occurred in the admission of this testimony was nonprejudicial. Even assuming that the evidence was improperly admitted, we find nothing to rebut the presumption that incompetent evidence was disregarded by the trial judge. See *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). Moreover, it is clear from the record that the court understood the legal prohibition against conclusory testimony from nonexperts. This assignment of error is overruled.

[2] Defendant maintains by his second assignment that he was stopped and detained by Officer Bryant in violation of his constitutional rights and that the court erred by refusing to order that all evidence obtained as a result of the intrusion be suppressed.

A police officer is authorized to stop a person without probable cause to arrest him if he observes unusual conduct making him reasonably suspicious that criminal activity may be afoot, and can point to specific facts that warrant the suspicion. *Terry v. Ohio*, supra. Our examination of the judge's findings of fact, which are based on the evidence and are thus conclusive, satisfies us

that Officer Bryant acted within the confines of the Fourth Amendment in making the investigatory stop of defendant's vehicle. Defendant was driving slowly down a dead-end street of locked businesses previously fraught with property crime. One of the businesses had been broken into, Officer Bryant believed, that very night. The stop occurred at a very early morning hour. Defendant was dressed shabbily but drove a "real nice" 1981 Chevrolet. He did not stop to ask directions, or otherwise communicate with the officer, though he drove within two feet of Officer Bryant, and appeared to avoid his gaze. We upheld the investigatory stop of a vehicle in *State v. Tillett and State v. Smith*, 50 N.C. App. 520, 274 S.E. 2d 361, *appeal dismissed* 302 N.C. 633, 280 S.E. 2d 448 (1981), on facts less compelling, perhaps, than these. There, an automobile travelling a dirt road was seen entering a heavily wooded, occasionally unoccupied area at about 9:40 p.m. The officer was aware of reports of "firelighting" deer in the area. He stopped the vehicle when it emerged from the area. We held it not unreasonable to believe the occupants of the vehicle were engaged in some sort of criminal activity. We hold in the case at bar, as we did in *Tillett*, that the facts "together with the reasonable inferences to be drawn therefrom, when viewed through the eyes of an experienced police officer, . . . justify the reasonable suspicion" that defendant "might be engaged in or connected with criminal activity." *Id.* at 524, 274 S.E. 2d at 364. The assignment of error is, therefore, overruled, and the order allowing the introduction of evidence acquired pursuant to the investigatory stop is

Affirmed.

Judge MARTIN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

In *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L.Ed. 2d 660, 673, 99 S.Ct. 1391, 1401 (1979), the United States Supreme Court held that

> . . . except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unli-

censed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Believing that the majority has failed properly to consider the application of *Prouse* to the facts of this case, I dissent.

To reach its conclusion that Officer Bryant had a reasonable suspicion that defendant might be engaged in criminal activity, the majority relies on *State v. Tillett and State v. Smith*, 50 N.C. App. 520, 274 S.E. 2d 361, *appeal dismissed* 302 N.C. 633, 280 S.E. 2d 448 (1981). The *Tillett and Smith* Court relied upon *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979). Significantly, *Thompson* was decided eleven (11) days before *Prouse*,[1] and *Tillett and Smith* is factually distinguishable from the case *sub judice*.

There was an arguable basis for stopping Tillett and Smith—Officer Wagner "did not observe an inspection sticker on the vehicle," 50 N.C. App. at 521, 274 S.E. 2d at 362, as is required by G.S. 20-183.2(a). In the case *sub judice*, the majority correctly points out that Officer Bryant "did not observe any traffic or equipment violations," ante p. 2. Further, in *Tillett and Smith*, Officer Wagner "approached the vehicle, asked the driver of the vehicle what he was doing[,] . . . shined his flashlight into the vehicle and" simultaneously observed, in Officer Wagner's opinion, marijuana. 50 N.C. App. at 522, 274 S.E. 2d at 362. In the case *sub judice*, Officer Bryant observed nothing about defendant to justify the intrusion.

I am particularly concerned that the majority deems significant the fact that the "[d]efendant was dressed shabbily but drove a 'real nice' 1981 Chevrolet" and that the defendant "did not stop to ask directions, or otherwise communicate with the officer, though he drove within two feet of Officer Bryant, and appeared to avoid his gaze." The majority's reasoning subjects most people

1. It is also significant to note that the facts in *Thompson* did not compel unanimity in our appellate courts. Judge Erwin dissented in 37 N.C. App. 628 (1978), and Justice Exum dissented in 296 N.C. 703 (1979).

on late-night (or even weekend) errands to the grocery store to police detention. The law has yet to deem shoulder-length braids on males or any other non-mainstream lifestyle, even while worn in a Chevrolet, as grounds for suspicious inference. *Compare United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed. 2d 607, 95 S.Ct. 2574 (1975), in which the Supreme Court rejected the Border Patrol's argument that it was lawful to stop cars late at night near the border because the occupants appeared to be of Mexican descent. Further, to construe a "cock" of the head as an intent to avoid a gaze (of the officer) rather than a glare (of the oncoming cruiser's headlights) is to "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, . . ." *Terry v. Ohio*, 392 U.S. 1, 22, 20 L.Ed. 2d 889, 906, 88 S.Ct. 1868, 1880 (1968).

Officer Bryant himself testified that he thought defendant may have been lost. Based on *Delaware v. Prouse*, I do not believe Officer Bryant had a reasonable and articulable suspicion that criminal activity was afoot when he observed defendant driving slowly from a dead-end street "of locked businesses previously fraught with property crime." Ante, p. 4.

In my opinion, the defendant's motion to suppress the evidence should have been allowed.

R. O. GIVENS, INC. v. THE TOWN OF NAGS HEAD

No. 811SC775

(Filed 7 September 1982)

1. **Municipal Corporations § 30.13— ordinance prohibiting outdoor advertising —authority of town**

A town had the authority to prohibit outdoor advertising in areas zoned commercial and industrial and to provide compensation for removed signs by amortization since the Outdoor Advertising Control Act, G.S. 136-126 *et seq.*, did not apply to such areas.

2. **Municipal Corporations § 30.13— ordinance prohibiting outdoor advertising —cash compensation for removed signs not required**

Outdoor advertising signs which were rendered unlawful by a town zoning ordinance were not signs "lawfully erected under the state law" within the meaning of G.S. 136-131, and the owners of signs required by the ordinance to be removed were thus not entitled to cash compensation for the removed signs.

3. **Municipal Corporations § 30.13— ordinance prohibiting off-premises advertising signs—police power**

A town ordinance prohibiting off-premises commercial signs and requiring their removal by a certain date constituted a valid exercise of the police power.

4. **Municipal Corporations § 30.13— ordinance prohibiting off-premises commercial signs—no violation of freedom of speech**

A town ordinance prohibiting off-premises commercial signs did not infringe on First Amendment freedom of speech rights.

5. **Municipal Corporations § 30.18— ordinance prohibiting off-premises commercial signs—amortization—constitutionality**

A town ordinance prohibiting off-premises commercial signs and requiring their removal within a period of five and one-half years was not confiscatory and was reasonable.

6. **Municipal Corporations § 30.13— ordinance prohibiting off-premises commercial signs—equal protection**

A town ordinance prohibiting off-premises commercial signs while permitting on-premises signs did not violate equal protection.

7. **Municipal Corporations § 30.13— ordinance prohibiting off-premises advertising signs—no action under Civil Rights Act**

In an action involving a town ordinance prohibiting off-premises advertising signs, the trial court did not err in denying plaintiff's motion to amend its complaint to assert a claim under 42 U.S.C. § 1983 of the Civil Rights Act based on an alleged violation of plaintiff's rights under the Federal Highway Beautification Act, 23 U.S.C. § 131.

APPEAL by defendant from *Preston, Judge.* Judgment entered 16 March 1981 in Superior Court, DARE County. Heard in the Court of Appeals 30 March 1982.

This appeal is from the trial court's holding that an ordinance of the town of Nags Head is unconstitutional and void. The ordinance in question prohibits off-premise commercial signs and requires their removal by 31 December 1977. Plaintiff, a corporation engaged in the business of outdoor advertising, brought this action for a declaratory judgment that the ordinance is null and void or, alternatively, a judgment requiring the town to compensate plaintiff for its loss in excess of $70,000 resulting from removal of its signs.

The town averred in its answer that the 1977 zoning ordinance was merely a recodification of a 1973 ordinance to which

plaintiff had not objected. It was argued, therefore, that plaintiff's claim was barred by the statute of limitations and laches. The town also denied plaintiff's claim that the ordinance was unconstitutional.

According to stipulations, plaintiff owns 675 off-premise advertising signs in 13 counties, 30 of which are in Nags Head. The town of Nags Head is located on the Outer Banks of North Carolina, and tourism is a vital part of its economy.

The primary purpose of the ordinance is to eliminate structures which block and detract from the town's scenic beauty. A period of five and one-half years was allowed between the time off-premise signs were outlawed in 1972 and the time their removal was required. Although plaintiff added no new signs after 1972, it claimed entitlement to the fair market value of its pre-existing signs.

The trial court found that the Nags Head ordinance had been preempted by the Outdoor Advertising Control Act (state act) and that the State had shown legislative intent to conform the latter to the Federal Highway Beautification Act (federal act). The court further concluded that the State's failure to comply with the federal act could result in a penalty. Accordingly, the local ordinance was declared void to the extent that it was inconsistent with the requirements of the federal act regarding compensation for removal of signs along primary highways.

The court adjudged Nags Head zoning ordinance § 6.04E(6) "arbitrary, unreasonable, confiscatory, unconstitutional and void" and permanently restrained its enforcement.

Defendant appealed. Plaintiff appealed from denial of its motion to amend its complaint.

Shearin, Gaw & Archbell, by Roy A. Archbell, Jr., and Norman W. Shearin, Jr., for plaintiff appellee.

Kellogg, White, Evans & Sharp, by Thomas L. White, Jr., and Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellant.

ARNOLD, Judge.

This action is complicated by the fact that outdoor advertising is subject to state and, indirectly, to federal regulation as well as to municipal control. Thus the trial court was required to consider the scope of the state Outdoor Advertising Control Act, G.S. 136-126, adopted by our legislature to implement the Federal Highway Beautification Act, 23 U.S.C. § 131, in determining the applicability of the Nags Head Ordinance.

On 11 June 1982 the General Assembly enacted Chapter 1147 of the Session Laws by adding a new section to Article 11 of Chapter 136 of our General Statutes. The new section, which expires 30 June 1984, requires that when outdoor advertising is removed just compensation shall be required in accordance with paragraphs (2), (3) and (4) of G.S. 136-131. Language in the bill (House Bill 193) enacted as Chapter 1147 which would have made the act applicable to billboards subject to pending litigation was removed prior to enactment by the General Assembly.

Defendant brings forth eight arguments in its appeal and plaintiff cross-appeals with one assignment of error.

I.

[1] The first contention of the town of Nags Head is that the trial court erred in finding that the local ordinance was preempted by the state act. The town argues that the state act does not affect signs located in areas zoned commercial or industrial and that nothing in the state act prohibits municipalities from regulating advertising which falls outside its provisions. This interpretation is supported by other state statutes which expressly provide that "[t]he fact that a State or federal law, standing alone, makes a given act, omission or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition." G.S. 160A-174(b). *See also* G.S. 160A-390. Thus, the town contends that it is authorized to outlaw outdoor advertising which is not regulated by state law and to provide compensation by amortization since the state act's compensation provision has no relevance. We tend to agree with the town.

[2] With respect to advertising signs which are not located in areas zoned commercial or industrial, the determination of applicable law is more complicated. The state and federal acts

specifically require cash compensation to sign owners whose signs are removed pursuant to those acts. However, in order to be compensable, the state statute requires that a sign be "lawfully erected under the state law." G.S. 136-131. The signs in question here, having been rendered unlawful by local zoning ordinances adopted pursuant to the state enabling statute, G.S. 160A-381, are not signs "lawfully erected" and therefore are not compensable.

We note that the federal act was amended in 1978 specifically to avoid this result and to require compensation for signs legal when erected. The judgment of the trial court effectively imposed these federal amendments on the state act. We question this result, however, since our legislature had not adopted the 1978 amendments when this matter was considered by the trial court. Plaintiff argues that the express terms of the state act contravene the intent of the federal act, as amended, and jeopardize a portion of our federal highway funds. While this contention may be well-taken, amendment of the statute is within the purview of the legislature and not this Court. Since legislative action had not been taken to alter the clear wording of the state act prior to trial of this action, we cannot find advertising signs legal which have been rendered illegal pursuant to state law.

II.

The town next challenges the trial court's conclusion that its zoning ordinance as to off-premises outdoor advertising is overbroad, exceeds police power and is arbitrary, oppressive, unreasonable and capricious.

[3] We have examined the zoning scheme and stated objectives of the town and we find the off-premises advertising restriction to be within the police power of the municipal government. Indeed, in the landmark case of *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the U.S. Supreme Court upheld a similar ordinance insofar as it affected commercial advertising signs. "Esthetics" have, in fact, been held to constitute a legitimate consideration in the exercise of police power. *See* Metromedia, *supra*; *State v. Jones*, 53 N.C. App. 466, 281 S.E. 2d 91 (1981), affirmed 305 N.C. 520, 290 S.E. 2d 675 (1982).

[4] As to the finding that the ordinance in question unconstitutionally restricts freedom of speech, we are not persuaded by

plaintiff's circuitous analysis of Nags Head's zoning laws that the sign restriction in any way affects noncommercial speech. The definition of "outdoor advertising structure" adopted by the town would appear expressly to limit application of the sign ordinance to commercial signs. As the town points out, the definition closely parallels that which received U.S. Supreme Court sanction in *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978). Accordingly, we hold that the ordinance imposes constitutional time, place and manner restrictions only and does not infringe on First Amendment rights.

[5] The trial court's holding that the town ordinance is confiscatory is in conflict with the decision of our Supreme Court in *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed*, 422 U.S. 1002 (1975). *Joyner* upheld the constitutionality of an ordinance requiring removal of non-conforming uses without compensation after a three-year amortization period. We have concluded that the five and one-half year amortization period here is reasonable in view of *Joyner*.

[6] Finally, we reject the plaintiff's contention that the town's prohibition of off-premise commercial signs, while permitting on-premise signs, violates equal protection. The U.S. Supreme Court has stated on similar facts that ". . . off-site commercial billboards may be prohibited while on-site commercial billboards are permitted." Metromedia, 453 at 512. The court explained that the city's legitimate interests could reasonably have been found to outweigh one classification of private interest, but not another.

Having concluded from the foregoing that the trial court erred in its conclusion of law with regard to the enforceability of the Nags Head sign ordinance, we find it unnecessary to reach defendant's remaining assignments of error.

PLAINTIFF'S APPEAL

III.

[7] Plaintiff brings forth one assignment of error in its cross-appeal, charging that the trial court erred in denying plaintiff's motion to amend its complaint to allege a claim under 42 U.S.C. § 1983 of the Civil Rights Act. Plaintiff's argument is based on the U.S. Supreme Court's holding in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that § 1983 actions could be brought for violation of

federal statutory rights. Our review of 23 U.S.C. § 131, however, reveals no creation of individual rights thereunder since the federal act does not impose regulation, but only authorizes federal-state agreements pursuant to which state regulatory statutes may be adopted. We can find no basis for a § 1983 cause of action and hold that plaintiff's motion to amend, therefore, was properly denied.

The order of the trial court is reversed and the cause remanded for disposition consistent with this opinion.

Reversed and remanded.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. ROBERT HOLLAND GREER

No. 8125SC923

(Filed 7 September 1982)

Public Officers §§ 11, 11.1— removal of magistrate error—indictment insufficient to state criminal charge—statute in irreconcilable conflict

An indictment charging a magistrate with a violation of G.S. 14-230 in that he willfully and corruptibly violated his oath of office by committing a person to jail without lawful process with the intent to extort from him the sum of $200 was insufficient to support his conviction since the provisions of G.S. 14-230 and the provisions of G.S. 7A-173 and 7A-376 are in irreconcilable conflict and since the enactment of the statutory scheme set out in the sections of G.S. 7A, by clear implication, repealed G.S. 14-230 so far as that statute applied to magistrates, who are now officers of the General Court of Justice, and the pertinent provisions of Chapter 7A of the General Statutes provide the exclusive procedures for charging a magistrate with misconduct in office or for removing him from office for misconduct. Article IV, § 17(3) of the Constitution of North Carolina.

Judge WEBB concurring in the result.

APPEAL by defendant from *Grist, Judge.* Judgment entered 2 April 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 9 February 1982.

The defendant, a magistrate in Caldwell County, was tried on a bill of indictment which charged him with a violation of G.S.

14-230 in that he willfully and corruptly violated his oath of office by committing a person to jail without lawful process with the intent to extort from him the sum of $200.00 and that the defendant did extort from that person $200.00 of which the defendant paid $125.00 to another person as reimbursement for damage to that person's automobile.

The evidence showed that Mr. Ottie Jackson Carroll, Jr. and his daughter, Rebecca Carroll Cox, were driving through Caldwell County at approximately 1:30 p.m. on 12 July 1980 when a bottle was thrown through the windshield of Mr. Carroll's automobile. The police came to the scene and arrested Larry Hafner for throwing the bottle. The officers carried Mr. Hafner to the office of the defendant who was the magistrate on duty at that time. Mr. Carroll and Mrs. Cox also went to the defendant's office. Mr. Hafner was intoxicated and unruly and the defendant ordered him removed from his office. Mr. Carroll testified that defendant said to an officer: "Take him up in jail and book him for 30 days contempt of court." Mrs. Cox testified she heard the defendant say "Now, I have told you to be quiet, and I am going to have to cite you for contempt of court if you don't be quiet," and then told the officer "Get him out of here." Mr. Hafner testified that he was "drunk as a cooter" but he remembered the defendant saying "lock him up for contempt." Sharon Kirby testified that she was an officer on duty, that she helped carry Larry Hafner to jail and put on the jail card "contempt" and "no bond." She testified she returned to the defendant's office and told him she had put Mr. Hafner in jail for contempt.

Mr. Carroll testified that in answer to a question by the defendant he told the defendant it would cost $125.00 to fix the windshield. He testified further that he asked the defendant to issue a warrant for Mr. Hafner. The defendant told Mr. Carroll to let him handle the matter in his way and did not issue a warrant. After the defendant had left his office for the day and at approximately 12:00 midnight, Mr. Hafner's stepfather came to the jail to procure Mr. Hafner's release. John H. Parlier, the magistrate on duty at the time, testified he went to the jail and the jail log had Larry Hafner's name on it with the notation "$200 bond for contempt" beside it. A pencil mark had been drawn through the word "contempt." Mr. Parlier testified further that he called the defendant and the defendant told him he was holding Mr. Hafner

because he had broken a windshield on someone's automobile. Mr. Parlier received $200.00 from Mr. Hafner's stepfather and gave him a receipt for it marked "contempt." Mr. Hafner was released from jail. The next day, Mr. Parlier gave the money to the defendant.

On 13 July 1980 the defendant called Mrs. Cox and told her he had collected $200.00 for the damage to the automobile windshield. He told her that if she would come to his office, he would give her $190.00 and would keep $10.00 for jail fees. She told him she could not come and asked him to send her a check. Mrs. Cox testified the defendant told her "No, I don't want any records of it because I handled it in an underhanded way." They agreed that Mr. Carroll would come to the defendant's office and get the money.

Mr. Carroll testified that he went to the defendant's office a few days later and the defendant gave him $125.00. Mr. Carroll asked about the balance of the $200.00 and the defendant told him he needed it for court costs but if any were left after he got it settled, he would send it to him. Mr. Carroll testified further that he offered to give the defendant a receipt for the money, but the defendant said he did not want a receipt, that some of his friends had "told him to watch his step, that it was hot money and he had to handle it in a careful way." The defendant paid $10.00 in jail fees and put the remaining $65.00 in an envelope which he kept until the time of trial.

The defendant was convicted and appeals from a sentence removing him from office.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Christopher P. Brewer, for the State.

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, by James E. Ferguson, II, for defendant-appellant.

WELLS, Judge.

Defendant's only assignment of error is the denial of his motion to dismiss. At trial, defendant did not move to quash the indictment nor did defendant otherwise challenge the sufficiency of the indictment. Defendant did not argue the sufficiency of the indictment on appeal. Despite these circumstances, the bill of indict-

ment, upon which the prosecution is based, is before us as a part of the record proper, and we are charged with notice of its contents. *State v. Able*, 11 N.C. App. 141, 180 S.E. 2d 333 (1971). If the bill of indictment is insufficient on its face to state a criminal charge and support a conviction, this Court, *ex mero motu*, should so declare and arrest the judgment. *State v. Able*, supra. *See also State v. Wallace*, 25 N.C. App. 360, 213 S.E. 2d 420 (1975), *cert. denied*, 287 N.C. 468, 215 S.E. 2d 628 (1975). *See also* 4 N.C. Index 3d, Criminal Law, Sec. 127 and 146.2.

Article IV, Sec. 17 of the Constitution of North Carolina makes provision for the removal of judicial officers. Subsection (3) of Section 17 provides as follows:

> (3) "*Removal of Magistrates.* The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity."

Pursuant to the predecessor of that Section, Article IV, Sec. 17(2), the General Assembly enacted G.S. 7A-173. *See* 1965 Session Laws, Ch. 310, Sec. 1, providing for the suspension, removal, or reinstatement of magistrates. Under that statute, a magistrate may be removed from office by the senior regular resident superior court judge or any regular superior court judge holding court in the district. The statute provides that grounds for removal are the same as for a judge of the General Court of Justice. G.S. 7A-376 sets forth the grounds upon which judges of the General Court of Justice may be removed from office.

The gravamen of the offense with which defendant was charged in this case is misconduct in office. The provisions of G.S. 14-230 and the provisions of G.S. 7A-173 and 7A-376 are in irreconcilable conflict. Although repeal by implication is not generally favored as a rule of statutory construction, *Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978), we are persuaded that the enactment of the statutory scheme set out in the sections of G.S. 7A referred to above have, by clear implication repealed G.S. 14-230 so far as that statute applies to magistrates, who are now officers of the General Court of Justice, *see* Article IV, Sec. 10 of the North Carolina Constitution, and that the pertinent provisions of Chapter 7A of the General Statutes provide the exclusive pro-

cedures for charging a magistrate with misconduct in office or for removing him from office for misconduct.

Accordingly, the judgment of the Court below must be

Arrested and vacated.

Judge MARTIN (Robert M.) concurs.

Judge WEBB concurs in the result.

Judge WEBB concurs in the result.

I agree with the majority that the conviction of the defendant cannot stand. I do not agree with the reasons they assign for this result. The majority holds that G.S. 7A-173 and G.S. 7A-376 repealed by implication G.S. 14-230 as applied to magistrates. I cannot agree with this holding. G.S. 14-230 provides that a magistrate who is convicted of corruptly violating his oath of office shall be fined or imprisoned in the discretion of the court and shall be punished by removal from office. G.S. 7A-173 provides for the removal of magistrates under certain conditions. I do not believe any of the provisions of this section conflict with G.S. 14-230. There is no reason that there cannot be separate methods of removing magistrates.

I would reverse the judgment of the superior court on another ground. All the evidence shows that at the time Mr. Hafner was ordered to jail, Mr. Hafner was in fact guilty of contempt of court. The defendant was justified in holding him in contempt. I do not believe we should go behind the judgment of a judicial officer and find some other ground for his action when his action is supported by the record. The defendant may have used poor judgment in some of his actions, but I do not believe this should affect the outcome of this case. The State's theory is that the defendant held Mr. Hafner in contempt for the purpose of extorting $200.00 from him. The evidence justified the defendant in holding Mr. Hafner in contempt. I do not believe we should impugn the defendant's motives by saying that he held Mr. Hafner in contempt for some reason other than Mr. Hafner's contemptuous action. I vote to reverse on this ground.

Heath v. Turner

MARY LEE HEATH AND SON, KENNETH LEE HEATH v. T. J. TURNER AND WIFE, EVELYN TURNER; GRAHAM TURNER AND WIFE, FRANCES TURNER; LLOYD KENNEDY AND WIFE, LOIS KENNEDY

No. 814SC636

(Filed 7 September 1982)

Quieting Title § 2.2; Trespass to Try Title § 4— superior title under Real Property Marketable Title Act

Where both plaintiffs and defendants have record title to land of more than thirty years duration which could be examined without finding an exception, plaintiffs' predecessor took prior to the thirty-year period by descent a vested remainder in fee with possession postponed until the death of his father, and defendants and their predecessors in title have been in possession of the property for more than thirty years, plaintiffs' record title did not affect defendants' marketable title, and defendants' title must prevail pursuant to provisions of the Real Property Marketable Title Act. G.S. 47B-3; G.S. 47B-8(2).

Judge MARTIN (R. M.) dissenting.

APPEAL by plaintiffs and defendants from *Cowper, Judge.* Judgment entered 24 March 1981 in Superior Court, DUPLIN County. Heard in the Court of Appeals 11 February 1982.

This action involves the title to real property. Margaret Hall died intestate in 1916. At the time of her death, she owned a 50-acre tract of land in Duplin County. She was survived by eleven children. The plaintiffs in this action alleged that they owned Lots 2 through 7 in the division of the Margaret Hall land, that the defendants were trespassing on their land, and that the defendants' claim constituted a cloud on the plaintiffs' title. The case was tried by the court without a jury.

The court found the following facts to which no exceptions were taken. Five of the children of Margaret Hall received deeds from their brothers and sisters to Lot 1, and Lots 8, 9, 10 and 11. Lillie Hall Hobgood, one of Margaret Hall's children, received deeds to a 2/11 undivided interest in Lots 3, 4 and 5 from a brother and a sister. Thomas Mosley Hall, Eliza Hall and Katie Hall Turner were children of Margaret Hall who did not receive recorded deeds to any of the Margaret Hall property. Nevertheless, Katie H. Turner and husband conveyed Lot 2 to B. F. Hobgood, Sr., the husband of Lillie H. Hobgood, by deed recorded 16 November 1923; Thomas Mosley Hall and wife and Eliza Hall

and husband conveyed Lots 6 and 7 to B. F. Hobgood, Sr. by deed recorded 2 May 1924. Lillie Hall Hobgood died intestate on 4 July 1929. She was survived by her husband and one child, B. F. Hobgood, Jr. B. F. Hobgood, Sr. conveyed Lots 2 through 7 to J. A. Thigpen by deed recorded 4 November 1932 which deed purported to convey a fee simple estate. The defendants took their title by deeds which had as their ultimate source J. A. Thigpen. The defendants and those through whom they claim have been in possession of the land for more than 30 years. B. F. Hobgood, Jr. conveyed his interest in Lots 2 through 7 in the Margaret Hall land to A. L. Mercer by deed recorded on 8 December 1943. The plaintiffs base their claim to title on this deed to A. L. Mercer. B. F. Hobgood, Sr. died on 20 August 1976. This action was commenced on 15 August 1978.

Based on the above findings of fact among others the court concluded the defendants are the owners of Lots 2, 6 and 7 by adverse possession for more than 30 years and under color of title for more than 7 years and *prima facie* by the Real Property Marketable Title Act. The court concluded that the plaintiffs had proved title to a 3/11 interest in Lots 3, 4 and 5, and the defendants held the remaining 8/11 undivided interest by adverse possession for more than 30 years and under color of title for more than 7 years and *prima facie* by reason of the Real Property Marketable Title Act.

Plaintiffs and defendants appealed.

Fred W. Harrison for plaintiff appellants and appellees.

Vance B. Gavin for defendant appellants and appellees T. J. Turner and Evelyn Turner.

Russell J. Lanier, Jr. for defendant appellants and appellees Lloyd Kennedy and Lois Kennedy.

WEBB, Judge.

The plaintiffs do not argue an assignment of error as to the court's ruling on Lots 2, 6 and 7 of the Margaret Hall tract. They do argue that the court erred in limiting their interest to a 3/11 undivided interest in Lots 3, 4 and 5. The defendants assign error to the court's failure to hold that they are entitled to all the interest in these three lots. The defendants claim their title to Lots

3, 4 and 5 based on a deed from B. F. Hobgood, Sr. who had a curtesy estate and purported to convey a fee simple title. The plaintiffs' claim is based on a deed from B. F. Hobgood, Jr., who held a vested remainder in Lots 3, 4 and 5 subject to the life estate of his father. We believe this case is governed by the Real Property Marketable Title Act. It provides in part:

"47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expendiency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title.

47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

* * *

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

* * *

47B-8. Definitions.

As used in this Chapter:

* * *

(2) The term "title transaction" means any transaction affecting title to any interest in real property, including but not limited to title by will or descent, title by tax deed, or by trustee's, referee's, commissioner's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or judgment or order of any court, as well as warranty deed, quitclaim deed, or mortgage."

Under this act, if a person or those under whom he claims has a record title to real property of at least 30 years duration and there is nothing of record which by a title search of that chain would show a defect in the title, such a person has a marketable title in the property. *See* J. Webster, Real Estate Law in North Carolina § 508 (rev. ed. 1981). Any interests in the property, with certain exceptions set forth in G.S. 47B-3, which may have been created prior to that period are extinguished. G.S. 47B-4 provides for recording interests to the property to keep such interests from being extinguished. No interests were recorded in this case. In this case both plaintiffs and defendants have record titles of more than 30 years duration which could be examined without finding an exception. The defendants have a record title which commences with the deed from B. F. Hobgood, Sr. to J. A. Thigpen recorded in 1932. The plaintiffs have a record title which would reveal no exceptions if searched to the deed from B. F. Hobgood, Jr. to A. L. Mercer recorded in 1943. We believe the defendants' title must prevail. G.S. 47B-3 provides that a marketable record title shall not affect the rights of a person who is in possession of the property. The superior court found as a fact that the defendants and their predecessors in title have been in possession of the property for more than 30 years. For this reason we do not believe the plaintiffs' record title affects

the defendants' marketable record title. *See* Webster, *The Quest for Clear Land Titles,* 44 N.C.L. Rev. 89, 108, 109 (1965).

In 1929 B. F. Hobgood, Jr. took by descent a vested remainder in fee with possession postponed until the death of his father. G.S. 47B-3(2) defines "title transaction" to include "title . . . by descent." G.S. 47B-8(c) provides that a "marketable record title" shall be clear of "all rights . . . the existence of which depends upon any . . . title transaction . . . that occurred prior to such 30-year period." We believe this section of the statute divests the plaintiffs of their interest. We note that there is no requirement that a person in possession of property hold it by adverse possession in order for his title to be perfected under the Real Property Marketable Title Act. The defendants and their predecessors did not hold adversely to the remainderman or his successors so long as the life tenant was living.

The plaintiffs did not raise a constitutional question in the superior court or in this Court as to the Real Property Marketable Title Act as applied to this case, and we have not considered the due process question.

For the reasons stated in this opinion, we hold that it was error for the superior court to hold that the plaintiffs had a 3/11 interest in Lots 3, 4 and 5. We hold that the defendants possess all interests in the land. We reverse and remand for a judgment consistent with this opinion.

Reversed and remanded.

Judge WELLS concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting.

I agree with the findings of fact and conclusion of law by the trial court that plaintiffs Mary Lee Heath and son, Kenneth Lee Heath, are the owners of a 3/11 undivided interest in lots 3, 4, and 5 of the division of the Margaret Hall lands and vote to affirm.

Plaintiffs established title through B. F. Hobgood, Jr. (son of Lillie Hall Hobgood). Defendants' title comes through B. F. Hobgood, Sr., who only held a curtesy right in his wife's lands.

B. F. Hobgood, Jr. inherited the land from his mother, Lillie Hall Hobgood, who died intestate on 4 July 1929, subject to his father's curtesy estate. His father, B. F. Hobgood, Sr. died in September 1976.

In my opinion, neither adverse possession nor the Real Property Marketable Title Act have any application in this case.

I respectfully dissent from the opinion filed by the majority.

SHELTON MOORE, AND WIFE, MARILYN MOORE, CHARLES R. CRADDOCK, AND WIFE, ALTHEA W. CRADDOCK, CHARLES C. ASBY, III, BELMONT MOORE, EDWARD W. LUCAS, AND WIFE, ALENE M. LUCAS, KEMP LEGGETT, AND WIFE, ALICE J. LEGGETT, JOSEPH F. RHEM, AND WIFE, DESSIE H. RHEM, DANNY LEE EDWARDS, LUTHER D. BAILEY, AND WIFE, LORETTA H. BAILEY, ROY BUCK, SALLIE BEACHAM, NORA McGOWAN, TERRIA H. WILLIAMSON, HARVEY L. CRISP, JAMES TAYLOR, MELVIN D. WEATHERINGTON, JR., ELIZABETH L. WATSON, J. W. JENKINS, CLEON LATHAM, AND WIFE, SARAH B. LATHAM, H. EARL GASKINS, AND WIFE, EVELYN H. GASKINS, AND MARVIN L. MASON v. G. T. SWINSON, LILLIE L. PITTMAN, AND JAMES R. VOSBURGH, MEMBERS OF THE BEAUFORT COUNTY BOARD OF ELECTIONS; AND HUBERT R. JOHNSON, TAX COLLECTOR OF BEAUFORT COUNTY

No. 812SC1055

(Filed 7 September 1982)

Elections § 2— newly annexed area—no right to vote in sewer bond referendum

Persons living in a newly annexed area were not entitled to vote in a municipal sewer bond referendum held after the annexation but before the expiration of the sixty-day period for preclearance of the resultant voting change in the municipality by the Attorney General pursuant to 42 U.S.C. § 1973(c), since the federal statute preempted all other provisions regarding the right of persons annexed to vote in the bond election, including those of G.S. 160A-49(f).

APPEAL by plaintiffs from *Peel, Judge.* Order entered 12 August 1981 in Superior Court, TYRRELL County. Heard in the Court of Appeals 24 May 1982.

This action was instituted 3 August 1981 by residents of an area west of and adjacent to the city limits of Washington, seeking an injunction and a declaration of their right to vote in the 11

August 1981 Sewer Bond Referendum conducted in that city. Plaintiffs alternatively sought a writ of mandamus directing defendants to permit them to cast ballots; or, in the alternative, a declaration that the special election was null and void. The cause came on for hearing before Judge Peel on 5 August 1981.

The trial court found:

6. That plaintiffs and defendants stipulated to the following facts for the purpose of this hearing only:

. . .

c. That pursuant to the procedure set forth in N.C.G.S., Section 160A-49, the City Council for the City of Washington, North Carolina, passed an ordinance annexing into the City of Washington an area west of the then existing city limits, said area being both north and south of U.S. Highway 264 West and extending to Cherry's Run.

d. That the ordinance referred to in subparagraph (c), above, was passed on June 8, 1981, and effective as of June 30, 1981.

e. That plaintiffs, live in and own real and personal property in the area described in subparagraph (c), above.

f. That the area described in subparagraph (c), above, will become subject to ad valorem taxes imposed by the City of Washington and said taxes will be collected by the Beaufort County Tax Collector.

g. That by unanimous vote on June 8, 1981, the City Council of the City of Washington, following a public hearing, approved a bond order entitled "Bond Order Authorizing the Issuance of $1,600,000 Sanitary Sewer Bonds of the City of Washington" and by resolution the City Council specified that said bond order, including the levy of a tax for the payment thereof, would be submitted to the qualified voters of the City of Washington at an election to be held on August 11, 1981.

h. That the defendants G. T. Swinson, Lillie L. Pittman, and James R. Vosburgh are the appointed members of

the Beaufort County Board of Elections and are residents of Beaufort County.

i. That the plaintiffs have been and are registered voters with the Beaufort County Board of Elections and are fully qualified to vote in all county, state and national elections.

j. That by unanimous vote of June 16, 1981, the defendants, G. T. Swinson, Lillie L. Pittman, and James R. Vosburgh, as members of the Beaufort County Board of Elections, ruled that the voters living in the area described in subparagraph (c), above, could not vote in the August 11, 1981 Special Sanitary Sewer Bond Election.

k. That on August 11, 1981, the defendants G. T. Swinson, Lillie L. Pittman, and James R. Vosburgh, as members of the Board of Elections, will conduct and supervise a Special Sanitary Sewer Bond Election to be held in the City of Washington, North Carolina.

l. That the sample ballot for the election attached to the complaint is a true and accurate copy of the ballot to be used for the August 11, 1981 Special Sanitary Sewer Bond Election.

m. That the question to be answered by voters participating in the election is:

> "Shall the order authorizing $1,600,000 of bonds secured by a pledge of the faith and credit of the City of Washington to pay capital costs of improving waste water treatment facilities, including the acquisition and installation of machinery and equipment required therefor and the acquisition of land or rights-in-land required therefor, and a tax to be levied for the payment thereof, be approved?"

7. That Beaufort County, North Carolina, and the City of Washington, North Carolina, are subject to The Voting Rights Act of 1965 and the regulations promulgated thereunder.

8. That plaintiffs have failed to show that they were or are entitled to a preliminary injunction preventing the defendants G. T. Swinson, Lillie L. Pittman and James R. Vosburgh from conducting the August 11, 1981 Special Sanitary Sewer Bond Election.

9. That plaintiffs have failed to show that they were or are entitled to a writ of mandamus directing G. T. Swinson, Lillie L. Pittman and James R. Vosburgh to permit the plaintiffs to vote in the August 11, 1981 Special Sanitary Sewer Bond Election.

10. That plaintiffs have failed to show that they were or are entitled to a declaratory judgment that their exclusion from the August 11, 1981 Special Sanitary Sewer Bond Election is in violation of rights afforded to them under the Constitutions of the State of North Carolina and/or the United States of America or of the rights provided them under the laws of the State of North Carolina.

11. That plaintiffs have failed to show that they will suffer immediate and irreparable injury, loss or damage if they are excluded from the August 11, 1981 Special Sanitary Sewer Bond Election.

The court denied plaintiffs' request for relief at the hearing on 5 August. Plaintiffs' appeal from the court's order, filed 17 August, denying declaratory or injunctive relief, or a writ of mandamus.

Herman E. Gaskins, Jr., for plaintiff appellants.

McMullan and Knott, by James B. McMullan, Jr., for defendant appellees.

MORRIS, Chief Judge.

Plaintiffs argue, by the two assignments of error brought forward, that the laws and Constitution of this State and the United States Constitution mandate their entitlement to vote in the sewer bond referendum of 11 August 1981, and that their exclusion from participation therein was an abridgement of a fundamental right resulting in their immediate and irreparable injury.

It was stipulated that plaintiffs lived in the annexed area and that they were qualified registered voters at the time the lawsuit was commenced. Plaintiffs concede that Section 5 of the Voting Rights Act of 1965, specifically 42 U.S.C. § 1973(c), requires that the annexation expanding the number of voters be approved by the Attorney General within 60 days after submission of the proposed change to him, and that because the 60-day period beginning on the day of annexation had not expired by 11 August, under the federal law alone they may have been properly excluded. See *City of Rome, Ga. v. United States*, 472 F. Supp. 221 (D.L.D.C. 1979), *aff'd* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed. 2d 119, *reh. den.* 447 U.S. 916, 100 S.Ct. 3003, 64 L.Ed. 2d 865 (1980). Plaintiffs contend, however, that because they became citizens of the City of Washington on 30 June 1981, G.S. 160A-49(f) enfranchised them in time to vote on 11 August. That section reads in part:

> From and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality.

Plaintiffs also invoke the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, Sections 8 and 19 of the North Carolina Constitution. They maintain that 42 U.S.C. § 1973(c) does not override these protections of state and federal law, and that compliance with all of the laws required that no election be held during the first 60 days after annexation. Although we agree that plaintiffs became citizens of Washington upon annexation, we hold that 42 U.S.C. 1973(c), which was designed, in part, to enforce the Fifteenth Amendment, preempts all other provisions regarding the right of those annexed to vote in the 11 August bond referendum. Plaintiffs, therefore, were properly denied access to the polls on that day.

The case of *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981), is instructive. In that case a series of annexations added new eligible voters to the electoral base of Indianola, Mississippi, and it was acknowledged by the parties, as it was in the case at bar, that the increase in the number of voters in the

municipality are changes of a voting qualification, prerequisite, standard, practice, or procedure requiring preclearance as contemplated by Section 5 of the Voting Rights Act. Judge Clark, writing for the three-judge Indianola court, wrote that until the city obtained clearance of its post-Act annexations in accordance with Section 5,

> *all future elections must be conducted on the basis of the city boundaries as they existed before the unprecleared annexations were made, and citizens residing in such annexed areas may not participate in future municipal elections,* either as electors or as candidates. . . . This relief applies only to the right to vote and be a candidate. It does not, of course, constitute de-annexation, and it does not affect the rights of citizens residing in the annexed areas in any other way.

(Emphasis added.) *Id.* at 403. We are in accord with the reasoning of the Indianola opinion and we deem it dispositive of the issue whether plaintiffs were entitled to vote in the 11 August sewer bond referendum, held after annexation but before the period for preclearance of the resultant voting change by the Attorney General had expired.

Nor did plaintiffs suffer abridgement of a fundamental right or injury by their exclusion as voters from the 11 August election. Said the Rome Court:

> "We need not decide whether the right to vote in a municipal election when that election is regularly scheduled can ever be deemed a fundamental right protected by the Constitution. For even if fundamental interests were at stake, we believe section 5 of the Act is justifiable as advancing the compelling national interest of enforcing the Fifteenth Amendment. . . ."

(Citation omitted.) *City of Rome, Ga. v. United States,* supra, at 242. We conclude that the trial court acted properly in finding that plaintiffs suffered no immediate or irreparable injury, loss or damage by their exclusion from the election.

The judgment of the trial court is

Affirmed.

Judges MARTIN and BECTON concur.

CHALMER L. PRIDDY, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC1059

(Filed 7 September 1982)

Master and Servant § 68— occupational disease—conflicting evidence concerning disability—findings as to disability insufficient

In a workers' compensation proceeding where an occupational disease was alleged and where the record contained conflicting evidence concerning the claimant's capacity to work because of her disability, the Commission erred in failing to make the necessary findings of fact as to plaintiff's earning capacity. G.S. 97-2(9) and G.S. 97-53(13).

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 7 July 1981. Heard in the Court of Appeals 24 May 1982.

Plaintiff began work for defendant Cone Mills in the spinning department on 15 May 1951. All during her employment she was exposed to respirable cotton dust. Plaintiff quit her job on 15 August 1974 because her efforts at breathing had become so difficult that she could not properly perform her work.

On or about 7 March 1979 plaintiff filed a claim with the North Carolina Industrial Commission seeking benefits for disability resulting from occupational lung disease. Following a hearing, the Deputy Commissioner found, in pertinent part, that

> 8. Plaintiff has contracted the disease byssinosis, with evidence of permanent and irreversible airway obstruction, albeit moderate in degree, as a result of her exposure to respirable cotton dust during her history of textile employment.
>
> 9. Plaintiff was last injuriously exposed to byssinosis while employed by defendant employer.

10. Although plaintiff retained permanent and irreversible pulmonary impairment as a result of byssinosis at the time she terminated her employment, she was not then, nor is she now, disabled, either temporarily, partially, or totally, as a result of said occupational disease. However, plaintiff does have a permanent disability as a result of byssinosis in that she has permanent injury to two important internal organs, to wit: her lungs. The proper and equitable consideration for the loss of function of these organs is $3,500.00.

The plaintiff was awarded the sum of $3,500.00 for partial loss of lung function and all medical expenses incurred as a result of her occupational disease.

Ling & Farran, by Jeffrey P. Farran, for plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant-appellees.

MARTIN (Robert M.), Judge.

Plaintiff argues that the Industrial Commission erred in not finding that she was disabled by an occupational lung disease and entitled to disability benefits. Even though we do not agree that the evidence compels a finding of disability as a matter of law, we hold that the award must be vacated and this matter remanded.

As a general rule an opinion and award of the Industrial Commission is conclusive on appeal if its findings of fact are supported by any competent evidence and the conclusions of law are supported by the findings. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980). However, an order may be remanded to the Commission for additional findings of fact where the findings are insufficient to determine the rights of the parties. *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E. 2d 649 (1969).

In the case at hand, the Commission found that at the time plaintiff terminated her employment she was suffering from byssinosis, an occupational disease, but that she was not disabled in any way as a result of this illness. The term "disability" as used under the Workers' Compensation Act refers to the diminished capacity to earn wages and not to physical infirmity. *Hall v. Thompson Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). It means the "incapacity because of the injury to earn the

wages which the employee was receiving at the time of injury in the same or any other employment." G.S. 97-2(9).

The Supreme Court has held in the recent decision of *Hilliard v. Apex Cabinet Company*, 305 N.C. 593, 290 S.E. 2d 682 (1982), that a conclusion of disability must be based upon the following findings of fact supported by competent evidence:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 695, 290 S.E. 2d at 683. Where the record contains conflicting evidence concerning the claimant's capacity to work because of his disability, the Commission is required to make findings of fact which support its conclusion as to the presence or absence of disability as defined by G.S. 97-2(9). *Id.*

The evidence in the record reveals that plaintiff's sole work experience was in cotton mills where she was exposed to respirable cotton dust which is known to result in byssinosis, an occupational disease under G.S. 97-53(13). Plaintiff was working as a room cleaner in the spinning department when she quit her job with Cone Mills. She left her employment soon after the denial of her request for a leave of absence to enable her to accompany her husband to Oklahoma. She testified that she quit her job because she suffered such extreme difficulty in breathing that she could not perform her work. Plaintiff smoked not more than three to four cigarettes a day. At the time of the hearing plaintiff was 59 years of age with a fifth grade education. She was obese and suffered from other medical problems. Plaintiff stated that she was unable to walk any distance without giving out of breath. Although both medical experts reported that plaintiff should not return to work in a dusty environment, one examining doctor opined that "minimal if any pulmonary disability [was] due to cotton dust exposure," while the other stated that "Mrs. Priddy was unable to continue working because of the severe day after day respiratory complaints that had [been] her lot for the previous 19 years. . . . She will never again be able to work for pay." Plaintiff testified that since 1974 she had been unemployed and had

not looked for other work because she was unable to work due to "breathing problems and other things."

In order to receive disability compensation, the burden is on the claimant to prove that his illness has impaired his capacity to work and the extent of this impairment. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). In this case Mrs. Priddy was required to show not only that she was unemployed but also that she had not gotten another job because she was unable to do so. *Hilliard v. Apex Cabinet Company*, 305 N.C. 593, 290 S.E. 2d 682 (1982).

Although the Industrial Commission is free to accept or reject any or all of plaintiff's evidence in making its award, it must make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. The order must contain more than mere recitals of medical opinion to resolve these basic issues. *Barnes v. O'Berry Center*, 55 N.C. App. 244, 284 S.E. 2d 716 (1981). The conflicting evidence in this case concerning plaintiff's disability created an issue of fact which required a finding by the Commission. Since the Commission failed to make the necessary findings of fact as to plaintiff's earning capacity, this cause is remanded to the Industrial Commission for proceedings consistent with this opinion.

Vacated in part and remanded.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. WILLIAM A. PAUL, JR.

No. 813SC1339

(Filed 7 September 1982)

1. Criminal Law § 102.3— jury argument outside the evidence—cure of impropriety

In a prosecution for possession and sale of marijuana, the trial court did not err in failing to declare a mistrial after the district attorney argued outside the evidence that a witness had seen defendant sell marijuana to a third person where the State's main witness had testified that she saw defendant sell marijuana to the third person, the trial judge instructed the district at-

torney to limit his argument to the evidence, and the district attorney then asked the jury to strike his prior argument from their minds.

2. **Narcotics § 5— not guilty of possession—guilty of sale—verdicts not inconsistent**

Verdicts of not guilty of possession of marijuana with the intent to sell or deliver and guilty of the sale or delivery of marijuana were not inconsistent so as to require the trial court to set aside the guilty verdict.

3. **Criminal Law § 122— verdict not coerced by court**

The trial judge did not coerce a guilty verdict when he called the jury in to determine the status of the deliberations, the foreman stated that they were unanimous on one count but still divided on the other, the judge then instructed the jury to have a short conference about whether an opportunity to deliberate further would be of help to them, the jury returned a short time later to announce that they had reached a verdict on the second count, and the jury returned verdicts of not guilty on a charge of possession of marijuana with intent to sell or deliver and guilty on a charge of sale or delivery of marijuana.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 3 September 1981 in Superior Court, PAMLICO County. Heard in the Court of Appeals 26 May 1982.

Defendant was convicted of sale or delivery of a controlled substance, marijuana. On a charge of possession with intent to sell or deliver the controlled substance, defendant was found not guilty. The alleged sale took place at the Hurricane Restaurant in Pamlico County where, on the evening of 25 March 1982, defendant was working as a fill-in cook. At trial, Stephanie Sue Best testified that on 26 March 1981 she was caught at school carrying marijuana in her pocketbook. She was taken to the sheriff's department for questioning where she told authorities that she had bought the marijuana from the defendant the previous evening.

Grace Perry testified that she was an assistant cook at the Hurricane Restaurant on the night in question. She heard Ms. Best ask the defendant if he could get her some "pot." Defendant made a phone call and sometime afterwards went out the back door. He returned and told Ms. Best "that he had got some stuff." Ms. Perry was not a witness to the alleged sale as defendant and Ms. Best went into the storeroom.

Defendant's evidence consisted of the testimony of Michelle Powers who stated that she was a waitress at the Hurricane Res-

taurant and did not see the defendant give or sell any marijuana to Ms. Best that night. Defendant took the stand and denied having "anything to do with buying pot, selling pot, getting drugs or anything like that."

Attorney General Edmisten by Assistant Attorney General Frank P. Graham, for the State.

Sumrell, Sugg & Carmichael by Rudolph A. Ashton, III, for the defendant.

MARTIN (Robert M.), Judge.

[1] During the trial defendant objected to the State's asking Ms. Perry whether she saw the defendant give anything to Michelle Powers. Simultaneously with the objection came Ms. Perry's answer—"Yes, I did." The trial court sustained the objection and instructed the jury to disregard the answer. Later, in his closing argument to the jury, the district attorney apparently stated that Ms. Perry had seen the defendant sell marijuana to Ms. Powers. Following an objection, the trial judge instructed the district attorney to limit his argument to the evidence. The district attorney then asked the jury to strike his prior argument from their minds. Defendant assigns as error the trial court's failure to declare a mistrial after the district attorney had argued outside the evidence "in such a manner that the defendant was irreparably prejudiced."

Control of the arguments of counsel is within the sound discretion of the trial judge. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). As a general rule, improper argument of counsel is cured by the court's action in cautioning counsel to confine argument to matters in evidence and cautioning the jury not to consider it. *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, *cert. den.* 403 U.S. 940 (1970). Defendant is entitled to a new trial only if the impropriety is shown to be prejudicial. *Yost v. Hall*, 233 N.C. 463, 64 S.E. 2d 554 (1951).

Defendant overlooks the fact that Ms. Best testified, without objection, that *she* saw the defendant sell some of the marijuana to Michelle Powers. In light of this testimony, coupled with the court's cautionary instruction and the district attorney's own

curative remarks, we find that the defendant has not shown sufficient prejudice to warrant awarding him a new trial.

[2] Defendant next contends that the court erred in not setting aside the guilty verdict on the sale of marijuana when the verdict for possession with intent to sell was not guilty. We do not agree. Our courts have treated sale and possession with intent to sell a controlled substance as two separate offenses. "[P]ossession is not an element of sale and sale is not an element of possession." *State v. Aiken*, 286 N.C. 202, 206, 209 S.E. 2d 763 (1974); *see State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Defendant argues that the State's evidence "conclusively shows that this was not a case where possession was legal (but the sale illegal) . . . and where Defendant made a sale without possession," thus attempting to distinguish *Aiken, supra*, and *Cameron, supra*. It appears, however, that the jury believed there was insufficient evidence on the possession charge. Ms. Best testified only that defendant "sold" her the marijuana. Ms. Perry did not see defendant in possession, nor did she actually witness the sale. Ms. Powers, on probation for shoplifting, denied any participation in the transaction. The State did not "conclusively" prove that the defendant made the sale without possession. The State merely failed to prove possession, the verdicts were not inconsistent and we find no error.

[3] Defendant next contends that "the jury failed to follow the instructions of the court in reaching a verdict," the effect of which was that the trial judge coerced the jury into making a decision. This contention is without merit.

At some point during their deliberations, the judge called the jury in to ask if they had been able to reach a verdict. The foreman stated that they were unanimous on one count, but still divided on the other. The court then instructed the jury to have a short conference about whether an opportunity to deliberate further would be of help to them. In effect, the jury answered the judge's question by returning shortly afterwards to announce that they had reached a verdict on the second count. At no time had the jury indicated that they were deadlocked or unable to reach a verdict. The trial judge, by his question, was attempting to determine the status of the deliberations, apparently in order to decide whether to allow the jury to continue that day or resume

deliberations the next day. He did not, at that time, invoke the provisions of 15A-1235. We find no error, and for this reason reject defendant's final assignment of error by which he contends the jury foreman should have been required to disclose whether the guilty verdict was the second verdict reached.

No error.

Chief Judge MORRIS and Judge BECTON concur.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION v. CREDIT AND LOAN COMPANY, A CORPORATION OF THE STATE OF NORTH CAROLINA; W. S. NICHOLSON, AND SPOUSE, IF ANY, AND IF THEY BE DECEASED, THEN THEIR UNKNOWN HEIRS, AND IF ANY OF SAID UNKNOWN HEIRS BE DECEASED, THEN THEIR RESPECTIVE HEIRS, DEVISEES, ASSIGNEES, AND SPOUSES, IF ANY; AND THE UNKNOWN HEIRS OF MINNIE BRAWLEY, FLORENCE CAMP, MOLLIE ALEXANDER, AND LULA H. LORD, DECEASED, AND IF ANY OF THEIR UNKNOWN HEIRS BE DECEASED, THEN THEIR RESPECTIVE HEIRS, DEVISEES, ASSIGNEES, AND SPOUSES, IF ANY; AND ALL OTHER PERSONS, FIRMS, OR CORPORATIONS WHO NOW HAVE, OR MAY HEREAFTER HAVE, ANY RIGHT, TITLE, CLAIM, OR INTEREST, IN THE REAL ESTATE DESCRIBED HEREIN, WHETHER SANE OR INSANE, ADULT OR MINOR, *IN ESSE*, OR *IN VENTRE SA MERE*, ACTIVE CORPORATIONS OR DISSOLVED CORPORATIONS, FOREIGN OR DOMESTIC.

No. 8122SC645

(Filed 7 September 1982)

1. **Wills § 36.2; Deeds § 15.1— avigation easement—terminated when condition of defeasible fee not fulfilled**

Where plaintiffs claim their title through a Bertha Murdock, and Bertha held "an estate in fee simple . . . defeasible upon [her] death . . . without bodily heirs," she held only a defeasible fee, and her successor in title could convey to plaintiff only a defeasible fee in an avigation easement. When Bertha died "without bodily heirs," plaintiff's avigation easement terminated.

2. **Aviation § 1; Easements § 6— avigation easement by prescription—no genuine issue as to adverse nature of overflights**

Plaintiff failed to show an avigation easement over property in question by prescription where defendants offered affidavits which showed that overflights of airplanes neither "interfere[d] with the . . . existing use" of the property nor endangered persons or property below, and where plaintiff offered no forecast of evidence which indicated that planes overflew defendant's property at such heights "as to interfere with the then existing use" of the land or airspace, or "as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land." G.S. 63-13.

City of Statesville v. Credit and Loan Co.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 9 March 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 2 March 1982.

Plaintiff brought this action to condemn certain land for use in the enlargement of its municipal airport. It appeals from a partial summary judgment decreeing defendant Credit and Loan Company (hereafter defendant) the "sole and exclusive fee simple owner" of the land.

Charles C. Green, Jr., for plaintiff appellant.

McElwee, Hall, McElwee & Cannon, by E. Bedford Cannon, for defendant appellee.

WHICHARD, Judge.

The sole issue is whether plaintiff has a valid avigation easement over land owned by defendant. We affirm the partial summary judgment decreeing defendant's ownership free of encumbrances.

[1] Plaintiff contends it has an avigation easement over the property in question by deed. It claims the easement pursuant to the following chain of title: Bertha Murdock had title in fee simple absolute, which she conveyed to one Smyre. Smyre in turn conveyed to one Nicholson, and Nicholson deeded an avigation easement to plaintiff.

Because the Supreme Court has previously determined that Bertha Murdock's title was not in fee simple absolute, but "an estate in fee simple . . . defeasible upon [her] death . . . without bodily heirs," *Murdock v. Deal,* 208 N.C. 754, 756, 182 S.E. 466, 467 (1935), and because the uncontradicted facts establish that Bertha Murdock died without bodily heirs, this argument must fail. Both plaintiff and defendant claim their interest in the property through Bertha Murdock. They thus are in privity with her. The questions and facts at issue here as to Bertha Murdock's title to the property are identical to those considered and determined in *Murdock v. Deal, supra.* The decision there is thus *res judicata* here on the issue of Bertha Murdock's interest. *See Shaw v. Eaves,* 262 N.C. 656, 661, 138 S.E. 2d 520, 525 (1964); *Masters v. Dunstan,* 256 N.C. 520, 124 S.E. 2d 574 (1962). Because Bertha Murdock held only a defeasible fee, her successor in title,

Nicholson, could convey to plaintiff only a defeasible fee in the avigation easement. When Bertha Murdock died "without bodily heirs," plaintiff's avigation easement thus terminated.

[2] Plaintiff contends in the alternative that it has a valid avigation easement over the property in question by prescription. It makes no claim that an avigation easement has been taken by exercise of the power of eminent domain. *See, e.g., United States v. Causby,* 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946); *Cochran v. City of Charlotte,* 53 N.C. App. 390, 281 S.E. 2d 179 (1981). The constitutional dimensions of a property owner's interest in the airspace above his property thus are not implicated, and the common and statutory law of North Carolina determine the issue.

The common law of North Carolina establishes that (1) use of a way over another's property is presumed permissive until proven adverse; (2) the burden of proving the elements necessary to establish a prescriptive easement is on the party claiming it; (3) to establish a prescriptive easement the use of the other's property must be (a) adverse, hostile, or under a claim of right, (b) open and notorious, and (c) continuous and uninterrupted for twenty years; and (4) there must be substantial identity of the easement claimed. *Dickinson v. Pake,* 284 N.C. 576, 580-81, 201 S.E. 2d 897, 900-01 (1974). The statutory law of North Carolina establishes that

> [f]light in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath.

G.S. 63-13. It is, then, lawful for airplanes to fly over property in this state unless done in the manner proscribed by G.S. 63-13. *Wall v. Trogdon,* 249 N.C. 747, 753, 107 S.E. 2d 757, 761 (1959).

A use, to be adverse, must be over property as to which another possesses the right of lawful control. G.S. 63-13 restricts the right of defendant to control the airspace over its property. Plaintiff thus, to establish adverse use, had the burden of proving that planes overflew defendant's property at such heights "as to

interfere with the then existing use" of the land or airspace, or "as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land." G.S. 63-13.

In support of its motion for summary judgment defendant offered the affidavit of an inhabitant of property adjacent to its property. The affidavit stated: "[F]rom time to time planes leaving the airport do fly over [defendant's] property. The same planes fly over all of the adjoining property at varying heights and the manner in which they fly does not indicate any right of ownership . . . ." Other affidavits offered by defendant established that its property was used for farming purposes prior to the death of Bertha Murdock in 1955, and that management and use of the land for farming and as a source of rental income had continued without interruption from 1955 through 1976. These affidavits showed that overflights of airplanes neither "interfere[d] with the . . . existing use" of the property nor endangered persons or property below.

Upon this showing by defendant, plaintiff could not "rest upon the mere allegations . . . of [its] pleading, but [its] response . . . [had to] set forth specific facts showing that there [was] a genuine issue for trial." G.S. 1A-1, Rule 56(e). Plaintiff, however, offered no forecast of evidence of specific facts in response. There thus was no genuine issue as to the adverse nature of any overflights of defendant's property; and because use adverse to defendant's ownership rights was an essential element of plaintiff's claim to a prescriptive easement, *Dickinson, supra*, partial summary judgment for defendant was properly entered. *See, e.g., Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E. 2d 595, 598 (1980).

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

Judge MARTIN (Harry C.) concurred in this opinion prior to his resignation from this Court on 3 August 1982 to assume the position of Associate Justice of the Supreme Court of North Carolina.

LESLIE G. FRYE v. FRANCES A. SOVINE

No. 8121SC1084

(Filed 7 September 1982)

Contracts § 6; Duress § 1— note and deed of trust—suppressing criminal prosecution—invalid consideration—duress

A note and deed of trust signed by the seventy-year-old respondent were void as against public policy where there was an implied agreement that if respondent signed the documents, there would be no further prosecution on criminal charges against her son for two worthless checks given by the son to the beneficiary of the note and deed of trust. Furthermore, the documents were also void on the ground that they were executed by respondent under coercion and duress where she signed the documents as a result of the beneficiary's harassment of her by repeated visits and telephone calls.

APPEAL by petitioner from *Wood, Judge.* Judgment entered 19 June 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 26 May 1982.

This is an appeal from an order dismissing the Petition for Order of Foreclosure filed by petitioner-trustee. The action arose out of a business transaction between respondent's son, Michael Sovine, and the beneficiary of the note and deed of trust, Robert Barrett. Barrett financed the purchase of used automobiles which Sovine then sold for profit to be divided between the two. After Sovine gave two worthless checks to Barrett, Barrett had two warrants issued against Sovine on 27 January 1979.

On 20 February 1979 Sovine and his mother executed a promissory note in the principal amount of $14,500 payable to Barrett. Mrs. Sovine also executed a deed of trust granting to Barrett a security interest in her home.

On 5 March 1979 the worthless check warrants against Sovine were dismissed by the court.

Sovine defaulted on the note after making two payments. On 9 August 1979, petitioner instituted foreclosure proceedings against Sovine. He appealed and sought a trial *de novo* after the Clerk of Court refused to authorize him to proceed with the foreclosure.

Barrett and Mrs. Sovine testified at the hearing before Judge Wood on 4 June 1981. The court held that the note and deed of

trust were void and unenforceable on the ground that respondent executed them as a result of coercion and duress and under threats of imprisonment of her son and also on the ground that dismissal of the criminal warrants against her son did not constitute valid consideration. Petitioner appeals from the Order dismissing the action and cancelling the deed of trust.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown by Charles O. Peed for petitioner appellant.

Bell, Davis & Pitt by Walter W. Pitt, Jr., for respondent appellee.

MORRIS, Chief Judge.

Petitioner assigns error to the court's findings of fact and conclusions of law concerning respondent's signing the note and deed of trust as a result of duress and threats of her son's imprisonment. In a non-jury trial the court's findings of fact are conclusive upon appeal if there is evidence to support them, even though the evidence might also support findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

The evidence presented by Barrett's testimony and respondent's testimony and affidavit support the court's findings of fact and conclusions of law. The evidence showed that after Barrett caused the warrants to be issued against Sovine, he visited respondent's home numerous times, trying to locate Sovine to obtain the money Sovine owed to him. Barrett asked her if she would take care of her son's debt and put up her house as security. Respondent refused, stating that she was a widow, 70 years old and retired, living on a fixed income. Her son never asked her to sign the note and deed of trust, because he knew she would refuse to do so. She testified that she finally signed the note and deed of trust drawn up by Barrett's attorney, for the following reasons:

> "[Y]es, he [Barrett] did threaten me to a certain extent. He told me if I didn't sign this, that Mike would get 18 months and he would see that he did, and you know, when something happens like that with your child, and all, you do most anything.
>
> * * * *

Well, I had to sign them. I'd had a month of that. A whole month, and when anyone has two checks in your hand and waves them at you every time they come to your house and he was there one day three times . . . . I think most anybody would do anything to get rid of something like that.

In her affidavit, respondent stated:

7. I am seventy years old and a widow. I live alone. I was frightened of Mr. Barrett. I was nervous and scared every time I saw him coming. I never knew what time of the day or night he would show up at my door or call me on the telephone. Every time I saw him, I asked him to leave me alone, but he ignored my pleas. During this period of time, I couldn't sleep; I was worried and frightened. I suffered a great deal of aggravation over Mr. Barrett's visits and telephone calls. I also lost seven pounds during this period.

8. The only reason I signed the papers was because I was afraid of what Mr. Barrett would do to me or Mike. Also, I was emotionally upset and couldn't take his continually harassing and dogging me to death to get me to sign the papers. I signed the papers just so that he would not put Mike in jail and so that he would stop his harassment and importuning. I have never made any payments to Mr. Barrett and signed his papers only because I felt that I was forced to do so in order to save my son from jail and to preserve my own health and peace of mind."

It can be reasonably implied from the circumstances surrounding this transaction that respondent believed that by signing the documents, she would prevent Barrett from pursuing any further criminal prosecution and subsequent imprisonment of her son. It is well-settled law that executory agreements such as the one before us made in consideration of preventing, refraining, or suppressing prosecution for a crime are void as against public policy. *Johnson v. Pittman*, 194 N.C. 298, 139 S.E. 440 (1927); *Corbett v. Clute*, 137 N.C. 546, 50 S.E. 216 (1905); *Garner v. Qualls*, 49 N.C. 223 (4 Jones 1856); 17 Am. Jur. 2d *Contracts* §§ 200-204 (1964). Barrett denied that he had threatened respondent or promised her anything to get her to sign the documents. However, he admitted that he had no further interest in prosecuting on the warrants once the note and deed of trust were signed and that he

had agreed to have the warrants dismissed. We hold under these particular facts that there was an implied agreement that if respondent signed the documents, there would be no further prosecution on the criminal charges against her son. There appears from the record no other consideration for respondent's signing since Barrett had never loaned her anything, she received nothing from him, and she had no connection whatsoever with the business relationship between Barrett and her son.

The evidence is also clear that respondent signed under coercion and duress. Respondent felt that Barrett was harassing her by his repeated visits. Because of the effect which Barrett's actions had upon respondent, we find that she was induced to execute the documents under circumstances which deprived her of the exercise of her own free will, which constitutes duress. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971).

We hold, therefore, that the findings of fact were fully supported by the evidence and that the findings support the conclusions of law. Since execution of the note and deed of trust was procured by coercion and duress and based upon illegal consideration of suppressing criminal prosecution, the instruments are void between the parties and the foreclosure proceeding was properly dismissed.

The court's order dismissing the action and cancelling the deed of trust is

Affirmed.

Judges MARTIN and BECTON concur.

EDITH E. MIDGETT AND HUSBAND, CARL M. MIDGETT v. CRYSTAL DAWN CORPORATION

No. 811SC766

(Filed 7 September 1982)

Rules of Civil Procedure § 37— sanctions for failure to comply with discovery order—proper

In an action instituted to remove cloud on title to land where a trial judge ordered defendant to produce three contracts, and defendant, in response, pro-

duced two of the three documents but deleted extensive portions from the two which it produced, the trial court did not abuse its discretion in finding that defendant had willfully and without justification or excuse failed to comply with the previous judge's order compelling discovery, and the court did not err in imposing appropriate sanctions against the defendant and its counsel pursuant to Rule 37. Nor did the court abuse its discretion by ordering production of documents prepared by defendant's counsel in anticipation of the action without first conducting an *in camera* inspection of the documents since it failed to appeal from the initial order to produce, and since the defendant could not unilaterally determine that the documents were privileged.

APPEAL by defendant from *Preston, Judge.* Order filed 24 March 1981 in Superior Court, DARE County. Heard in the Court of Appeals 30 March 1982.

Defendant appeals from an order decreeing the appropriateness of imposition of sanctions on account of defendant's failure to comply with a discovery order. We affirm.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., and McCown & McCown, by Wallace H. McCown, for plaintiff appellees.

Shearin, Gaw & Archbell, by Norman W. Shearin, Jr., and Roy A. Archbell, Jr., for defendant appellant.

WHICHARD, Judge.

Plaintiffs seek by this action to remove a cloud on the title to land which they allegedly own, and to restrain defendant from trespassing thereon. Defendant denies plaintiff's material allegations; alleges title in the land by adverse possession; and counterclaims, in the event plaintiffs are adjudged the sole owners, for the value of improvements to the land which it allegedly made in good faith under color of title.

Through discovery plaintiffs ascertained the existence of certain contracts between defendant and the corporation through which it claims ownership. Upon defendant's failure to produce these documents in response to plaintiff's request therefor pursuant to G.S. 1A-1, Rule 34, plaintiffs moved, pursuant to G.S. 1A-1, Rule 37, for an order compelling production. Judge Bruce reviewed affidavits and depositions, heard arguments, and ordered defendant to produce a true copy of three requested documents. Defendant, in response, produced two of the three

documents. It deleted therefrom, however, extensive portions which its counsel, by letter of transmittal, opined to be protected from, or improper subjects of, discovery. G.S. 1A-1, Rule 26. It asserted inability to locate the third document.

Plaintiffs thereupon moved for imposition of sanctions pursuant to G.S. 1A-1, Rule 37; and defendant responded that the deleted portions were the work product of its attorney, prepared in anticipation of this litigation, and were thus immune from discovery. Judge Preston found, however, that defendant had wilfully and without justification or excuse failed to comply with Judge Bruce's order, in that the two documents produced were not "true copies" on account of the extensive deletions, and the third document was not produced at all. He decreed that "it is in order for the court to impose appropriate sanctions against the defendant and its counsel pursuant to Rule 37 . . . , but the imposition of such sanctions is withheld pending appeal . . . ." From this order, defendant appeals.

The briefs present a threshold question of appealability. Pursuant to the rationale set forth in *Willis v. Power Co.*, 291 N.C. 19, 229 S.E. 2d 191 (1976), we find the order immediately appealable. *See id.* at 27-30, 229 S.E. 2d at 196-98.

Defendant contends the court abused its discretion by ordering production of documents prepared by its counsel in anticipation of this action without first conducting an *in camera* inspection of the documents. Whether to conduct an *in camera* inspection of documents appears, as a general rule, to rest in the sound discretion of the trial court. *See Kerr v. United States District Court*, 426 U.S. 394, 405-06, 48 L.Ed. 2d 725, 734, 96 S.Ct. 2119, 2125 (1976); *Willis, supra*, 291 N.C. at 36, 229 S.E. 2d at 201 ("the trial judge may require *in camera* inspection and may allow discovery of only parts of some documents"). *Cf. State v. Hardy*, 293 N.C. 105, 127-28, 235 S.E. 2d 828, 842 (1977) (justice requires *in camera* inspection "when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged").

In determining whether failure to conduct such an inspection here constituted an abuse of discretion, the following is pertinent:

Defendant did not appeal from the initial order to produce. Absent a stay by virtue of appeal, defendant could not justifiably

disobey the order. When a party wilfully disobeys an order entered with personal and subject matter jurisdiction, a judgment of contempt (a permissible Rule 37 sanction) is appropriate even if the order was erroneously issued. *Elder v. Barnes*, 219 N.C. 411, 415, 14 S.E. 2d 249, 251 (1941); *Godsey v. Poe*, 36 N.C. App. 682, 685, 245 S.E. 2d 522, 524 (1978). *Cf. Massengill v. Lee*, 228 N.C. 35, 37, 44 S.E. 2d 356, 358 (1947). Such an order is "not void and [is] entitled to respect," *Barnes*, 219 N.C. at 415, 14 S.E. 2d at 251, and the proper remedy for any error therein is "not by open defiance," but by appeal, *Massengill*, 228 N.C. at 37, 44 S.E. 2d at 358. Further, "[i]t is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E. 2d 479, 480, *disc. review denied*, 293 N.C. 589, 239 S.E. 2d 264 (1977). *See also Stanback v. Stanback*, 287 N.C. 448, 459, 215 S.E. 2d 30, 38 (1975).

Having failed to appeal from the initial order to produce, defendant undertook its own determination of what it would produce and what it would withhold as privileged. Unilateral determination by a party that documents are privileged, and on that account may be withheld from discovery in defiance of a court order to produce them, "rests the matter upon the *ipse dixit* of each defendant and not upon the judgment of the court." *Stone v. Martin*, 56 N.C. App. 473, 477, 289 S.E. 2d 898, 901, *disc. review denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982), *quoting from Allred v. Graves*, 261 N.C. 31, 39, 134 S.E. 2d 186, 193 (1964). Determination of whether a privilege applies must be by the court, not the individual claiming the privilege. *Stone*, 56 N.C. App. at 476, 289 S.E. 2d at 901. *See also* 1 *Stansbury's North Carolina Evidence*, § 62, p. 199 (Brandis Rev. 1973) ("Determination of whether a claim of the privilege is proper is for the court, not the attorney, and the court may conduct a preliminary inquiry into its propriety.").

The record here contains no indication that the documents in question were at any time tendered to the trial court for its determination of whether all or parts thereof were privileged. Nor does it present those documents for our review. Under this state of the record we are unable to find an abuse of discretion in the order appealed from.

Defendant also contends the court abused its discretion in decreeing imposition of sanctions to be appropriate for failure to produce the document which it asserts it has been unable to locate. The record contains no evidence regarding defendant's inability to locate this document, but only the bare assertion thereof in its unverified response to the motion for imposition of sanctions. Under this state of the record, we can find no abuse of discretion in the order as it relates to this document. Further, the failure to produce the other documents would, in any event, suffice to sustain the order.

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

Judge MARTIN (Harry C.) concurred in this opinion prior to his resignation from this Court on 3 August 1982 to assume the position of Associate Justice of the Supreme Court of North Carolina.

STATE OF NORTH CAROLINA v. BOBBY DALE JACKSON

No. 8110SC1255

(Filed 7 September 1982)

Larceny § 7— larceny of boat—insufficiency of evidence

The evidence was insufficient to support defendant's conviction of larceny of a boat where the State's evidence showed only that defendant was in the presence of a codefendant who was identified as one of the two men who stole the boat both before and after the boat was taken, and defendant testified that he was with the codefendant all evening but neither one of them took the boat.

APPEAL by defendant from *Preston, Judge.* Judgment entered 15 September 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1982.

The defendant and Roy Williams were tried for the larceny of a boat and accessories belonging to William Larry Thorne on 21 March 1981. Mr. Thorne testified that he operated a store approximately three miles north of Fuquay-Varina on Highway 401.

His mother lived in a mobile home 200 yards from the store on a road that runs off Highway 401. Mr Thorne testified further that on the evening of 21 March 1981 he owned a boat which was on a trailer in his mother's yard. The defendant and Roy Williams were in Mr. Thorne's store early in the evening on 21 March 1981.

On 21 March 1981 Gerald Clay Bush and Jackie Nesmith were sitting in Mr. Bush's automobile near Mr. Thorne's store. It was dark. They saw a red truck turn down the road towards Mr. Thorne's mother's home and come out a few minutes later pulling a trailer with Mr. Thorne's boat on it. Mr. Bush and Mr. Nesmith followed the red truck for approximately nine miles before returning to Mr. Thorne's store to tell him what they had seen. Mr. Bush could not identify the defendant as one of the two men they had seen in the red truck. Mr. Nesmith is deaf and testified with some difficulty. He testified that he was at the store in Mr. Bush's automobile and Mr. Bush drove while they followed the truck towing the boat. Mr. Nesmith was able to get the numbers "146" from the license plate on the truck. As to the identity of the two men in the truck, he testified as follows:

"Q. Okay, now, at any time on that day did you happen to see the two defendants in this case, Mr. Jackson and Mr. Williams?

A. Yes, sir.

Q. All right, sir, what time—when did you first see them, Jackie?

A. I saw them at the store. The truck leave.

Q. What store? You saw them at Larry's store?

A. I saw them when we went out on the highway somewhere and when he was following behind them.

Q. Now, Jackie, the first time you saw them on the 21st of March, the first time where were they? Where were they?

A. (Nods head.)

REPORTER'S NOTE: This witness seems to be hard of hearing and speaks in almost inaudible voice.

Q. Where were they when you first saw them on the 21st of March? Where were you?

A. We were following behind them and parked down the road somewhere and when I got the license plate, I didn't get all of it. The license plate number was 146.

JUROR: We can't hear.

JUROR: Your Honor, we can't hear.

* * *

Q. What did you do after you got the numbers off of the tag? Don't understand me? Did you know that Larry owned a boat?

A. No.

Q. You didn't. How many people in the truck?

A. Two. (Holds up two fingers.)

Q. Did you see a face in the truck?

A. Yes.

Q. Is the person you saw in the truck—

A. (Nods head.)

Q. In the courtroom today?

A. Yes.

Q. Can you point him out to us?

A. (Nods head.) One of those two men right there. (Pointing.)

Q. You saw one of those men—

A. (Nods.)

Q. —in the truck?

A. (Nods head.)

Q. Which one did you see?

A. The one got glasses on.

Q. The man with the glasses on?

A. Yes.

COURT: Let the record show that the witness referred to Roy Williams, the defendant."

On cross-examination, Mr. Nesmith answered a question as to when he saw the two people in the truck as follows:

"We follow them, behind them and slow down and I saw the face of the old man. He got a mustache and the boy was sitting over there. Look like a mustache."

After Mr. Bush and Mr. Nesmith returned to the store, the two of them and Mr. Thorne began to search for the boat. They found Roy Williams and the defendant in a trailer park standing by the red truck which had pulled the boat. The boat was never found.

The defendant testified he was with Roy Williams on the night of 21 March 1981 and they did not take the boat. The defendant was found guilty of felonious larceny and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Dement, Askew and Gaskins, by Johnny S. Gaskins, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the denial of his motion to dismiss at the close of all the evidence. We believe this assignment of error is well taken. The evidence against the defendant is that he was in the presence of Mr. Williams, who was identified as one of two men who stole Mr. Thorne's boat, before and after the boat was taken. The defendant testified he was with Mr. Williams all evening but they did not take the boat. We do not believe this is substantial evidence that the defendant took the boat. The defendant's testimony that he was with Mr. Williams all evening and neither one of them took the boat is evidence that Mr. Williams did not take the boat and not evidence that the defendant took it.

We do not believe the testimony of Mr. Nesmith is helpful to the State. He did state that he saw both defendants in the truck at the time the boat was being pulled away from Mr. Thorne's

mother's home. We believe this testimony is too equivocal to have probative force. The witness did not testify he was able to recognize the defendant when he observed two men in the truck. When asked if he saw the face of either man in the truck, he said he saw Mr. Williams' face. He did not say he saw the defendant's face. We think a fair reading of this testimony is that the witness testified he recognized Mr. Williams in the truck and testified the defendant was in the truck because he assumed he was one of the two guilty parties.

We hold there was not substantial evidence of the defendant's guilt and the motion to dismiss should have been allowed. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

Reversed and remanded.

Judges WELLS and WHICHARD concur.

DEBORAH MELISSA CHEEK CASSIDY v. ANNIE CAVINESS CHEEK AND CURTIS ASTOR MOORE

No. 8119SC946

(Filed 7 September 1982)

1. **Infants § 3; Parent and Child § 2.1— parent-child immunity doctrine—child injured prior to 1 October 1975**

Where plaintiff was injured while a passenger in a car driven by her mother on 22 September 1975, and there was no genuine issue regarding the material fact that plaintiff was an unemancipated minor at the time of her injury, the law is clear that at the time of the accident the suit was barred by the parent-child immunity doctrine since G.S. 1-539.21 (Cum. Supp. 1981), which abolished parent-child immunity in actions for personal injury arising out of the operation of a motor vehicle, applies to causes of action accruing on or after 1 October 1975.

2. **Rules of Civil Procedure §§ 37, 41— action dismissed for failure to comply with discovery order—subsequent voluntary dismissal ineffective**

Where on 18 July 1979, a judge ordered plaintiff to answer interrogatories and to produce documents within 30 days, and where on 14 December 1979 the plaintiff had failed to produce the documents as ordered and a court ordered that "if the plaintiff fails to produce . . . those documents . . . before January 7, 1980, then plaintiff's action shall be and the same will be

dismissed with prejudice . . ."; the documents were not filed before 7 January 1980 as requested; on 9 January 1980 plaintiff filed a notice of voluntary dismissal; and on 6 January 1981 she commenced a new action against defendant based on the same claim, the trial judge did not err in granting defendant's motion for summary judgment since when plaintiff filed her voluntary dismissal on 9 January 1980, her action had been dismissed; and the voluntary dismissal came too late.

APPEAL by plaintiff from *Wood, Judge.* Judgments entered 8 April 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 28 April 1982.

Plaintiff sued defendants, drivers of two cars involved in a collision in which she was injured. The trial court granted summary judgment in favor of both defendants and dismissed the actions against them with prejudice.

Plaintiff appeals.

Ottway Burton, P.A., for plaintiff appellant.

Gavin and Pugh, by W. Ed Gavin, for defendant appellee Cheek.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Richard L. Vanore, for defendant appellee Moore.

WHICHARD, Judge.

DEFENDANT CHEEK

[1] Plaintiff was injured while a passenger in a car driven by her mother, defendant Cheek. The accident occurred on 22 September 1975. G.S. 1-539.21 (Cum. Supp. 1981), which abolished parent-child immunity in actions for personal injury arising out of the operation of a motor vehicle, applies to causes of action accruing on and after 1 October 1975. An unemancipated minor child injured prior to 1 October 1975 by the ordinary negligence of its parent has no right of action against the parent. *E.g., Foster v. Foster*, 264 N.C. 694, 697, 142 S.E. 2d 638, 640 (1965); *Morgan v. Johnson*, 24 N.C. App. 307, 308, 210 S.E. 2d 503, 504 (1974).

In her motion for summary judgment defendant Cheek alleged that on 22 September 1975 "plaintiff was an unemancipated, 17 year old child living in the home of this defendant and subject

to this defendant's care and supervision." The record reveals no forecast of contrary evidence by plaintiff.

Summary judgment is properly granted where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). There is no genuine issue regarding the material fact that plaintiff was an unemancipated minor at the time of her injury, and the law is clear that at that time the suit was barred by the parent-child immunity doctrine. Summary judgment in favor of defendant Cheek was therefore proper.

DEFENDANT MOORE

[2] Plaintiff originally sued defendant Moore on this claim in September 1978. On 23 March 1979 defendant Moore filed interrogatories and a request for production of certain documents. On 18 July 1979, upon motion by defendant Moore, Judge Brewer ordered plaintiff to answer the interrogatories and to produce the documents within thirty days. On 14 December 1979 Judge Davis found that plaintiff had failed to produce the requested documents as ordered. He ordered that "if the plaintiff fails to produce . . . those documents . . . before January 7, 1980, then plaintiff's action shall be and the same will be dismissed with prejudice . . . ." The documents were not filed "before January 7, 1980" as required by the order.

On 9 January 1980 plaintiff filed a notice of voluntary dismissal in the action. On 6 January 1981 she commenced a new action against defendant Moore based on the same claim. Judge Wood granted defendant Moore's motion for summary judgment and dismissed the action with prejudice.

Plaintiff contends that her voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1), was filed prior to entry of any judgment of involuntary dismissal with prejudice pursuant to the 14 December 1979 order, and thus was timely. She argues that Judge Wood therefore erred in dismissing with prejudice her new action based on the same claim commenced within one year after the dismissal. G.S. 1A-1, Rule 41(a)(1). We disagree, and accordingly affirm.

Judge Davis' 14 December 1979 order that if plaintiff failed to produce the requested documents as ordered the action "shall

be and the same will be dismissed with prejudice" was authorized by G.S. 1A-1, Rule 37, which establishes "dismissing the action . . . or any part thereof" as a permissible sanction if a party fails to obey an order to provide or permit discovery. Further, "as a general rule the court, in its discretion, may make a dismissal . . . conditional on plaintiff's noncompliance with the terms imposed by its order." 27 C.J.S., Dismissal & Nonsuit, § 74, pp. 475-76. Judge Davis, then, had discretionary authority to enter the order; and in view of plaintiff's dilatoriness and recalcitrance with regard to discovery requests and orders, entry thereof was not an abuse of discretion.

Subject only to the possibility of compliance by plaintiff "before January 7, 1980," Judge Davis' order effectuated a Rule 37 dismissal of the action. That plaintiff failed to comply with the order is clear. Thus, when plaintiff filed her voluntary dismissal on 9 January 1980, her action had been dismissed; and the voluntary dismissal came too late.

In view of Judge Davis' 14 December 1979 order requiring dismissal of the action upon plaintiff's noncompliance with the discovery order, and of plaintiff's noncompliance therewith, any action by Judge Wood other than dismissal with prejudice would have violated the "well settled [rule] that the findings and decisions of one superior court judge are not subject to review by another superior court judge." *Topping v. Board of Education*, 249 N.C. 291, 297, 106 S.E. 2d 502, 507 (1959). In view of plaintiff's conspicuous dilatoriness and recalcitrance in the discovery process, any other action would also have undermined effective implementation of Rule 37 sanctions in a situation which manifestly implored their imposition.

We hold the judgments properly entered, and they are accordingly

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. PAUL WILLOUGHBY, JR.

No. 8111SC931

(Filed 7 September 1982)

1. **Homicide § 27.2— failure to aid one in trouble—insufficient to justify charge of involuntary manslaughter**

The trial court did not err in failing to submit a charge of involuntary manslaughter in addition to a charge of second degree murder where the defendant's own evidence showed he invited the deceased into the water and refused to help him when the defendant saw he was drowning since the common law does not extend criminal responsibility to a person who does not go to the aid of one he sees is in trouble.

2. **Homicide § 28.8— failure to charge on defense of accident—proper**

In an action in which defendant was tried for the second degree murder of a man whom defendant was charged with drowning, the trial court did not err in failing to charge the jury on the defense of accident since if the victim died as a result of an accidental drowning, it was an accident with which the defendant had nothing to do.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 24 October 1980 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 February 1982.

The defendant was tried for the second degree murder of Joseph McCray Denning. The State's evidence showed that the defendant, Mr. Denning, Jimmy Seth Perry, and Chris Stanley were riding in the defendant's automobile on 12 June 1980. All of them were drinking whiskey. The defendant told Chris Stanley that he would kill Mr. Denning because Denning had shot one of his friends. They drove to a place called Taylor's Bridge on the Little River in Johnston County. The defendant went into the water and asked Mr. Denning to do so also. Mr. Stanley and Mr. Perry went to the automobile for each of them to have a drink of whiskey and when they returned to Taylor's Bridge, Mr. Denning was floating face up in the water and making a "grunting" sound at which time the defendant said, "Is the son of a bitch dead?" Mr. Stanley said, "Hey, he's still breathing, you better go back out there and hit him again." The defendant then said, "You all walk on down back to the car, I don't want you all to see this." Mr. Perry and Mr. Stanley left the scene and returned approximately ten minutes later. Mr. Denning was floating face down. The defendant was coming out of the water at which time he said

to Mr. Perry and Mr. Stanley, "Is the son of a bitch dead? I told him I was going to kill him before the day was over." An autopsy showed Mr. Denning died by drowning.

The defendant testified that he went to Taylor's Bridge with the other three men. He said that he and Mr. Denning were swimming when he heard someone say, "Hey, what's the matter with McCray?" He saw Mr. Denning floating face down and said, "I don't know. Is he dead?" The defendant testified further that he became frightened and left. He denied touching Denning or saying he would kill him. Two witnesses testified for the defendant that they saw Mr. Denning earlier on that day in a drunken condition "falling all over the place." They observed bruises on his face.

Defendant was found guilty of second degree murder. He appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders Malcolm R. Hunter, Jr. and Lorinzo Joyner, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to be court's failure to submit a charge of involuntary manslaughter to the jury in addition to the charge of second degree murder. The defendant contends that his own evidence shows he invited the deceased into the water and refused to help him when the defendant saw he was drowning. The defendant argues that under this evidence, he had a duty to help Mr. Denning and his failure to do so was culpable negligence which proximately caused Mr. Denning's death. This case presents the question of the criminal responsibility of a person who does not go to the aid of one he sees is in trouble. The parties in their briefs have cited no cases from this jurisdiction and we have found none dealing with the question posed in this case. It seems clear that under the common law the defendant would not be guilty of manslaughter for this omission to act. *See* Frankel, *Criminal Omissions: A Legal Microcosm*, 11 Wayne L. Rev. 367 (1965); Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615 (1942); and Hughes, *Criminal*

Omissions, 67 Yale L.J. 590 (1958). We do not believe we should extend the common law to cover manslaughter by omission in this case. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends it was error for the court not to charge the jury on the defense of accident. We do not believe the court should have charged on accident. If Mr. Denning died as the result of an accidental drowning, it was an accident with which the defendant had nothing to do. The jury accepted the version of the incident in accordance with the State's evidence. This evidence showed the defendant committed murder. If the jury had accepted the defendant's version of the event, the jury should have found the defendant not guilty under the charge given to them by the court. It was not necessary for the court to charge on accident.

No error.

Judges MARTIN (Robert M.) and WELLS concur.

ALAMANCE COUNTY, H. LARRY SCOTT AND RUBY WRIGHT v. N.C. DEPARTMENT OF HUMAN RESOURCES, HARVEY J. HYATT, REX PARAMORE, HELEN B. FLOYD, DORIS DEES, MOZELLE STOUT, JAMES C. SPENCER, JAMES F. RICHARDSON, HELEN R. MARVIN, CEDRIC S. RODNEY, BETSY H. JOHNSON, MARGUERITE WHITFIELD, SOCIAL SERVICES COMMISSION, SARAH T. MORROW

No. 8115SC1050

(Filed 7 September 1982)

Administrative Law § 3; Social Security and Public Welfare § 1— public assistance funds—equalizing formula—discretion of Social Services Commission—failure to state claim for relief

Plaintiffs failed to state a claim for relief in an action involving an "equalizing formula" adopted by the Social Services Commission pursuant to G.S. 108A-92 for distribution of reserved public assistance funds to counties according to their needs where their complaint contained no allegations sufficient to establish the "fraud, manifest abuse of discretion or conduct in excess of lawful authority" which is requisite to intervention by the courts in the Commission's exercise of its statutorily authorized discretion.

Alamance County v. Dept. of Human Resources

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 21 May 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 7 May 1982.

Defendants, pursuant to statutory authority, adopted an "equalizing formula" for distribution of reserved public assistance funds to counties according to their needs. Plaintiffs by this action challenged, on several grounds, the formula which defendants adopted.

From a judgment denying a preliminary injunction and dismissing the action for failure to state a claim upon which relief can be granted, plaintiffs appeal.

Dow M. Spaulding for plaintiff appellants.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for defendant appellees.

WHICHARD, Judge.

G.S. 108A-92 (Cum. Supp. 1981) (formerly G.S. 108-58) provides, with respect to the funds in question: "The amount reserved shall be distributed among the counties according to their needs under a formula approved by the Social Services Commission so as to produce a fair and just distribution." Plaintiffs seek (1) an order enjoining distribution of funds under the formula adopted pursuant to the foregoing statute, (2) court supervision of the development of a new formula, (3) award to them of funds to which they claim entitlement, and (4) an order requiring defendant Department of Human Resources to consult with representatives of the counties in establishing a new formula.

The foregoing statute vests in the Social Services Commission discretionary authority to approve an equalization formula designed to distribute the funds among the counties according to their needs in a fair and just manner. "When discretionary authority is vested in [a] commission, the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene." *Pharr v. Garibaldi,* 252 N.C. 803, 811-12, 115 S.E. 2d 18, 24-25 (1960). *Accord, Utilities Commission v. Ray,* 236 N.C. 692, 696, 73 S.E. 2d 870, 874 (1953); *Jones v. Hospital,* 1 N.C. App. 33, 34-35,

159 S.E. 2d 252, 253 (1968). Absent, then, a showing of fraud, manifest abuse of discretion, or conduct in excess of lawful authority, plaintiffs seek relief beyond the power of the court to grant.

A mere assertion of a grievance is insufficient to state a claim upon which relief can be granted. Some degree of factual particularity is required. The statement of a claim for relief must "satisfy the requirements of the substantive law which give rise to the pleadings." *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E. 2d 161, 167 (1970). *See also Morrow v. Kings Department Stores*, 57 N.C. App. 13, 17, 290 S.E. 2d 732, 735, *disc. review denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982). A complaint, to state a claim for relief, must refer to "the transactions, occurrences, or series of transactions or occurrences, intended to be proved." G.S. 1A-1, Rule 8(a)(1). *See Manning v. Manning*, 20 N.C. App. 149, 154-55, 201 S.E. 2d 46, 50 (1973).

Plaintiffs' complaint here contains no allegations sufficient to establish the "fraud, manifest abuse of discretion or conduct in excess of lawful authority" which is requisite to intervention by the courts in the Commission's exercise of its statutorily authorized discretion. *Pharr, supra.* It states merely conclusory allegations of grievances and offers no indication of the existence of facts which, if proven, would permit a finding of fraud, manifest abuse of discretion, or unlawful conduct. It thus "appears to a certainty that plaintiff[s] [are] entitled to no relief under any state of facts which could be proved in support of the claim," *Sutton, supra*, 277 N.C. at 103, 176 S.E. 2d at 166 (emphasis omitted); and dismissal for failure to state a claim upon which relief can be granted was therefore proper.

Affirmed.

Judges WEBB and WELLS concur.

SUNBOW INDUSTRIES, INC., FORMERLY KNOWN AS EASTERN TRANSIT-STORAGE COMPANY, INC. v. ALVIN A. LONDON

No. 8126SC1051

(Filed 7 September 1982)

Attorneys at Law § 5.1; Limitation of Actions § 4.1— negligence of attorney—failure to perfect security interest—statute of limitations had not run

In an action based upon the alleged negligence of an attorney in performing his duty where defendant failed to file a financing statement or otherwise perfect a security interest between plaintiff and another corporation, where the other corporation went bankrupt approximately two years after the plaintiff had entered into a security agreement with it, and where the bankruptcy court held that plaintiff had not perfected its security interest and was subordinated as a creditor, the trial court erred in dismissing plaintiff's action against the attorney for the reason that the statute of limitations had expired since plaintiff commenced its action within three years of the time that the bankruptcy judge ruled that the security interest had not been perfected. G.S. 1-15(c).

APPEAL by plaintiff from *Freeman, Judge*. Order entered 29 April 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1982.

This is an action based on the alleged negligence of the defendant in performing his duties as an attorney at law. The plaintiff alleged that it retained the defendant to represent it in the sale of certain assets to DBE, Inc.; that the sale was concluded on 27 May 1976, at which time the plaintiff entered into a security agreement with DBE, Inc. under the terms of which the plaintiff took a security interest in the assets which had been sold; and that the defendant did not file a financing statement or otherwise perfect the security interest. The plaintiff alleged further that on 24 February 1978 DBE, Inc. filed a voluntary petition in bankruptcy and on 25 September 1978 the bankruptcy court held the plaintiff had not perfected its security interest and was subordinated as a creditor. The plaintiff alleged that it was damaged by the defendant's negligent failure to perfect the security interest. The plaintiff's action was filed on 31 December 1979.

In his answer filed 11 August 1980 the defendant made a motion to dismiss the action under G.S. 1A-1, Rule 12 on the ground that the plaintiff had failed to state a claim upon which relief may

be granted. The defendant filed a motion on 25 March 1981 asking that the action be dismissed on the ground that it was not filed within the "applicable statute of limitations." On 29 April 1981 the court dismissed the action, stating as its reason that the statute of limitations had "expired prior to the filing of this action." The plaintiff appealed.

DeLaney, Millette, DeArmon and McKnight, by Ernest S. DeLaney, III and Timothy G. Sellers, for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by Rodney A. Dean and Ned A. Stiles, for defendant appellee.

WEBB, Judge.

The defendant's motion to dismiss the complaint was properly allowed under G.S. 1A-1, Rule 12(b)(6) if the complaint has pled a fact that will necessarily defeat its claim. *See Powell v. County of Haywood*, 15 N.C. App. 109, 189 S.E. 2d 785 (1972). The defendant argues that the complaint shows on its face that the cause of action accrued more than three years prior to the filing of the complaint and is thus barred by G.S. 1-52(5). He contends that the complaint alleges that the last act of negligence occurred on 27 May 1976 which was the date the sale of the plaintiff's property occurred and on which date the defendant failed to perfect the security interest. The action was commenced on 31 December 1979 which was more than three years after 27 May 1976. G.S. 1-15 provides in pertinent part:

> "(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must

be commenced within one year from the date discovery is made . . . ."

The plaintiff may not proceed under the proviso of G.S. 1-15(c). He alleges that on 25 September 1978 the bankruptcy judge ruled that the security interest had not been perfected. He knew no later than that date of the alleged negligence and did not file this action until more than one year later.

The resolution of this appeal depends on whether the defendant had a continuing duty to file the financing statement after 27 May 1976. We hold that he did have such a duty. We believe that an attorney who represents a party as alleged in this action has a duty to file the financing statement after the transaction is closed, which duty continues so long as the filing of the financing statement would protect some interest of his client. If the financing statement in this case had been filed a sufficient period of time prior to the date of filing of the petition in bankruptcy, the plaintiff would not have lost his lien. It is on that date that the three-year statute of limitations began to run. The complaint does not allege a fact that will necessarily bar the plaintiff's claim and it was error to dismiss the action.

Reversed and remanded.

Judges WELLS and WHICHARD concur.

EDWARD O. JONES, PLAINTIFF v. E. L. COLLINS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ARCHIE THOMAS WEBB, JR., THIRD-PARTY DEFENDANT

No. 8113SC926

(Filed 7 September 1982)

Automobiles and Other Vehicles § 95.2; Torts § 4.3— driver as agent of plaintiff— dismissal of third-party claim against driver—submission of issue as to negligence of driver

In an action in which the parties stipulated that the third-party defendant driver was acting as the agent of plaintiff at the time of the collision in question, the trial court did not err in submitting an issue as to the negligence of the third-party defendant after the court had dismissed the original defendant's third-party claim against him, since the dismissal of the third-party

claim did not determine the question of the third-party defendant's contributory negligence which would be imputed to plaintiff. G.S. 1A-1, Rule 14(a).

APPEAL by plaintiff from *Trest, Judge.* Judgment entered 29 May 1981 in District Court, BRUNSWICK County. Heard in the Court of Appeals 9 April 1982.

This is an action for personal injury received in an automobile collision. The plaintiff alleged he was a passenger in his own automobile, which was being driven by Archie Thomas Webb, Jr., on 25 May 1980 in a westerly direction on Highway 29 in Mecklenburg County where the vehicle was struck in the rear by a 1973 Lincoln Continental driven negligently by the defendant, E. L. Collins. In his answer, the defendant Collins denied he was negligent and pled the negligence of Archie Thomas Webb, Jr. as the sole cause of the plaintiff's injuries. The original defendant made Archie Thomas Webb, Jr. a third-party defendant and pled Webb's negligence as the sole cause of the accident. He pled in the alternative that if the jury should find that he was negligent then Webb's negligence contributed to the plaintiff's injuries and he asked for contribution from Webb.

The plaintiff and Archie Thomas Webb, Jr. testified for the plaintiff. Each of them testified that Webb was driving the plaintiff's automobile in a westerly direction on Highway 29 in the left-hand lane of a three-lane road. Webb was driving at approximately 15 miles per hour looking for an opening in the median in order to turn through and proceed in an easterly direction. Each of them testified that while Webb was so driving the plaintiff's automobile, it was struck in the rear by an automobile driven by the original defendant. Webb testified that he had given a left turn signal before the collision.

E. L. Collins and Mary Edwards, who was a passenger in Mr. Collins' automobile at the time of the accident, testified that Mr. Collins was driving Mr. Collins' automobile in a westerly direction on Highway 29. Each of them testified that Mr. Collins was in the left lane of a three-lane highway when the vehicle being driven by Mr. Webb moved from the right lane to a position directly in front of Mr. Collins' automobile without giving a signal. They testified further that the automobile being driven by Mr. Webb

stopped just after it pulled in front of Mr. Collins' vehicle so that Mr. Collins could not avoid the collision.

The parties stipulated that Webb was acting as the agent of the plaintiff at the time of the collision.

At the end of all the evidence, the court granted a motion by the third-party defendant that the third-party claim against him be dismissed.

The court submitted to the jury an issue as to whether the plaintiff was injured and damaged by the negligence of E. L. Collins and an issue as to whether the plaintiff was injured and damaged by the negligence of Webb. The jury answered both issues yes. The court allowed a motion by the original defendant to amend his answer to plead contributory negligence by Webb and entered judgment for the defendant. The plaintiff appealed.

Walton, Fairley and Jess, by Ray H. Walton, for plaintiff appellant.

Stuart V. Carter for defendant appellee.

WEBB, Judge.

The plaintiff assigns error to the submission of the negligence issue as to Archie Thomas Webb, Jr. after the court had dismissed the third-party action against him. The plaintiff argues that the third-party claim, under which the original defendant alleged the negligence of Webb was the cause of the accident, was dismissed. This established Webb was not negligent and it was error to let the jury find he was negligent.

We do not believe the dismissal of the third-party claim against Webb was a judicial determination that Webb was not negligent. G.S. 1A-1, Rule 14 provides in part:

> "(a) *When defendant may bring in third party.*—At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

Under this rule, an original defendant may bring in a third-party defendant for contribution to the original defendant for a part of his liability to the plaintiff. If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant. In this case the parties stipulated that Archie Thomas Webb, Jr. was acting as the agent of the plaintiff at the time of the collision. If he were the plaintiff's agent, the plaintiff would be barred from recovery by Mr. Webb's negligence under the doctrine of respondeat superior. *See Morrow v. Railroad*, 213 N.C. 127, 195 S.E. 383 (1938). The court was correct in dismissing the third-party claim because if Webb were negligent, the plaintiff could not recover of the original defendant and if the original defendant were not liable to plaintiff, the original defendant could not recover of the third-party defendant. The dismissal of the third-party claim did not determine the question of Webb's negligence. That was done when the jury answered the issue of Webb's negligence which was submitted to them.

No error.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. LARRY DEAN STRANGE

No. 829SC3

(Filed 7 September 1982)

Larceny § 4.2— indictment—ownership of stolen property

An indictment charging the larceny of a barbecue cooker "the personal property of Granville County Law Enforcement Association" is fatally defective in failing to allege the ownership of the cooker in a legal entity capable of owning property.

APPEAL by defendant from *Hobgood, Judge.* Judgments entered 28 August 1981 in Superior Court, GRANVILLE County. Heard in the Court of Appeals on 31 August 1982.

Defendant was charged in separate bills of indictment with the larceny of a barbecue cooker "the personal property of Gran-

ville County Law Enforcement Association having a value of excess of $400.00 dollars," (Case No. 81CRS2483), a felony, and with breaking or entering a building "occupied by Kenneth Riley used as [a] garage located at Main St., Stem, N. C.," (Case No. 81CRS2536), and with felonious larceny after breaking or entering of an air compressor "the personal property of Kenneth Riley having a value of $150.00 dollars," (Case No. 81CRS2536).

The defendant was found guilty of misdemeanor larceny of the barbecue cooker and with felonious breaking or entering and felonious larceny of the air compressor.

In Case No. 81CRS2483, misdemeanor larceny, the defendant was ordered imprisoned for two years, and in Case No. 81CRS2536, breaking or entering and felonious larceny, the defendant was ordered imprisoned for five years, the sentences to run concurrently. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Dimmock, Reagan & Dodd, by Mike Dodd, for the defendant appellant.

HEDRICK, Judge.

Defendant has failed to note any exceptions in either the record or the transcript. In his brief defendant does not refer to either assignments of error or exceptions. Thus, defendant presents no question for review. Nevertheless, we have carefully reviewed the contentions made by the defendant in his brief and we have also carefully reviewed the record in light of defendant's arguments and find that the defendant had a fair trial free from prejudicial error in the case wherein he was charged with felonious breaking or entering and felonious larceny of an air compressor, Case No. 81CRS2536.

This Court, however, *ex mero motu*, arrests judgment in the case where the defendant was charged and found guilty of the larceny of a barbeque cooker "the personal property of Granville County Law Enforcement Association, . . ." a misdemeanor, because this bill of indictment is fatally defective since it fails to charge the defendant with the larceny of the cooker from a legal entity capable of owning property. *See State v. Roberts*, 14 N.C.

App. 648, 188 S.E. 2d 610 (1972); *State v. Thornton*, 251 N.C. 658, 111 S.E. 2d 901 (1960); and *State v. Biller*, 252 N.C. 783, 114 S.E. 2d 659 (1960).

The result is: in Case No. 81CRS2483, larceny of the barbeque cooker, judgment must be arrested. In Case No. 81CRS2536, breaking or entering and larceny of the air compressor, no error.

Judgment arrested in part; no error in part.

Judges ARNOLD and WELLS concur.

MICHAEL H. MEISELMAN v. IRA S. MEISELMAN, LAWRENCE A. POSTON, PAUL EDWARD LLOYD, EASTERN FEDERAL CORPORATION, RADIO CITY BUILDING, INC., CENTER THEATRE BUILDING, INC., COLONY SHOPPING CENTER, INC., GENERAL SHOPPING CENTERS, INC., M & S SHOPPING CENTERS OF FLORIDA, INC., MARTHA WASHINGTON HOMES, INC., AND TRY-WILK REALTY COMPANY, INC.

No. 8126SC692

(Filed 21 September 1982)

1. **Corporations § 13— closely held corporation—insufficient evidence to support court's findings concerning corporate policy—alternatives to dissolution should have been considered—summary judgment improper**

In an action by a minority stockholder against the different corporations and the majority stockholder, his brother, the trial court erred in entering summary judgment for defendant since the evidence did not support the trial court's findings that (1) there was an absence of evidence that "corporate financial policy . . . resulted in any inequities to" plaintiff; (2) that there was "a lack of evidence to support the finding of fact that personal differences between the majority and minority stockholders have in any way influenced corporate policy;" or (3) that "there (was) no evidence to support the finding of fact that there was . . . the taking of unfair advantage of the minority stockholder." Considering the range of options available to our courts under G.S. 55-125.1, the trial court misapplied the applicable law *and* abused its discretion by concluding that relief, other than dissolution, under G.S. 55-125.1 was not reasonably necessary for plaintiff's protection. G.S. 55-125(a)(4).

2. **Corporations § 12— inability of majority stockholder in one corporation to divert profits from that corporation into another corporation solely owned by the majority stockholder**

In an action by a minority stockholder against a majority stockholder, the trial court erred in finding as a matter of law "no actionable breach of

fiduciary responsibility," where the majority stockholder, in the corporation in which plaintiff also shared stock, was permitted to retain profits diverted into the majority stockholder's solely owned corporation. G.S. 55-35.

Judge HILL dissenting.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 29 January 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 March 1982.

Plaintiff, Michael Meiselman, and defendant, Ira Meiselman, are brothers who received stock in the defendant corporations by gift and bequest from their parents. Defendant corporations own and manage movie theaters and other real estate in North Carolina, Georgia and Florida. Ira owns or controls approximately sixty to seventy percent of the business; Michael owns approximately thirty to forty percent of the business.

Michael, as the minority shareholder, brought suit, asserting for purposes of this appeal, two claims. First, Michael argues that an involuntary dissolution or, alternatively, a buy-out of Michael's share of the business is necessary because of an irreconcilable conflict between him and his brother. Second, Michael seeks, derivatively, on behalf of the family corporations, to recover profits diverted into a corporation owned solely by Ira.

The trial court, sitting without a jury, entered judgment dismissing both claims, and the plaintiff appealed.

Fleming, Robinson, Bradshaw & Hinson, P.A., by Russell M. Robinson, II, for plaintiff appellant.

Blakeney, Alexander & Machen, by J. W. Alexander, Jr., for individual defendant appellees.

Farris, Mallard & Underwood, P.A., by Ray S. Farris, for corporate defendant appellees.

BECTON, Judge.

With remarkable clarity, and in exceptionally well-researched and well-written briefs, the parties have painstakingly set forth their contentions.[1] Indeed, we have partially adopted, as a model,

1. Although the briefs are a model of clarity, they win no laurels for brevity. Plaintiff's 62-page brief contains 62 footnotes, cites reported cases from Canada,

the outlines used by the parties in structuring their arguments. Having reviewed the record and the applicable law, we reverse the trial court's holdings that Michael is not entitled to relief under G.S. 55-125.1 and that there was no actionable breach of fiduciary duty by Ira.

I

The Development and Distribution of the H. B. Meiselman Enterprise.

Michael and Ira are the only surviving children of H. B. Meiselman, who emigrated to this country in 1913. By 1951, Mr. Meiselman had accumulated substantial wealth in movie theaters and real estate, and, in that year, he formed several interrelated corporations into which he transferred most of his property. In 1951, Mr. Meiselman also initiated a series of *inter vivos* gifts of corporate stock to Michael and Ira, a course of action which eventually led to ownership by his sons of virtually all of his holdings. For the most part, Michael and Ira were treated equally in the gifts and bequests from their parents.[2] In September 1968, however, defendant Eastern Federal Corporation (Eastern) was formed by Mr. Meiselman and several existing corporations were merged into it, making Eastern, in effect, the parent corporation. Mr. Meiselman vested control of Eastern in Ira in 1968, and Ira has been the controlling shareholder since that time.

On 13 March 1971, Mr. Meiselman made his final *inter vivos* gift of stock to his sons when he transferred 83,072 shares of stock in Eastern to Ira, and 1,966 shares of stock in that company to Michael. As stated by Michael in his brief, the result of these transactions is a complicated pattern of ownership with the defendant corporations owning stock in each other. The percentage of ownership, including intercorporate ownership, is as follows:

England, Scotland and South Africa, unreported cases from North Carolina and California, and refers to Business Week, Time Magazine, The New York Times, and the Holy Bible. Seeking not to be outdone, defendants' 37-page brief contains 43 footnotes and cites cases from foreign jurisdictions.

2. The brothers also received stock by inheritance from their mother, who died in 1966.

Ira and family	—	39.07%
Michael	—	29.82%
Defendant corporations	—	31.11%[3]

Under Mr. Meiselman's leadership the corporations never paid dividends. They were operated, insofar as possible, on a cash basis with a minimum of borrowed funds. Mr. Meiselman followed a policy of "plowing back" earnings for expansion of his enterprise. By 1968, when Ira took control of operations, the *book value* of all the defendant corporations was $3,412,403. After ten years under Ira's management, this value has increased to $11,168,778.[4]

The *tax value* of Eastern's fixed assets is approximately 135% of the *book value*. Michael argues that if the total *book value* of all corporations (not just Eastern) were increased by 135%, the assessed tax value of the enterprise as of 31 December 1978 would have been over fifteen million and that the *fair market value* of the enterprise would have been even greater.

II

(1) Relief under G.S. 55-125.1 as an alternative to involuntary dissolution under G.S. 55-125(a)(4).[5]

Reduced to its basics, Michael's claim is that he inherited millions which he cannot get or control. Specifically, Michael argues that an order requiring the defendants to "buy him out at the appraised fair value of his interest" is necessary for his protection because (i) an irreconcilable conflict, causing intense

3. Michael contends that Ira does not own all the stock that the corporations own themselves and that his percentage of ownership in the business can be properly calculated "only by eliminating the intercorporate ownership in accordance with generally accepted accounting principles, and that such calculations would show that he owns approximately 43% of the business."

4. Michael's share of that book value would be $3,330,303 using the 29.82% figure, and approximately $4,800,000 using the 43% figure.

5. Although praying for an involuntary dissolution, or, alternatively, a buy-out in his Complaint, plaintiff, at trial, sought only a buy-out. In its 29 January 1981 judgment the trial court specifically said: "The plaintiff does not seek dissolution of the corporations as provided in G.S. 55-125, but does request the court to exercise its discretion to eliminate the minority interest of the plaintiff in these corporations in accordance with G.S. 55-125.1. . . ."

hostility and bitterness, exists between Michael and Ira; (ii) Ira has control of the family corporations and has totally excluded Michael from any participation in the business, and has, moreover, fired him; and (iii) Michael is unable to use or control his inheritance, which ranges from three to seven million dollars, because of Ira's actions.

G.S. 55-125(a)(4) authorizes the involuntary dissolution of a corporation when "reasonably necessary for the protection of the rights or interests of the complaining shareholder." Involuntary dissolution, however, is not the exclusive remedy in North Carolina, because under G.S. 55-125.1 the court has broad discretion to grant any kind of relief it deems appropriate as an alternative to dissolving a corporation.

The breadth of the relevant provisions of our Business Corporation Act, G.S. 55-125, *et seq.*, can best be understood by an historical analysis which demonstrates that our courts should not hesitate to dissolve corporations or grant other relief to minority shareholders when relief is warranted. Realizing then that the statutory provisions authorize relief for minority shareholders, our trial courts must, in the exercise of sound discretion, determine the relief, if any, a minority shareholder is entitled to receive. While it is true that history teaches that we are not to be blinded by narrow common law precepts and that our legislature did not view corporate existence as a "sacred cow," Latty, "The Close Corporation and the New North Carolina Business Corporation Act," 34 N.C.L. Rev. 432, 448 (1956), it is equally true that our legislature did not intend for the cow to be butchered. *See* Comment: Deadlock and Dissolution in the Close Corporation: Has the Sacred Cow Been Butchered? 58 Neb. L. Rev. 791 (1979).

(a) Historical Background

Although the courts at common law did not have the power to dissolve corporations in suits by shareholders, that rule was modified for the protection of shareholders in a few cases. *See*, for example, *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N.W. 218 (1892). The dissolution of corporations was most often seen in cases involving closely held corporations in which "there [were] only a few stockholders, so that the corporation for practical purposes, as between those interested, [was] much like a partnership." *Flemming v. Heffner and Flemming*, 263 Mich. 561,

568, 248 N.W. 900, 902 (1933). *See also State ex rel. Conlan v. Oudin Etc. Mfg. Co.*, 48 Wash. 196, 198, 93 P. 219, 220 (1908) and Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778 (1952). Interestingly, not all courts accepted the close corporation-partnership analogy. In *Baker v. Commercial Body Builders*, 264 Or. 614, 630, 507 P. 2d 387, 394 (1973), the Oregon Supreme Court aptly stated the contra view:

> We also reject the concept that a "closed corporation" is like a partnership to the extent that a minority stockholder should have the same right as a partner to demand a dissolution of a business upon substantially the same showing as may be sufficient for the dissolution of a partnership. After all, the remedy of a forced dissolution of a corporation may equally be "oppressive" to the majority stockholders.

This contra view expressed in *Baker* did not reverse the trend. Courts, generally speaking, have not viewed corporate entities as "untouchables" or "sacred cows." State legislatures have followed suit, giving more protection to minority shareholders. Now every state has a statute authorizing its courts to order the involuntary dissolution of a corporation upon the petition of the complaining shareholder when the shareholders are deadlocked, when the majority shareholders are oppressing the minority shareholders, or when liquidation is deemed necessary for the protection of the rights and interests of the minority shareholders.[6]

In the absence of a deadlock, involuntary dissolution is most often authorized by statutes or ordered by courts when there is a showing of mismanagement or wrongdoing[7] or when "fairness" requires court relief.[8] Moreover, "oppressiveness," as a statutory ground for dissolution, does not mean "illegal" or "fraudulent" conduct. Courts have uniformly equated oppressive conduct with impropriety and wrongful conduct by majority shareholders. For

6. *See* statutes cited in Model Business Corporation Act, Annot., § 97, ¶ 6 (1971, 1973 supp.; 1977 supp.).

7. *See* 19 Am. Jur. 2d, Corporations, §§ 1604, 1605 (1965).

8. *See Stumpf v. C. E. Stumpf & Sons, Inc.*, 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (1975).

example, *see* Annot. 56 A.L.R. 3d 358, 362 (1974) in which it is said:

> "[O]ppression" . . . [is] defined as a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely, and also as a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members. It has been observed that as interpreted by some decisions, this ground has some latitude beyond the common law situations and may include acts which thwart the expectations of a shareholder that the corporation will be run honestly and ratably for the benefit of all shareholders, and that the shareholder will be allowed to participate in management.

See also, Comment, Oppression as a Statutory Ground for Corporate Dissolution, 1965 Duke Law Journal 128.

(b) The North Carolina Business Corporations Act and Its Legislative History.

G.S. 55-125.1 was copied from a virtually identical provision in the South Carolina Business Corporation Act.[9] With regard to the South Carolina Act, Professor Ernest L. Folk, III, the drafter and official reporter of that Act, stated: "The trend is towards increasingly liberal grounds for dissolution by court order, remembering always that the court does not dissolve corporations automatically, but only if, broadly speaking, it believes dissolution to be equitable." S. C. Business Corporation Act, Annot. Ed. p. 181 (1964). Folk suggested that in addition to involuntary dissolution provisions, the legislature should offer the courts an alternative. Consequently, the S. C. Business Corporation Act expressly provided that relief could be granted thereunder even if involuntary dissolution would not be appropriate. Folk recommended that the same provision be added to the North Carolina Business Corporation Act. Folk, "Revisiting the North Carolina Corporation Law: The Robinson Treatise Reviewed and the Statute Reconsidered," 43 N.C. L. Rev. 768, 870-71 (1965). Following the suggestions in Folk's article, our Business Corporation

9. *See*, S. C. Code Ann. § 12-22.23 (1962), subsequently recodified as S. C. Code Ann. § 33-21-230 (1976).

Act was revised, and G.S. 55-125.1 containing the language of the S. C. Business Corporation Act was enacted in 1973. 1973 N.C. Sess. Laws 469, s. 1.

G.S. 55-125.1 reads:

> Discretion of court to grant relief other than dissolution. —(a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:
>
> (1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or
>
> (2) Canceling, altering, or enjoining any resolution or other act of the corporation; or
>
> (3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or
>
> (4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders, such fair value to be determined in accordance with such procedures as the court may provide.
>
> (b) Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate.

(c) Statutory Interpretation and Analysis

The words of the statute are simple and clear. The confluence of G.S. 55-125.1 and G.S. 55-125(a)(4) gives the trial court plenary power to frame whatever order it sees fit to protect the rights of a complaining shareholder. This seems especially significant since the North Carolina Business Corporation Act was acclaimed, when enacted, as the most progressive and significant legislative contribution yet made to the law of close corporations. O'Neal, *Close Corporations*, § 1.14(a), n. 4 and supporting texts (2d ed. 1971). Indeed, Michael's counsel, long before this litigation en-

sued, wrote: "This is the most sweeping authority granted by any state statute, other than the South Carolina statute from which it was taken almost verbatim." Robinson, *North Carolina Corporation Law and Practice*, § 29-14 at 596 (2d ed. 1974).

Considering the history and liberal sweep of our Business Corporation Act, we interpret G.S. 55-125(a)(4), which authorizes liquidation, not when there is "oppression," but when it is reasonably necessary for the protection of the complaining shareholder, to require the complaining shareholder only to show that basic "fairness" compels dissolution. *A fortiori*, G.S. 55-125.1(b), which authorizes a court to grant, without limitation, such other relief as it deems appropriate "as an alternative to a decree of dissolution or . . . whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate," does not require a complaining shareholder to show bad faith, mismanagement or wrongful conduct, but only real harm.

Remembering, then, that: (1) "oppression" is not listed as a statutory ground for involuntary dissolution under G.S. 55-125(a); (2) that Michael does not seek the harsher remedy of dissolution; and (3) that our trial courts need find only that an alternative to dissolution is appropriate—that is, reasonably necessary for the protection of the complaining shareholder—, we review the trial court's exercise of discretion.

(d) The Exercise of the Court's Discretion

[1] Michael first contends that the refusal to grant any relief at all was a clear abuse of discretion and "an unprecedentedly restrictive decision made under what is and was intended to be the most liberal and enabling statute in any state." Given the applicable law, it was the trial court's duty to review all the evidence to determine whether fairness and the equities warranted judicial intervention. We conclude that the trial court's findings of fact, relevant portions of which follow, are not supported by the evidence:

> II. As to the exercise of the Court's discretion in accordance with G.S. § 55-125.1, the Court finds:
>
> A. The corporate philosophy of all the defendants has remained the same under Ira S. Meiselman as it was under

H. B. Meiselman, to wit, a "pay as you go" or conservative approach to business management.

B. The record is silent, and there is an absence of evidence . . . that corporate financial policy has resulted in any inequities to minority stockholder Michael H. Meiselman.

C. There is no evidence of unexplained:

1. Increases of salaries of corporate officers including Ira S. Meiselman;

2. Increase [sic] in corporate reserves such as depreciation, capital improvement or any other reserve;

3. Changes in dividend policy to the detriment of the minority stockholder;

4. Retention of earnings (an area closely monitored by IRS) to the detriment of the minority stockholder, Michael H. Meiselman;

5. Purchases of assets to obtain long term appreciation of asset values for the benefit of second-generation heirs.

D. There is no evidence of bad faith or the adoption of unduly expansive growth requiring capital outlays to the detriment of the majority or minority stockholders.

. . . .

F. The management of these companies has resulted in a ten-year growth from 1968 to 1978 in book value of the minority shareholder's equity of $2,500,000.00; such book value increased further in 1979.

G. There is a lack of evidence to support a finding of fact that personal differences between the majority and minority stockholders have in any way influenced corporate policy, financial or otherwise; and to the contrary the record indicates that objections by minority stockholder, Michael H. Meiselman, apparently motivated the corporations and the individual defendants to:

1. Abandon a merger; and

2. Terminate a management agreement between Republic Management Corporation and Eastern Federal Corporation.

H. There is no evidence to support a finding of fact that there was oppression, overreaching on the part of management, the taking of any unfair advantage of the minority stockholder by the majority stockholder or any other wrongful conduct on the part of the majority stockholder, Ira S. Meiselman.

I. In the absence of gross abuse or the taking of gross unfair advantage by the majority stockholder, the Court's exercise of discretion to require a sale would be, as a practical matter, difficult to effectuate.

1. Book value is not the same as market value.

2. The shares of a closely held corporation are not marketable generally.

3. If the businesses are to continue, ordinarily a majority stockholder would prefer to pay a premium to avoid an uncooperative holder of the outstanding shares.

J. There is no deadlock in the management of the corporate affairs of any defendant corporation.

K. There is no evidence of the financial ability of or the appropriateness of any other individual stockholder purchasing the shares of Michael Meiselman.

We have found only a few cases in which our appellate courts have been asked to review the trial court's exercise of its discretion in cases brought under G.S. 55-125(a)(4) and 55-125.1. *See Dowd v. Foundry Co.*, 263 N.C. 101, 139 S.E. 2d 10 (1964); *Royal v. Lumber Co.*, 248 N.C. 735, 105 S.E. 2d 65 (1958); and *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E. 2d 567 (1980). This may mean, as a practical matter, that shareholders do not usually appeal discretionary denials or grants of relief by trial courts because of the broad discretionary powers vested in trial courts. After all,

> [t]he rule is universal that the action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof; or, as it is frequently

> stated, the appellate court will not review the discretion of the trial court.

Welch v. Kearns, 261 N.C. 171, 172, 134 S.E. 2d 155, 156 (1964) *quoting* 3 Am. Jur., Appeal & Error, § 959.

The "universal" rule should not, however, be applied in this case. The record shows great bitterness and hostility between Ira and Michael. In his deposition testimony, Ira said: "Yes, it is my position . . . that . . . Michael suffers . . . from crippling mental disorders and that was a reason that my father put me in control of the family corporations." Further, Ira, who effectively exercises total control of the defendant corporations, has completely denied Michael any participation in the management of the defendant corporations,[10] including establishing dividend policy and declaring dividends,[11] has fired Michael from employment, thus depriving Michael not only of his salary but also from all other employment benefits, and has, occasionally, denied Michael access to the corporate offices, premises, books of accounts, and records. In other words, the evidence shows that Michael's immense book value wealth is being rendered worthless to him as current income, and that, despite Michael's stock in the corporate enterprises, he is denied the benefits of that ownership.

We are persuaded that this evidence cannot by any stretch of judicial discretion support the trial court's finding that there is an absence of evidence that "corporate financial policy has resulted in any inequities to minority stockholder Michael Meiselman;" or that "there is a lack of evidence to support the finding of fact that personal differences between the majority and minority stockholders have in any way influenced corporate policy;" or that "there is no evidence to support the finding of fact that

10. Michael's right, by cumulative voting to elect himself to the Board of Directors of the defendant corporations, seems a futile gesture in view of the following statement made by Ira's attorney and contained in Defendants' Exhibit 9:

> We have no desire to see the productive efforts of the boards be affected by possibly allowing them to function as a forum for airing personal hurts and slights; and we all recognize that the course of business activity for the companies is not going to be altered by Michael's representation.

11. It is true that Michael has received dividend income since 1977 including approximately $60,000 in dividends in 1980. Michael's annual return, however, using either the 29 or 43 percent ownership figure, is less than 2 percent.

there was . . . the taking of unfair advantage of the minority stockholder."

Further, the trial court's finding "I" (ante, p. 12) is more properly classified as a conclusion of law, and is neither supported by the evidence nor by any other finding of fact. The reasoning expressed in this "finding" indicates that the trial court reached its judgment on a misconception of applicable law. The sale of stock in large closely held corporations may be unlikely; it may, as a practical matter, be difficult to effectuate; but this is certainly no ground for denying Michael relief under the applicable provisions of the Business Corporation Act.

Michael also argues that "since the trial court did not understand that under the statute it could order a determination of 'fair value' that would bind both sides," and since the trial court erroneously believed that there had to be evidence of "bad faith" or "oppression" or "gross abuse" or "deadlock" to justify ordering the purchase of Michael's shares, the trial court's purported exercise of discretion in denying relief to Michael was defective.

Michael takes solace in the colloquy between the trial judge and Michael's attorney during closing argument concerning the binding effect of an audit and in the following paragraph that was included as part of the Initial Memorandum of Judgment:

> 4. Even if the Court should order an expensive full audit as a requisite to exercising its discretion, this Court has no assurance that either shareholder would accept the results of such an independent audit; and even if, as counsel for plaintiff admitted, the plaintiff would agree to be bound by that audit, the defendant has made no such concession, and without both agreements to be bound the Court's exercise of discretion would in effect foster another lawsuit.

Record on Appeal, at 195. Significantly, the Initial Judgment was never signed, and the portion excerpted above from Paragraph 4 was not included in the final judgment. Moreover, that the Initial Memorandum of Judgment was not to be binding is evidenced by the prefacing remarks of the trial court:

> COURT: Mrs. Parker, I'll ask you to take this down in the form of a memorandum of judgment which the Court would edit grammatically *as well as otherwise*, but the essential

findings—I will attempt to articulate the essential findings that the judgment shall contain, *together with any you gentlemen care to offer.* [Emphasis added.]

Record on Appeal, at 192.

We are compelled to note, as did defendants, that if tentative thoughts take precedence over formal orders, appellate courts will be clogged as a practical matter. As a legal matter, Michael makes no assignment of error with regard to the colloquy or the Initial Memorandum of Judgment. He therefore cannot use the colloquy as a separate basis to argue prejudicial error. The colloquy does suggest the trial judge's thought processes, however, and we are convinced that the trial court misconceived and misapplied the law.

We reach our conclusion that fairness and the equities warrant judicial intervention in this case in the face of defendants' strenuous argument that courts still show an aversion to ordering the dissolution of solvent and profitable corporations. Michael himself admits that the corporate defendants are strong financially, and that under the leadership of Ira, Ira's and Michael's net worth have increased enormously—more than three hundred percent. On this point, defendants rely primarily on a passage from Carlos Israel's article, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778, 785 (1952),[12] but Israel dealt with "deadlock and dissolution," neither of which is present in this case.

We fully recognize a potential misuse of involuntary dissolution statutes by dissatisfied minority shareholders who desire to place undue pressure on majority shareholders; we recognize also that "[t]he ends of justice would not be served by too broad an application of [an involuntary dissolution] statute, for that would merely eliminate one evil by substituting a greater one—the op-

12. Israel states:

> It has been suggested that the courts' reluctance to dissolve varies in inverse ratio to the prosperity of the enterprise; that where the faction which happens to be in office at the date of the resignation, death or other incident which caused the *deadlock* is continuing to manage the company successfully, it is necessary in addition to prove some measure of exploitation of the minority. [Emphasis added.]

pression of the majority by the minority." *Hockenberger v. Curry*, 191 Neb. 404, 406, 215 N.W. 2d 627, 628 (1974). These general principles do not apply in the case *sub judice*, however. The circumstances which give rise to relief under our involuntary dissolution statutes are so infinitely varied that courts must determine if judicial intervention is necessary on a case by case basis. In this case, there is no evidence that Michael desires to place any undue pressure on Ira or that Michael is misusing our involuntary dissolution statute for his benefit. There is a plethora of evidence to suggest that Ira's actions have irreparably harmed Michael.

For the foregoing reasons, and considering the range of options available to our courts under G.S. 55-125.1—for example, cancelling or altering any provision in the charter or bylaws of the corporation, cancelling, altering, or enjoining any resolution or act of the corporation, directing or prohibiting acts of directors or shareholders, and forcing a "buy-out"—we hold that the trial court misapplied the applicable law *and* abused its discretion by concluding that relief, other than dissolution, under G.S. 55-125.1 was not reasonably necessary for Michael's protection.

III

[2] By his second argument, Michael, as minority shareholder, and on behalf of the defendant corporations, seeks to recover from Ira the profits that have accumulated in Republic, a corporation which is owned solely by Ira. Michael contends that Republic drained off profits which would have otherwise belonged to Eastern, the parent corporation. He also contends that Ira, as director, officer, and majority shareholder of Eastern, had a fiduciary duty not to enter into a contract providing profits only for himself. Ira, on the other hand, contends that the management contract between Republic and Eastern was "just and reasonable" at the time it was executed, and that there was no violation of any fiduciary duty.

The relevant facts are not in dispute. Republic was organized in 1973, and Ira bought all of its outstanding stock for $300 cash. Beginning 1 August 1973, Republic agreed to perform management services for, and receive a management fee from, Eastern. By 31 December 1977, Republic had accumulated net earnings totalling $65,632.01, all of which came from Eastern and inured

solely to Ira's benefit by reason of his sole ownership of the stock. Michael repeatedly objected to Ira's sole ownership of Republic and insisted that either (a) he be allowed to share in its profits by buying one-half of the corporation, or (b) Republic be operated without profit.

On the evidence presented, the trial court made the following findings of fact relating to this claim:

> I. A. The name of Republic Management Corporation was selected by H. B. Meiselman;
>
> B. The elder Meiselman (H. B. Meiselman) had a management corporation involved in his business dealings for a number of years prior to the chartering of Republic Management Corporation;
>
> C. The evidence is silent as to any bad faith exercised by Ira S. Meiselman in connection with the management company, and this Court makes this finding with full knowledge that Ira S. Meiselman signed the management agreement in his capacity as chief executive officer of the defendant corporations and as President of Republic Management Corporation.
>
> D. Republic Management Corporation has retained earnings resulting from the management contract in the approximate amount of $61,000.00 covering a period of time of some five years, which earnings reached a peak in 1974 of $57,000.00 and plunged to a loss of $11,000.00 in 1975;
>
> E. The uncontradicted evidence shows that virtually all of the retained earnings were accumulated during the exceptionally good years of 1973 and 1974 and that the corporation has since that time suffered losses of approximately $10,000.00 for which Republic Management Corporation has not sought reimbursement;
>
> F. The plaintiff himself received salary from Republic Management Corporation, a company in which he has no equity and for which he has provided no compensable work;
>
> G. The management contract between Republic Management Corporation and defendant Eastern Federal

> Corporation was just and reasonable at the time it was executed.

Record on Appeal at 197.

Based on these findings of fact, the trial court concluded that "[t]here has been no actionable breach of fiduciary responsibility by any of the defendants which could incur liability to this plaintiff, and this claim for relief is denied and that count dismissed." In so doing, the trial court erred.

It does not matter that Republic was a successor to previous management companies which performed management services for the defendant corporations.[13] Nor is it relevant, for purposes of this litigation, that Michael received a salary from Republic even though he provided no compensable work.[14] What is important is this: Ira, as controlling shareholder and director of Eastern, cannot, over Michael's objection, enter into a contract that generates a profit for a corporation which he owns alone. Ira concedes that in North Carolina, directors, officers, and majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation. *See Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981). Although written seventy years ago, the following words from *Pender v. Speight*, 159 N.C. 612, 615, 75 S.E. 851, 852 (1912), still state the applicable law.

> Directors of a corporation are trustees of the property of the corporation for the benefit of the corporate creditors, as well as shareholders. It is their duty to administer the trust assumed by them, not for their own profit, but for the mutual benefit of all parties interested; and, when such directors receive an advantage to themselves not common to all, they are guilty of a plain breach of trust.

13. As early as 1951, Mr. Meiselman formed a management company, Fran-Mack Theaters, Inc., to provide management services to the other interrelated corporations at a fixed management fee. Union Management, Inc., succeeded Fran-Mack Theaters, Inc., but two weeks after Mr. Meiselman's disproportionately large transfer of stock to his son Ira in March 1971, Republic was formed to take over management of the interrelated corporations.

14. According to Ira, Republic "paid Michael a total of nearly $200,000 in 'salary' between 1973 and 1979."

(*See also* Robinson, *North Carolina Corporation Law and Practice*, § 12-5, at 232 (2d ed. 1974).) G.S. 55-35 restates and reinforces those common law principles announced in *Pender* by declaring that

> [o]fficers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions.

On the basis of strong and consistent case law and the codification of the relevant common law principles in our statutory law, we conclude that the trial court erred as a matter of law in finding "no actionable breach of fiduciary responsibility . . . ." This conclusion by the trial court was based in part upon what was labeled a finding of fact, but what was in reality, a conclusion of law, to wit: "The management contract between Republic Management Corporation and defendant Eastern Federal Corporation was just and reasonable at the time it was executed." The trial court did not detail findings to support either of these conclusions. We conclude, as did Michael in his brief, that "a decision permitting Ira to retain the profits diverted into his solely owned corporation, even if he acted innocently and in good faith, would be a rejection of those safeguards against self-dealing and the mistreatment of minority shareholders that have long characterized the corporation law of this State."

IV

Having failed to present and discuss in his brief Assignment of Error No. 3, relating to the trial court's award of judgment to Eastern under its counterclaim, we deem as abandoned any question raised by Michael in this Assignment of Error. Rule 28(a), Rules of Appellate Procedure.

SUMMARY

The trial court misapplied the applicable law and abused its discretion in determining that judicial intervention was not reasonably necessary to protect the interests of Michael as minority shareholder or otherwise appropriate under the circumstances of the case. The judgment denying Michael the alter-

native relief he sought is therefore reversed and the case is remanded to the trial court for the determination of an appropriate remedy under G.S. 55-125.1 that is reasonably necessary to protect Michael's rights and interests.

The judgment in the derivative action is reversed, and the case is remanded to the trial court for entry of judgment on behalf of the defendant corporation against Ira, as sole owner of Republic, in the total amount of the profits accumulated to date in Republic plus interest and cost of this action.

Reversed and remanded.

Judge WELLS concurs.

Judge HILL dissents.

Judge HILL dissenting.

The subject of this controversy is a closely held family corporation or corporations originally organized and developed by the father of the plaintiff and later his defendant brother, Ira Meiselman. The corporate structure grew steadily under the elder Meiselman's management as it has under the direction of defendant. Their parents brought the sons, Michael and Ira, into the business. Ira succeeded; Michael did not. The father recognized this in his organization of the holding company, Eastern Federal Corporation. He originally gave the sons equal shares of stock in the companies. He rewarded Ira disproportionately, however, with a larger gift of shares in the holding company.

Through his shares in Eastern Federal Corporation, Ira exercised corporate control. In less than ten years he increased the book value of the corporations 350%—to $11,168,778.00—and Michael benefited proportionately through his shares. The company pays dividends regularly, and Michael's annual share usually totals a tidy $60,000. The principal portion of the earnings is "plowed back" into the company as growth, and Michael benefits from this through increased book value of his stock.

Michael says he ought to be receiving more dividends. He complains that he is not benefiting from the sums "plowed back" into the company. Perhaps he is not benefiting, at least not in the

sense that he can squander his wealth. Yet, his holdings and wealth increase regularly. He says his brother fired him from his job in the business. The record indicates, however, that Michael did not meet the demands of the job.

I find no quarrel with the findings of fact by the trial judge. They support the judge's conclusions. Nor do I believe the legislature intended that any disgruntled minority stockholder may compel his fellow majority stockholders in the company to acquire his interest or otherwise bail him out simply when established, legitimate, corporate policy does not coincide with his judgment.

Had there been a change in policy under Ira; had there been evidence of mismanagement by Ira or any evidence that Michael was receiving less now than he was during the years when he was active in the affairs of the business; had there been facts to show Michael had exhausted his efforts to sell his shares to another, or that Michael had attended stockholders' meetings and exhausted his rights, or that he really tried to work in the business faithfully and efficiently; then, perhaps the findings by the trial judge would have been different.

I do not read G.S. 55-125(a)(4) as a tool to compel a change in the established policy of a corporation committed to growth to one of dividend payout, simply upon showing that the minority stockholder desires to receive more dividend payout.

The problem is not one of deadlock and dissolution. Rather, it is one of corporate direction. I must conclude that, under the circumstances, the majority stockholder has simply continued the corporate goals established long ago by the corporation in which the brothers inherited stock—and he has succeeded amazingly well. I find no abuse of discretion on the part of the trial judge.

Nor am I convinced that Republic, a management corporation solely owned by Ira, is unduly draining off profits which actually belonged to Eastern, the major or parent corporation, and that Ira, as director, officer, and majority stockholder of Eastern, had a fiduciary duty not to enter into the contract which would provide profits for himself. The record shows the management contract between Republic and Eastern at the time it was executed was "just and reasonable." The record further shows Republic en-

joyed profits and suffered losses over the years. It shows further that the plaintiff was paid a salary from Republic, even though he provided no compensable services. Again, I concur in the findings of fact made by the trial judge that there has been no actionable breach of duty or fiduciary responsibility on the part of the defendants.

I vote to affirm the decision of the trial judge.

ROBERT B. BROUGHTON v. CELESTE GOLD BROUGHTON

No. 8110DC58

(Filed 21 September 1982)

1. **Divorce and Alimony § 19.4— modification of alimony award—changed circumstances—sufficiency of evidence**

In an action for modification of an alimony award, the trial court did not err in finding changed circumstances sufficient to support an increase in alimony where evidence was presented on the estates, earnings and accustomed standard of living of the parties, and findings were made concerning the pre-divorce lifestyle, the property holdings of both parties and the plaintiff's income. G.S. 50-16.9 and G.S. 50-16.5.

2. **Divorce and Alimony § 19.4— modification of alimony—earning capacity finding erroneous—insufficient to cause remand**

The trial court erred in entering a finding concerning plaintiff's earning capacity where there were no facts showing a deliberate attempt to depress his earnings; however, the error was not fatal since the award could have been properly based on the plaintiff's earnings under G.S. 50-16.5(a).

3. **Divorce and Alimony § 19— dependent spouse's earning capacity—necessity for findings**

It was not a denial of equal protection for the trial court to consider plaintiff's earning capacity but not to consider defendant's earning capacity in making an award of alimony.

4. **Divorce and Alimony § 19— modification of alimony award—award of attorney's fees proper**

The trial court did not err in awarding attorney's fees to defendant for the motion directed at increased alimony where defendant showed (1) she was a "dependent spouse as defined by G.S. 50-16.1(3), (2) she was entitled to the relief demanded, and (3) defendant did not have sufficient means to defray expenses of the suit. Further, G.S. 50-11(c) allows an award of counsel fees "for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for revision of alimony or other rights . . . ."

5. Evidence § 45— testimony as to value of property—properly admitted

The trial court did not err in allowing a witness to testify as to the fair market value of plaintiff's property since the witness testified as to his personal examination of the property, as to how it was zoned and to its highest and best use therefore laying a proper foundation for the testimony.

6. Divorce and Alimony § 19— modification of alimony award—testimony concerning income and estate of plaintiff's present wife—no error

Admission of testimony concerning the income and estate of plaintiff's present wife and consideration of that evidence in determining plaintiff's ability to pay increased alimony was not error since (1) the court's consideration of the assets of plaintiff's present wife was negligible, and (2) the Court in *Wyatt v. Wyatt*, 35 N.C. App. 650 (1978) allowed consideration of the present wife's income in determining the husband's ability to pay.

7. Divorce and Alimony § 19.7— modification of alimony award—review of court's findings—supported by competent evidence

In a suit concerning modification of alimony, several findings concerning plaintiff's net worth, plaintiff's average income, the consumer price indexes, defendant's needs, and the amount of alimony awarded were supported by competent evidence and therefore are conclusive on appeal.

APPEAL by both parties from *Braswell, Judge.* Order entered 15 July 1980 in District Court, WAKE County. Heard in the Court of Appeals 31 August 1982.

This appeal is from a motion in the cause by defendant seeking an increase in alimony and child support from an order originally entered on 4 January 1973.

Plaintiff and defendant were married in 1964 and lived together until 1969, when plaintiff moved out of their residence. They were divorced in 1973. Two children were born to the couple, one in 1965 and one in 1967.

In the 1980 order now before us the trial court made findings of fact about the property of each party and concluded that the defendant was "substantially dependent" on the plaintiff at the time of the 1973 order.

The 1980 order also contained findings relevant to this case that have occurred since 1973. These included findings that the residence of defendant had lapsed into disrepair, that defendant had more than $21,000 in unpaid State and Federal tax liability, that she had received inheritances in 1973 and 1975, and that she had declared a revocable trust in 1977 with her residence as the

corpus, which was mortgaged twice in 1978 and 1979. In its order the court also detailed the plaintiff's financial status and holdings and considered an appraisal report on the value of real property in which plaintiff has an interest.

The real property owned by plaintiff and his present wife as tenants by the entirety was listed and the financial status of the wife was detailed. The order limited consideration of the present wife's income to weighing "plaintiff's necessary and reasonable expenses and debts against his financial resources in determining his financial ability to pay defendant's [increased] demands."

Findings on the reasonable needs of the defendant, the minor children and the plaintiff were itemized by the court. According to the order, the sum of plaintiff's needs, alimony and child support would exceed his average income over the prior three years even if he converted his partnership interest into an income producing asset.

Defendant's legal expenses were estimated by the court and found to be reasonable. The findings of fact concluded that defendant is still substantially dependent on plaintiff, that her standard of living is substantially lower and her debts substantially higher than at the time of the 1973 order.

The court defined the $1,500 per month award in the 1973 order as $500 per month alimony and $500 per month for each child as child support. The order concluded that there had been a material and substantial change in the circumstances and conditions of the parties that justified an increase in what defendant should receive. Although the order left the child support, medical and dental expenses at the same amount, the permanent alimony was increased to $1,000 per month, and defendant was granted $5,567.50 for attorney's fees for that part of her motion directed at increased alimony. Moreover, while it was not so ordered the court also found that the plaintiff could increase his ability to pay without depleting his estate by converting his non-income producing partnership interest into an income producing asset.

From this order, both parties appealed.

Harrell and Titus, by Bernard A. Harrell and Richard C. Titus, for plaintiff appellant.

Celeste Gold Broughton, pro se.

ARNOLD, Judge.

PLAINTIFF'S APPEAL

Before an alimony award can be modified, the party seeking modification must show changed circumstances. G.S. 50-16.9. The change in circumstances must be substantial with a final decision based on a comparison of the facts existing at the original order and when the modification is sought. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980).

[1] Plaintiff first contends that the 1980 order made no findings about the financial condition of the parties in 1973. Because there was nothing with which to compare the facts in 1980, he asserts that it was an error to find changed circumstances.

This argument, however, ignores the findings concerning the pre-divorce lifestyle, the property holdings of both parties in 1973, and the plaintiff's 1973 income. While it is true that no balance sheets were introduced at the 1973 hearing, the trial court did cite sufficient facts to show the relative financial condition of the parties in 1973. "When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal. . . ." *Beall v. Beall*, 290 N.C. 669, 673, 228 S.E. 2d 407, 409 (1976).

G.S. 50-16.9, the modification of alimony statute, does not list factors to help in the modification decision. But the alimony statutes (G.S. 50-16.1 through 50-16.10) have been read *in pari materia* because they deal with the same subject matter. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). In *Rowe v. Rowe*, 52 N.C. App. 646, 280 S.E. 2d 182 (1980), the court followed the *Williams* rationale and read G.S. 50-16.9 (modification of alimony) *in pari materia* with G.S. 50-16.5 (amount of alimony).

Rowe is important because G.S. 50-16.5 lists factors to consider on the modification issue. Evidence was presented here on three of those factors, namely the estates, earnings and accustomed standard of living of the parties.

In addition, the trial court made findings with respect to plaintiff's earning capacity. Specifically, it found that plaintiff could "substantially increase his income, without depleting his estate, by converting his non-income producing interest in MRW

Co. [a partnership with his two brothers] into proceeds for income producing assets. . . ." The court found that this could increase after-tax income by $12,000 per year.

[2] Plaintiff bases two assignments of error on this finding by the trial court. He first attacks the earning capacity finding on the ground that there are no facts showing a deliberate attempt to depress his earnings.

Although earning capacity is a permissible ground on which to base modification under G.S. 50-16.5(a), plaintiff correctly cites the limitation on its use. As Chief Justice Sharp stated in *Beall*,

> Capacity to earn . . . may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children.

290 N.C. at 674, 228 S.E. 2d at 410. See also *Bowes v. Bowes*, 287 N.C. 163, 172-73, 214 S.E. 2d 40, 45 (1975). We agree with plaintiff that there is no showing in the record here of such a deliberate attempt by plaintiff to depress his income.

A lack of any finding that plaintiff depressed his income may not be fatal to the record before us in this case however. The award may still be properly based on the plaintiff's earnings under G.S. 50-16.5(a). Plaintiff's income at the time the award is made can be considered on the modification issue "if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably." *Bowes*, 287 N.C. at 172-73, 214 S.E. 2d at 45, citing *Conrad v. Conrad*, 252 N.C. 412, 418, 113 S.E. 2d 912, 916 (1960). The 1980 order made this finding about plaintiff's work as an attorney and considered his earnings in granting the modification.

Thus, even though earning capacity was discussed in the 1980 order, we do not find sufficient reliance by the trial court on it to constitute error or require a remand. In our opinion the trial court provided defendant with a "reasonable subsistence . . . in the exercise of a sound judicial discretion from the evidence before [it]." *Beall*, 290 N.C. at 673-74, 228 S.E. 2d at 410.

[3] Plaintiff next attacks the earning capacity finding on the ground that it was a denial of equal protection for the trial court

to consider his earning capacity but not to consider defendant's earning capacity. A similar argument was rejected in *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E. 2d 701 (1977), *cert. denied*, 294 N.C. 363, 242 S.E. 2d 634 (1978). Although G.S. 50-16.5(a) lists the earning capacity of the parties as a factor in the amount of alimony, *Upchurch* concluded "we do not think that in all cases the court is required to make findings of fact on the question of the dependent spouse's earning capacity." 34 N.C. App. at 661, 239 S.E. 2d at 703. We agree with *Upchurch* and hold that it was not error when the trial court did not consider the defendant's earning capacity in this case.

[4] By a fourth assignment of error plaintiff attacks the award of attorney's fees to defendant for the motion directed at increased alimony. As plaintiff notes, G.S. 50-16.9, the modification section, does not mention attorney's fees.

G.S. 50-16.4 provides for attorney's fees when a dependent spouse would be entitled to alimony pendente lite under G.S. 50-16.3. In this case, defendant does not seek alimony pendente lite but seeks a modification of permanent alimony subsequent to an absolute divorce. This does not mean that defendant is denied her attorney's fees paid in seeking increased alimony, however.

Upchurch construed G.S. 50-16.4 to be applicable *any time* a dependent spouse could show that she has the *grounds* for alimony pendente lite, even though the proceeding was not brought for that purpose. (Emphasis added.) That *any time* "includes times subsequent to the determination of the issues in her favor at the trial of her cause on the merits." 34 N.C. App. at 664-65, 239 S.E. 2d at 705. Thus, if defendant meets the three requirements of G.S. 50-16.3(a) for alimony pendente lite, she can recover her attorney's fees even though she sought alimony modification subsequent to absolute divorce.

First, defendant must show that she is a "dependent spouse" as defined by G.S. 50-16.1(3). The trial court specifically made that finding in its 1980 order.

Second, it must appear from all the evidence presented that the defendant is entitled to the relief demanded. The increase in alimony below confirms this fact.

Finally, it must appear that defendant does not have sufficient means to defray expenses of the suit. The trial court also made a specific finding on this point.

G.S. 50-11(c) also supports defendant's claim to attorney's fees. Subject to two exceptions that are not relevant here, the statute provides that

> a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and *other rights provided for such spouse* under any judgment or decree of court rendered before or at the time of the rendering of the judgment for absolute divorce. (Emphasis added.)

The court in *Shore v. Shore*, 15 N.C. App. 629, 190 S.E. 2d 666 (1972), interpreted G.S. 50-11(c) to allow an award of counsel fees "for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for revision of alimony or other rights. . . ." 15 N.C. App. at 633, 190 S.E. 2d at 669. Although a dependent spouse was resisting an effort by her husband to terminate alimony in *Shore* which is different from this case, its broad holding lends support to this case where defendant sought a revision in alimony. See also, 2 R. Lee, N.C. Family Law § 152 (4th ed. 1980).

[5] Plaintiff next contends that it was error for the trial court to admit the testimony of Clyde Idol as to the fair market value of the real property held by MRW Company, a partnership in which plaintiff is a member, and to conclude that the property's value was $850,000. Even though the trial judge acknowledged that seven comparable sales that Idol used in determining the MRW land value were not probative, and that he gave little consideration to the effect on the land value of the enactment of the Raleigh Flood Plain Regulations in 1973, the court set a valuation of $850,000 on the land, with plaintiff's share being valued at $425,000. This value was based in part on "Mr. Idol's general knowledge of real estate values."

To introduce evidence on valuation, a proper foundation must be laid. First, it must be shown "that the witness is familiar with the thing on which . . . [he] professes to put a value and [second] that he has such knowledge and experience as to enable him intelligently to place a value on it." *Britt v. Smith*, 6 N.C. App. 117,

122, 169 S.E. 2d 482, 486 (1969). *See also, Passmore v. Woodard,* 37 N.C. App. 535, 246 S.E. 2d 795 (1978).

Idol's testimony showed his familiarity with the property here. He personally walked it, drew a map of it and exhibited his knowledge of the surrounding areas, including their future development trends. In addition, he testified as to his qualifications and past experience of 25 years as a real estate appraiser to show his expertise in this area. Thus, the portions of Idol's testimony not based on the comparable land sales, which the trial court explicitly rejected in its findings, were competent evidence.

Whether the part of Idol's testimony that the court relied on was competent is important because

> where 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.

1 Strong's N.C. Index 3d, *Appeal and Error* § 57.2 (1976). *See also, City of Statesville v. Bowles,* 278 N.C. 497, 502, 180 S.E. 2d 111, 114-15 (1971).

There was sufficient competent evidence here to support the order. Idol testified as to his personal examination of the property, as to how it was zoned and to its highest and best use. The court also had before it an opinion on value from plaintiff's expert that the 1980 value was about the same as that in 1973 if the flood plain ordinance and inflation was considered, and an opinion from plaintiff that the value was $600,000. Plaintiff, as owner, was a competent witness on value. *Highway Comm. v. Helderman,* 285 N.C. 645, 652, 207 S.E. 2d 720, 725 (1974).

Finally, it is important that the court valued plaintiff's property at a substantially lower figure than Idol's valuation of $1,433,375. The court's figure of $850,000 was closer to plaintiff's opinion of $600,000 than to Idol's opinion. This further illustrates the court's reliance on factors other than Idol's testimony. It was not error to allow Idol to testify as to the fair market value of plaintiff's property or to conclude that the property's value was $850,000.

[6] Plaintiff's final assignment of error is that testimony of the income and estate of plaintiff's present wife and consideration of that evidence in determining plaintiff's ability to pay increased alimony was incorrect. We find no error on this ground for two reasons.

First, the court's consideration of the assets of plaintiff's present wife was negligible. The order restricted consideration of her income to weighing "plaintiff's *necessary* and reasonable expenses and debts against his financial ability to pay defendant's demands . . ." (Emphasis added). In addition, only plaintiff's earnings and partnership interest were explicitly considered by the trial court in determining his ability to pay.

Second, a decision with facts similar to this case allowed consideration of the present wife's income in determining the husband's ability to pay. The court in *Wyatt v. Wyatt*, 35 N.C. App. 650, 242 S.E. 2d 180 (1978), based its decision largely on the fact that the present wife was a member of the same household as the husband. "Under these circumstances, it was proper for the court to consider the substantial income received by a member of that household who shared in the responsibility for its support." 35 N.C. App. at 652, 242 S.E. 2d at 181. Here, as in *Wyatt*, plaintiff and his present wife live together. The fact that the husband raised the issue of his present wife's income in *Wyatt*, unlike this case where the former wife raised the issue, is not enough to dissuade our reliance in part on it.

DEFENDANT'S APPEAL

Defendant first questions the value of plaintiff's interest in MRW Company. The discussion above disposes of the issue and we find no error as to the court's valuation of the property.

[7] A second assignment of error is that the trial judge incorrectly calculated the financial status of the parties in 1973 and 1980. Defendant in essence is attacking the trial court's findings of fact. Under G.S. 1A-1, Rule 52(a), the trial judge is required to find facts specially in any action tried without a jury. "[I]f supported by competent evidence, such facts are as conclusive as the verdict of a jury." *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E. 2d 149, 153 (1971). *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968).

Defendant here is rearguing facts that have a basis in the record and support the findings of the order from which she appeals. Three examples illustrate her approach. First, she "finds" that plaintiff's net worth is $1,078,924. This figure apparently includes the estimate of Clyde Idol that plaintiff's interest in MRW was worth over $715,000. But the trial court made a specific finding that plaintiff's interest was worth only $425,000. The court's finding was based on competent evidence as previously discussed.

Second, she disputes as too low the court's determination that plaintiff's average income for the years 1977 through 1979 was $55,000. We do not find this amount to be "arbitrarily . . . established" as defendant contends, but find sufficient evidence on an examination of the record to support the trial court.

Third, defendant argues that the court did not take judicial notice of the consumer price indexes introduced into evidence. This contention ignores the explicit statement in the record that "the value of the dollar has depreciated substantially between January 4, 1973 and . . . May, 1980 . . . ." Thus, there is in the record competent evidence to support the court's findings and we can find no error on this issue.

Defendant next attacks the court's finding that her needs that she listed at trial were unrealistic in light of available funds, especially given the plaintiff's property holdings in MRW and the possibility of converting them into income-producing property. We have already discussed the court's improper consideration of plaintiff's earning capacity.

As for defendant's needs, she estimated them to be over $92,000 a year. While "accustomed standard of living" is a factor that G.S. 50-16.5(a) lists for determining the amount of alimony, there is no evidence that defendant was ever accustomed to the standard of living she now seeks while she was married to plaintiff. The trial court found that plaintiff's total income in the early 1970's was less than half of what defendant now seeks. Moreover, there is sufficient evidence in the record to support the court's findings of plaintiff's income being much less than what defendant now seeks. We will not disturb the court's finding of unrealistic demands by the defendant. It should be remembered that "the question of the correct amount of alimony and child support is a

question of fairness to all parties." *Beall*, 290 N.C. at 674, 228 S.E. 2d at 413.

Defendant's fourth argument concerns the amount of alimony awarded by the court. In her brief under this topic she discusses a number of areas that are not relevant to this issue. Given the facts of this case and our discussion above on factors to be considered in setting alimony, we find no abuse of discretion by the trial judge. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975); *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966).

The final assignment of error by defendant is in essence an attack on the court's findings of fact. She argues that there was not full disclosure of plaintiff's assets at trial. We can only conclude that a comparison of the record with the order appealed from reveals evidence to support the trial court.

We find no error prejudicial to either plaintiff or defendant and the order appealed from is

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. LORAN RICHARD CHRISTOPHER, JR.

No. 8125SC1358

(Filed 21 September 1982)

1. Indictment and Warrant § 17.4— variance between averment and proof—ownership

Defendant failed to show that he was misled by a variance between the indictment and proof at trial or that he was hampered in any way in presenting his defense where the indictment alleged ownership of hams in "Mom (n) Pops Smokehouse, Inc., a corporation, located in Claremont, North Carolina," and at trial the owner of the stolen hams was referred to by various witnesses as Mom & Pop's Incorporated, Mom & Pop's, Mom & Pop's Ham House and Mom & Pop's Smokehouse in Claremont.

2. Indictment and Warrant § 17.2— conspiracy to commit felonious larceny and feloniously receiving stolen goods—variance between date alleged in indictment and proved at trial—prejudicial as to receiving charge

Where indictments alleged that defendant conspired to commit felonious larceny and feloniously received stolen goods "on or about the 12th day of December, 1980," and at trial, the evidence disclosed that sometime before and during December defendant had several conversations with another person concerning hams and that defendant received stolen hams on a Sunday night in late December, after Christmas, the discrepancy between the date alleged in the indictment and the date shown by the State's evidence was fatal as to the receiving charge. Defendant clearly relied upon the date charged in the indictment by presenting an alibi defense for that date, and introducing evidence tending to show that the receiving charge occurred on a date other than the one charged in the indictment tended to "ensnare [the] defendant and thereby deprive him of an opportunity to adequately present his defense." Since there was evidence that the conspiracy commenced prior to December 1980 and continued through the 14th until late December, there was no fatal variance between the date alleged in the conspiracy indictment and the date shown by State's evidence.

3. Conspiracy § 6— criminal conspiracy—sufficiency of evidence

Evidence which tended to show that defendant solicited a person to steal ham from his employer, that defendant received the stolen ham from the person and that defendant paid the person substantially less than the true value of the ham, along with statements to the person that he "was sitting on a gold mine" and that he "could get rid of some ham" if the person "could get some ham," was sufficient for the jury to infer "a mutual, implied understanding" between defendant and the person "to do an unlawful act."

4. Conspiracy § 7— criminal conspiracy—instructions proper

The trial court correctly applied the law of conspiracy to the evidence presented on the element of conspiracy which requires that the defendant and his co-conspirator intended at the time their agreement to commit larceny was made that it would be carried out.

5. Criminal Law § 171.1— defendant convicted of two charges—one conviction vacated—single sentence imposed—judgment appealed from not disturbed

Although the Court vacated a verdict on a receiving charge as a result of error in defendant's trial, the judgment appealed from was not disturbed since the trial court consolidated the conspiracy and receiving charges for purposes of judgment and imposed a sentence which was within the parameters of the punishment authorized for the crime of conspiracy to commit larceny. G.S. 14-2.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 13 August 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 7 June 1982.

Defendant appeals his conviction of felonious conspiracy to commit larceny and of feloniously receiving stolen goods.

At trial, Johnny McCracken testified that in December of 1980, he was employed as a truck driver for Mom & Pop's Smoke House, a business which bought, cured and processed country hams. He had known the defendant for seven or eight years.

Prior to December of 1980 defendant had remarked several times that McCracken "was sitting on a gold mine." He asked McCracken if he "could get some ham;" that he "could get rid of some ham" if McCracken could get it. McCracken testified that he stole a pallet containing 110 cases of center ham slices while loading a truck in December. He delivered the ham to his house because "[t]his is where Mr. Christopher was to pick it up." Defendant picked up the ham on a Sunday night in late December, after Christmas, loading it into his station wagon. "There was talk of splitting the profit," but defendant later gave McCracken an old Chevrolet car and $50.

Ray Isenhower, plant manager of Mom & Pop's Smoke House, testified that in mid-December he suspected that a substantial amount of ham had disappeared and began taking inventory in January. The inventory showed a shortage of 249 cases of "centers". Isenhower also testified that Mom & Pop's Smoke House is a wholly owned subsidiary of Western Steer Mom & Pop's, Incorporated.

Tom McCall testified that he knew the defendant as an employee of a brokerage company and that prior to December of 1980 he had purchased food items from defendant for his discount food store. Sometime in December or January, on three different occasions, he purchased from defendant a total of 30 or 40 cases of pre-priced packaged sugar cured Mom & Pop's ham. "[I]t was supposed to be overrun merchandise or mis-shipped merchandise." He received a receipt for the ham in February or March, but it was in a "ficticious name".

Defendant denied selling ham to Tom McCall. He offered an alibi witness who stated that defendant was in Kingsport, Tennessee, with her on the weekend of 12 December 1980. She also testified that she was with the defendant in Hickory, North Carolina the following weekend.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Sigmon, Clark and Mackie, by Jeffrey T. Mackie, for defendant-appellant.

HILL, Judge.

Defendant contends that error occurred in his trial with respect to both charges. We conclude that the trial court did commit error in connection with the receiving charge but find no merit in defendant's assignments of error in the conspiracy case.

[1] Defendant contends first that there was a fatal variance between the crimes charged in the bills of indictment and the proof of the same with respect to ownership and time.

The indictments allege ownership of the hams in "Mom (n) Pops Smokehouse, Inc., a corporation, located in Claremont, North Carolina." At trial the owner of the stolen hams was referred to by various witnesses as Mom & Pop's Incorporated, Mom & Pop's, Mom & Pop's Ham House and Mom & Pop's Smoke House in Claremont. The owner of the hams was further identified as a wholly owned subsidiary of Western Steer Mom & Pop's, Incorporated. The only variance between the indictment and proof was the omission of any reference to "Mom (n) Pops Smokehouse, Inc.," as alleged in the indictment. Nevertheless, the testimony at trial sufficiently identified the owner of the stolen hams to be the same entity referred to in the indictments and sufficiently established the owner to be a legal entity capable of owning property. Although "evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense," 7 Strong's N.C. Index 3rd, Indictment and Warrant § 17, p. 162, " '[a] variance will not result where the allegations and proof, although variant, are of the same legal significance.' [Citations omitted.]" *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914). Defendant has not shown that he was misled by the variance or that, having been informed of the charges against him, he was hampered in any way in presenting his defense. *See State v. Martin*, 270 N.C. 286, 154 S.E. 2d 96 (1967); *State v. Currie*, 47 N.C. App. 446, 267 S.E. 2d 390, *cert. denied*, 301 N.C. 237, 283 S.E. 2d 134 (1980).

[2] The indictments further allege that defendant conspired to commit felonious larceny and feloniously received stolen goods "on or about the 12th day of December, 1980." At trial, the evidence disclosed only that sometime before and during December defendant had several conversations with Johnny McCracken concerning the hams and that defendant received the stolen hams on a Sunday night in late December, after Christmas. Defendant argues that this discrepancy between the time named in the indictments and the time shown by State's evidence constituted a fatal variance requiring dismissal of the charges. We agree with respect to the receiving charge, but not the conspiracy charge.

"Where time is not of the essence of the offense charged . . . a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal. [Citations omitted.] 'But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.' *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E. 2d 396, 403 (1961)." *State v. Locklear*, 33 N.C. App. 647, 653-54, 236 S.E. 2d 376, 380, *discr. rev. denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977).

In the present case, defendant clearly relied upon the date charged in the indictment by presenting an alibi defense for that date. Although he also presented testimony as to his whereabouts on the following weekend, this evidence was apparently introduced to bolster his alibi for the date charged in the indictment. *Cf. State v. Currie, supra* (the defendant presented alibi evidence for the date charged in the indictment and the date shown by the State's evidence); *State v. Locklear, supra* (the defendant presented alibi evidence relating to neither the date charged in the indictment nor the date shown by the State's evidence). On the facts of this case, the introduction of evidence by State tending to show that the receiving offense occurred on a date other than the one charged in the indictment tended to "ensnare [the] defendant and thereby deprive him of an opportunity to adequately present his defense" and constituted a fatal variance between the indictment and the proof. The verdict on the receiving charge must therefore be vacated.

Further error occurred on the receiving charge when the court instructed the jury that defendant could be convicted of that charge if the jury found that he had committed the offense "on or about December the 14th or the latter part of December, 1980." While not required to charge on the date of the offense, a court which does so must charge on the date as shown by the evidence. *See State v. Currie, supra.* The evidence in the present case shows that, if defendant received the stolen hams, he did so in late December, after Christmas. There is no evidence whatsoever that defendant received the hams on 14 December 1980. The court's instruction permitted the jury to disregard the evidence as to when the offense occurred.

Although the court gave the same instruction on the conspiracy charge, it did not constitute error because the evidence at trial showed that the conspiracy commenced prior to December 1980 and continued through the 14th until late December. For the same reason, there was no fatal variance between the date alleged in the conspiracy indictment and the date shown by State's evidence.

[3] Nor is defendant entitled to dismissal of the conspiracy charge because of insufficient evidence, as he contends.

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. [Citation omitted.] To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: " 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " [Citations omitted.] . . . As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E. 2d 521, 526 (1975) (emphasis original). *Accord State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

State's evidence in the present case tended to show that defendant solicited McCracken to steal ham from his employer, that defendant received the stolen ham from McCracken and that defendant paid McCracken substantially less than the true value

of the ham. Defendant argues that because there was no evidence of an express request by defendant that McCracken steal the ham, there was insufficient proof of a conspiracy to do an unlawful act. As previously stated, however, an express agreement need not be shown. Defendant's statements to McCracken that he "was sitting on a gold mine" and that he "could get rid of some ham" if McCracken "could get some ham," considered with the subsequent dealings between defendant and McCracken with regard to the ham, were sufficient for the jury to infer "a mutual, implied understanding" between defendant and McCracken "to do an unlawful act." *See State v. Jackson and State v. Marshall*, 57 N.C. App. 71, 291 S.E. 2d 190, *cert. denied*, 306 N.C. 389, 294 S.E. 2d 216 (1982).

[4] Defendant also assigns error to the court's charge on conspiracy. He concedes that the court correctly charged as to the law of conspiracy but contends that the court failed to correctly apply to the evidence presented the element of conspiracy which requires that the defendant and his co-conspirator intended at the time their agreement to commit the larceny was made that it would be carried out. Our review of the charge reveals no prejudicial error. On the element of intent, the court required the jury to find that "at the time of the taking the defendant and Johnny McCracken intended to deprive Mom & Pop's Ham House of its use permanently pursuant to the agreement. . . ." The Court had previously informed the jury that State was required to prove that defendant and another person intended that their agreement to commit larceny be carried out "at the time it was made." When construed as a whole, the charge correctly required a finding that at the time of his agreement with McCracken, defendant intended for McCracken to commit larceny from his employer pursuant to the agreement.

[5] Although we have vacated the verdict on the receiving charge as a result of error in defendant's trial, the judgment appealed from need not be disturbed.

> Where the jury renders a verdict of guilty on each count of a bill of indictment, an error in the trial or in the charge of the court as to one count is cured by the verdict on the other count where the offenses which are charged are of the same grade and punishable alike, only one sentence is imposed, and

the error relating to one count does not affect the verdict on the other.

State v. Daniels, 300 N.C. 105, 115, 265 S.E. 2d 217, 222-23 (1980). Here, the court consolidated the conspiracy and receiving charges for purposes of judgment and imposed a sentence of three years imprisonment, with all but 90 days suspended. Conspiracy to commit larceny and receiving stolen goods are both felonies for which no specific punishment is prescribed by statute. As such, they are both punishable by fine, by imprisonment not exceeding ten years, or both. G.S. 14-2. The single sentence imposed was within the parameters of the punishment authorized for the crime of conspiracy to commit larceny.

In the judgment entered, we find

No error.

Judge MARTIN (Harry C.) concurred prior to 3 August 1982.

Judge BECTON concurs.

TOMAS H. URBANO v. DAYS INN OF AMERICA, INC.; OFFICE PARKS OF CHARLOTTE, INC., D/B/A DAYS INN BUDGET LUXURY MOTELS; COMMERCIAL MANAGEMENT, INC.; AND DAYS INN BUDGET LUXURY MOTELS

No. 8126SC1121

(Filed 21 September 1982)

1. Negligence § 55; Innkeepers § 3.5— invitee injured by acts of criminal—duty of owner to exercise reasonable care to protect plaintiff—summary judgment for owner improperly granted

An owner of a motel was under a duty to plaintiff to exercise reasonable care to protect plaintiff from criminal acts of third persons on defendant's motel premises, and summary judgment was improvidently entered on plaintiff's claim for relief based upon defendant's negligence where there was evidence that defendant knew of at least 42 episodes of criminal activity taking place on its motel premises during a period of three years preceding the date of plaintiff's injury, twelve episodes occurred during the three and one-half months preceding plaintiff's injury, the premises were not guarded or patrolled by security officers employed by the motel, defendant's motel park-

ing lot was not fenced in or otherwise enclosed, and the area where plaintiff's room was located may have been dimly lighted.

2. **Innkeepers § 5— innkeeper not insurer of personal safety of business invitees**

G.S. 72-1(a) does no more than state the common law duty of an innkeeper to provide suitable lodging for guests and carries with it no warranty of personal safety.

3. **Courts § 9.4— denial of motion for summary judgment for one defendant by a judge not binding on another judge as to another defendant**

Each defendant is entitled to have its motions considered and ruled upon separately; therefore, it was not error for one judge to grant one defendant's motion for summary judgment after another judge had denied another defendant's motion for summary judgment.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 4 June 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 August 1982.

Plaintiff was a guest in a motel owned and operated by defendant Office Parks of Charlotte, Inc., hereinafter referred to as Office Parks. After checking into his room late at night, plaintiff returned to his car parked in defendant's parking lot to retrieve his luggage, whereupon he was criminally assaulted and seriously injured by unidentified assailants. Plaintiff instituted this action against Office Parks as owner-operator and against Days Inn of America, Inc., hereinafter referred to as Days Inn, as franchisor, seeking recovery on negligence and contract theories.

In his complaint, plaintiff alleged in his first claim for relief that his injuries and damage were proximately caused by defendant Office Parks' negligent failure to provide adequate lighting on the motel premises; failure to fence, enclose or guard the motel property or take other reasonable measures to limit access to the motel property; failure to give plaintiff notice or warn plaintiff of other acts of violence committed during evening hours on the motel premises; failure to exercise reasonable care to monitor, inspect and manage the motel premises; allowing a hidden, dangerous condition to exist on the motel premises; and failure to institute and maintain adequate measures for the protection of their guests. In his second claim for relief, plaintiff alleged that through advertising, representations and inducements, defendant Office Parks warrantied to plaintiff that its motel premises were reasonably safe for plaintiff's use; that such representations in-

duced plaintiff to seek lodging in defendant's motel; that defendant breached its warranties to plaintiff; and that such breach of warranty proximately caused plaintiff's injuries and damage. In a separate claim for relief, plaintiff alleged that defendant's actions were reckless, wanton, and in willful disregard of plaintiff's rights and safety, so as to entitle plaintiff to punitive damages.

Defendant Office Parks answered, denying the plaintiff's essential allegations as to negligence, breach of warranty, and willful or wanton conduct. Defendant also asserted an affirmative defense that intervening wrongful acts of third persons were the proximate cause of plaintiff's injuries and damage.

Defendant Days Inn's motion for summary judgment was denied by Judge Allen on 18 February 1981. Defendant Office Parks moved for summary judgment on 7 May 1981. Judge Snepp granted defendant Office Parks' motion, stating that "there is no just reason for delay." Plaintiff appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage, Max E. Justice and Christian R. Troy, for plaintiff-appellant.

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., by J. B. Craighill and Nancy E. Foltz, for defendant-appellees.

WELLS, Judge.

The principal questions presented in this appeal are two: one, whether defendant Office Parks was under a duty to plaintiff to exercise reasonable care to protect plaintiff from criminal acts of third persons on defendant's motel premises; and two, whether the provisions of G.S. 72-1(a)[1] provide plaintiff with a warranty of personal safety while plaintiff was a guest at defendant's motel. We answer the first question, yes, and the second, no.

[1] In *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981), our Supreme Court dealt with the duty of a shopping center to protect its business invitees from the criminal acts of third persons on its premises. In recognizing such a duty, the court stated that "foreseeability is the test in determining the

1. 72-1(a) Every innkeeper shall at all times provide suitable lodging accommodations for persons accepted as guests in his inn or hotel.

extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons". In *Foster*, the court also made it clear that a parking lot provided by a business owner for the use of his invitees is considered a part of the business premises. *See also Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

In *Peters v. Holiday Inns, Inc.*, 278 N.W. 2d 208 (Wisc. 1979), the Wisconsin Supreme Court stated the rule for innkeepers in the following terms:

> [T]he conduct of hotel innkeepers in providing security must conform to the standard of ordinary care. In the context of the hotel-guest relationship, it is foreseeable that an innkeeper's failure to maintain adequate security measures not only permits but may even encourage intruders to rob or assault hotel patrons.

For other cases where the courts of other states have recognized the duty of innkeepers to exercise reasonable care to protect their guests from the criminal acts of third persons on the hotel or motel premises, *see* Annot. 70 A.L.R. 2d 628, 646, § 9 and A.L.R. 2d Later Case Service.

The materials before the trial court in this case tended to show that defendant Office Parks knew of at least 42 episodes of criminal activity taking place on its motel premises during a period of three years preceding the date of plaintiff's injury. At least 12 of the episodes occurred during the three and one half months preceding plaintiff's injury. While none of these criminal episodes involved an assault on a guest, there was one armed robbery on the premises and seven illegal entries into motel rooms.

The materials before the trial court show without dispute that the motel premises were not guarded or patrolled by security officers employed by the motel, but that defendant Office Parks relied on routine visits by local police to provide security. These materials also showed that defendant's motel parking lot was not fenced in or otherwise enclosed, and that the area where plaintiff's room was located may have been dimly lighted.

We are persuaded that under the general rules set out in *Foster*, the materials before the trial court in this case raised triable issues as to whether defendant Office Parks should have

reasonably foreseen that the conditions on its motel premises were such that its guests might be exposed to injury by the criminal acts of third persons and whether defendant Office Parks exercised reasonable care to protect plaintiff from injury from such acts. We therefore hold that as to plaintiff's first claim for relief, based upon defendant's negligence, summary judgment for defendant Office Parks was improvidently entered.

[2] As to plaintiff's second claim for relief, based upon an implied warranty of safety, we hold that summary judgment for defendant Office Parks was appropriate. Under our decisional law, an innkeeper or other occupier of land is not the insurer of the personal safety of business invitees. *Foster*, supra; *Rappaport*, supra. Plaintiff's argument that the provisions of G.S. 72-1(a) provide him with such a warranty of personal safety is not supported by any cited decisions of our courts; and we are not aware of any such decisions. G.S. 72-1(a) does no more than state the common law duty of an innkeeper to provide suitable lodging to guests, and carries with it no warranty of personal safety. *See Waugh v. Duke Corp.*, 248 F. Supp. 626 (M.D. N.C., 1966).

[3] In one of his assignments of error, plaintiff contends that Judge Allen's denial of defendant Days Inn's motion for summary judgment was binding on Judge Snepp as to defendant Office Parks' motion. We do not agree. Although it may appear logically inconsistent for one trial judge to keep the non-operating franchisor in the case and another to let the operator-franchisee out, each defendant was entitled to have its motion considered and ruled upon separately. Under these circumstances, Judge Snepp did not overrule Judge Allen's previous judgment. *Compare Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *cert. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981).

Defendant contends that summary judgment in its favor was appropriate as to plaintiff's claim for punitive damages. The question of whether plaintiff is entitled to have an issue of punitive damages submitted to the jury must be determined in light of the evidence presented at trial.

The results are:

As to summary judgment on plaintiff's claim for relief for defendant Office Parks' negligence, reversed.

As to summary judgment on plaintiff's claim for relief on defendant Office Parks' contractual warranty of plaintiff's personal safety, affirmed.

Affirmed in part; reversed in part; and remanded.

Judges HEDRICK and ARNOLD concur.

NOLAND COMPANY, INC. v. TED A. POOVEY, T/A TED A. POOVEY PLUMBING COMPANY, AND THE OHIO CASUALTY INSURANCE COMPANY

No. 8025SC1110

(Filed 21 September 1982)

1. **Principal and Surety § 9.1— goods sold and delivered—contractor's payment bond—separate issues as to liability of contractor and surety**

The surety on a plumbing contractor's payment bond for materials used in the construction of a county building was liable only for materials which plaintiff in good faith believed were to be used by the contractor in constructing such building, and the trial court erred in refusing to submit separate issues as to the amount of the contractor's liability to plaintiff for materials delivered to him at the construction site of the county building and the amount of the surety's liability on the payment bond where there was evidence tending to show that some of the materials delivered to defendant at such construction site were not used by defendant in constructing the county building but were used in other construction projects. G.S. 44A-25(5), G.S. 44A-26(a)(2) and G.S. 44A-30.

2. **Interest § 2; Judgments § 55— prejudgment interest—failure to object to account stated—interest allowed from date of breach**

The trial court erred in permitting interest on plaintiff's judgment against defendant on an account stated from the date of judgment rather than from the date of the breach which was construed to be two months from the date of demand and refusal of payment.

ON rehearing.

The plaintiff's petition for rehearing our decision filed 6 October 1981 at 54 N.C. App. 695 (1981) was allowed on 9 December 1981. The parties have filed additional briefs.

The facts were adequately stated in our previous opinion.

Purrington and Purrington, by A. L. Purrington, Jr., for plaintiff appellant.

Byrd, Byrd, Ervin, Blanton and Whisnant, by Robert B. Byrd and Lawrence D. McMahon, Jr., for defendant appellant Ohio Casualty Insurance Company.

Triggs and Mull, by C. Gary Triggs and Wayne O. Clontz, for defendant appellant Ted A. Poovey.

MORRIS, Chief Judge.

We withdraw the portion of our previous opinion dealing with defendant Insurance Company's appeal and substitute therefor the following.

[1] The superior court refused to submit an issue as to the liability of the Insurance Company on the bond but held that it was liable for the full amount recovered by plaintiff against defendant Poovey. We hold this was error. The sections of the statute governing this question are as follows:

> G.S. 44A-25(5)—"Labor or materials" shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract.
>
> G.S. 44A-26. Bonds required.—(a) A contracting body shall require of any contractor who is awarded a construction contract . . . the following bonds:
>
> . . .
>
> (2) A payment bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor or subcontractor is liable.

G.S. 44A-30 makes the above section a part of the bond under which the plaintiff claims. The parties have not cited and we have not found a case in this state interpreting this statute. There have been several federal cases interpreting a similar statute. *See United States to the Use of Carlson v. Continental Casualty Company*, 414 F. 2d 431 (5th Cir. 1969); *U.S. v. Endelbrock-White Company*, 275 F. 2d 57 (4th Cir. 1960); and *St. Paul-Mercury Indemnity Company v. U.S.*, 238 F. 2d 917 (10th Cir. 1956). We believe that if the plaintiff in good faith furnished the material for the construction of the project, it is entitled to recover for materials so furnished. It is not required to prove the materials were actually used on the project.

In this case Mr. Hefner testified that more plumbing materials were delivered to Poovey at the job site than were needed to complete defendant Poovey's job. Poovey testified that he used the figure $19,500.00 as given to him by the plaintiff's salesman as the price of the materials when computing his bid on the Center. He testified further that the plaintiff's agents informed him that materials would be delivered to the job site for the Center which were to be used on the Alleghany Hospital project and that this was done. We believe this is evidence from which the jury could conclude that the plaintiff delivered some materials to the job site which it did not in good faith believe were intended for the project. The issue as to the Insurance Company's liability on the bond should be submitted to the jury.

We also withdraw that portion of our previous opinion which deals with the plaintiff's appeal and substitute in lieu thereof the following.

[2] The plaintiff contends it is entitled to prejudgment interest. We agree. G.S. 24-5, dealing with interest on recoveries for breach of contract, has been interpreted to hold that "where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach." *See Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977) and *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). The defendants contend that in order to allow prejudgment interest, it is necessary to be able to make an accurate determination as to the exact amount owed by the defendant Poovey to the plaintiff. They argue that since the jury returned a verdict for less

damages than that for which the plaintiff prayed, the exact amount of damages could not be calculated and no prejudgment interest should be allowed. We believe we are bound by *Construction Co. v. Crain and Denbo, Inc.*, supra, to reject this argument. In that case our Supreme Court held it was not error for the superior court to allow prejudgment interest against a subcontractor and the surety on the subcontractor's bond in an action to recover by the contractor for work it was required to do after the subcontractor defaulted. We do not believe the damages were more easily calculated in that case than this one.

In this case the jury allowed a recovery based on an account stated. The last statement was rendered by the plaintiff to Poovey on 6 June 1977. On the evidence the jury found that by his failure to object to the account within a reasonable time, Poovey agreed to the account. We believe two months would be a reasonable time for Poovey to object to the account, and we believe interest should run against him from 6 August 1977. As to the defendant Insurance Company, interest would run against it from the time demand was made on it for payment. *See Construction Co. v. Crain and Denbo, Inc.*, supra. It is not clear from the record when the demand for payment was made on the Insurance Company. Mr. Nelson testified he contacted the Insurance Company in April 1977 in regard to the delinquent account, but he did not testify he demanded payment. Since there must be a new trial as to the plaintiff's claim against the Insurance Company, evidence as to the time of the plaintiff's demand on the Insurance Company may be offered in the event the plaintiff recovers.

As to defendant Poovey, we find no error.

As to defendant Insurance Company, we order a new trial.

As to plaintiff, we reverse and remand.

Judges WEBB and WHICHARD concur.

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

No. 8110IC1202

(Filed 21 September 1982)

Master and Servant § 99— inability of Industrial Commission to award attorney fees for services rendered on appeal to Court of Appeals

Under G.S. 97-88, the Industrial Commission, in its discretion, can award attorney fees only when an appeal is before it to review a hearing commissioner's decision. The Commission may also exercise limited discretion when the Court of Appeals approves an award of attorney fees but certifies its decision to the Commission with instructions to decide the exact amount to be awarded; however, the Court of Appeals is the only body which can decide whether to allow attorney fees for services rendered on appeal taken to the Court of Appeals. Therefore, where the Court of Appeals refused to tax attorney fees against the defendant, the Industrial Commission erred in subsequently ordering the defendant to pay plaintiff's attorney fees for services rendered on appeal to the Court of Appeals.

APPEAL by defendant from North Carolina Industrial Commission. Orders entered 24 June 1981 and 29 July 1981. Heard in the Court of Appeals 1 September 1982.

On 27 April 1979, plaintiff was awarded temporary total disability benefits and a 15 percent permanent partial disability for a back injury resulting from an accident occurring in the course of her employment. Deputy Commissioner Rush approved attorney fees of $1,400.00, to be deducted from plaintiff's award. Defendant appealed and the Full Commission adopted the opinion and award of 27 April 1979. At the same hearing the Commission denied a motion by plaintiff that attorney fees be taxed against defendant. On 17 March 1980 the Commission filed an amendment ordering additional attorney fees for plaintiff's counsel in the amount of $300.00, to be deducted from plaintiff's award. Defendant then appealed to the North Carolina Court of Appeals, where the opinion and award of the Commission was affirmed. 52 N.C. App. 88, 278 S.E. 2d 268 (1981). On that same date, 19 May 1981, the Court of Appeals denied plaintiff's motion to tax attorney fees against the defendant.

On 8 June 1981, the Court of Appeals certified to the Industrial Commission that its opinion and award were affirmed. On 24 June 1981, Commissioner Vance signed an order directing

defendant to comply with the original opinion and award. That order also provided that the defendant was to pay plaintiff's attorney fees for services before the Court of Appeals, in the amount of $1,500.00. On 29 July 1981, Commissioner Vance signed an order denying defendant's motion to set aside the order of 24 June 1981.

Jeffrey L. Miller, for plaintiff-appellee.

Maupin, Taylor & Ellis, by Albert R. Bell, Jr. and M. Keith Kapp, for defendant-appellant.

MARTIN (Robert M.), Judge.

The defendant has presented one issue for our review. The question he raises is whether, under N.C. Gen. Stat. § 97-88, the North Carolina Industrial Commission can order defendant, *ex mero motu*, to pay plaintiff's attorney fees for services rendered on appeal to the Court of Appeals, when the Court of Appeals had previously entered an order denying those same attorney fees.

Attorney fees are not ordinarily allowed as costs in civil actions or in special proceedings unless expressly authorized by statute. *Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967). Furthermore, the Industrial Commission has only the limited power and jurisdiction delegated to it by statute, as it is purely a creation of the General Assembly. *Id.* Applying these basic principles to the statute in question, it appears that the plaintiff and the Commission have chosen an overly broad interpretation of the Commission's power to award attorney fees.

N.C. Gen. Stat. § 97-88 provides:

> Expenses of appeals brought by insurers.—If the industrial commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to

be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

This court in *Taylor v. J. P. Stevens & Co., Inc.*, 57 N.C. App. 643, 292 S.E. 2d 277 (1982), has placed limitations on the Commission's power to allow attorney fees under § 97-88. Judge Clark, speaking for the Court, stated:

> We hold that the Commission was not authorized to award fees for the services rendered in connection with the appeal before the Supreme Court. It was authorized to make an award of attorney's fees for services rendered in connection with the hearing before the Commission.

57 N.C. App. at 648, 292 S.E. 2d at 280.

The statutory language of § 97-88 supports the *Taylor* interpretation. The General Assembly used the wording "Commission or court" on three separate occasions in § 97-88. The plaintiff and the Commission have suggested that this language means the Commission and the court are interchangeable; that the Commission can award attorney fees for services rendered before the Court of Appeals, while the Court of Appeals can award such fees for services rendered before the Industrial Commission. We do not agree with that reading of § 97-88.

The better interpretation of this statute is that the Commission, in its discretion, can award attorney fees only when an appeal is before it to review a hearing commissioner's decision. In such a situation the amount of the award for attorney fees is limited to the value of those services rendered on the appeal taken to the Industrial Commission. The Commission may also exercise limited discretion when the Court of Appeals approves an award of attorney fees but certifies its decision to the Commission with instructions to decide the exact amount to be awarded. See *Swaney v. George Newton Construction Co.*, 5 N.C. App. 520, 169 S.E. 2d 90 (1969). In such a case, the Commission may determine only the amount of the award and not whether the award should be made at all. It follows that the Court of Appeals is the only body which can decide whether to allow attorney fees for services rendered on an appeal taken to the Court of Appeals.

In this case the Court of Appeals, by an order dated May 19, 1981, refused to tax attorney fees against the defendant. While

the Commission may disagree with this Court's decision, it has no power to ignore that order. After affirming the Commission's opinion and award the Court of Appeals certified its decision to the Industrial Commission. That certification process did not constitute a "hearing on review" before the Commission and did not give the Commission the power or opportunity to reconsider the appellate court's decision as to the award of attorney's fees incurred on appeal to the Court of Appeals. "Appellate courts may render final judgment in proper cases . . . Ordinarily, the opinion is certified down and, . . . binding on the court or [sic] original jurisdiction. . . ." 1 N.C. Index 3d, Appeal & Error § 66. Put another way "No judgment other than that directed or permitted by the appellate court may be entered. 'Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.' " *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722-23, 152 S.E. 2d 199, 202 (1966), quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E. 2d 298, 306 (1962).

For the foregoing reasons this Court must vacate the orders of the Industrial Commission dated 24 June 1981 and 29 July 1981.

Vacated.

Chief Judge MORRIS and Judge BECTON concur.

BRUCE BOULTON, INDIVIDUALLY AS FATHER OF CHAD E. BOULTON v. ONSLOW COUNTY BOARD OF EDUCATION

No. 8110IC1193

(Filed 21 September 1982)

Death § 7— wrongful death award combined with additional medical and funeral expenses award erroneous

In a wrongful death action arising from a school bus accident in which plaintiff's son was killed, the Industrial Commission erred in awarding plaintiff, as administrator of his son's estate, a wrongful death recovery of $30,000 and in additionally awarding him, individually, the medical and funeral expenses he incurred as a result of his son's death. Pursuant to G.S. 28A-18-2(b)(1), (3), the medical and funeral expenses which plaintiff incurred as

the result of the death of his minor son were encompassed in the wrongful death award he obtained as administrator of the son's estate. The separate award of these expenses to him in his individual capacity was error.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and Award entered 7 July 1981. Heard in the Court of Appeals 1 September 1982.

Defendant appeals from an award to plaintiff of medical and funeral expenses incurred as a result of the death of plaintiff's minor son.

Brumbaugh & Donley, by Patrick M. Donley, for plaintiff appellee.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for defendant appellant.

WHICHARD, Judge.

The parties stipulated that the death of plaintiff's five year old son was proximately caused by injuries he sustained when run over by a school bus owned by defendant and being operated by its agent within the scope of his employment. The Industrial Commission awarded plaintiff, as administrator of his son's estate, a wrongful death recovery of $30,000, the maximum allowed by the State Tort Claims Act, G.S. 143-291, at the time of the accident. It also awarded him, individually, the medical and funeral expenses he incurred as a result of his son's death.

The sole issue is whether plaintiff may recover these medical and funeral expenses in his individual capacity in addition to his recovery, as administrator, of a wrongful death award. We hold that he cannot, and accordingly reverse.

Plaintiff correctly asserts that under the common law of North Carolina a personal injury to a minor child, proximately caused by the negligence of another, gave rise to two distinct causes of action—one by the child for damages for the personal injury, and a second by the parent for, *inter alia*, expenses incurred for necessary medical treatment of the child. *E.g., Clary v. Board of Education*, 285 N.C. 188, 192, 203 S.E. 2d 820, 823-24 (1974), *withdrawn and superseded on other grounds*, 286 N.C. 525, 212 S.E. 2d 160 (1975); *Kleibor v. Rogers*, 265 N.C. 304, 306, 144

S.E. 2d 27, 29 (1965). "[H]owever, when the General Assembly legislates in respect to the subject matter of any common law rule, the statute supplants the common law and becomes the public policy of this State in respect to that . . . matter." *Christenbury v. Hedrick*, 32 N.C. App. 708, 711, 234 S.E. 2d 3, 5 (1977).

The General Assembly has provided that damages recoverable for death by wrongful act include, *inter alia*, "[e]xpenses for care, treatment and hospitalization incident to the injury resulting in death" and "[t]he reasonable funeral expenses of the decedent." G.S. 28A-18-2(b)(1), (3). This Court has held that any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute, and accordingly has held proper the dismissal of an action by the surviving mother of unemancipated minor children who died as a result of an automobile collision, in which action the mother sought recovery in her individual capacity of, *inter alia*, medical and funeral expenses incurred on behalf of the children. *Christenbury v. Hedrick, supra.* We find that decision controlling here.

Plaintiff contends that because the wrongful death recovery here is limited to a maximum of $30,000, which the Industrial Commission found to be inadequate compensation for the loss plaintiff incurred, the holding in *Christenbury* should not apply. The Court there stated, however, that "*any* common law claim which is now encompassed by the wrongful death statute must be asserted under that statute." *Christenbury*, 32 N.C. App. at 712, 234 S.E. 2d at 5 (emphasis supplied). Such claims thus must be uniformly so asserted, and plaintiff's argument is untenable.

The Industrial Commission stated that the recovery of medical expenses by plaintiff was permissible because plaintiff's son, had he lived, would not have had a claim therefor; and allowance of medical and funeral expenses to plaintiff thus would not result in double recovery. Such was equally the case in *Christenbury*, however. The defendant there was the estate of the father of the minor decedents. Because parent-child immunity then obtained, the minor decedents there likewise would have had no claim for their medical expenses; and allowance of medical and funeral expenses to their mother would not have resulted in double recovery. The court nevertheless held that the claims had to be asserted under the wrongful death statute.

Pursuant to G.S. 28A-18-2(b)(1), (3), as interpreted and applied by this Court in *Christenbury*, the medical and funeral expenses which plaintiff incurred as a result of the death of his minor son were encompassed in the wrongful death award he obtained as administrator of the son's estate. The separate award of these expenses to him in his individual capacity is accordingly

Reversed.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. KEVIN REID KENNEDY

No. 8126SC1434

(Filed 21 September 1982)

Criminal Law § 80; Searches and Seizures § 32— intercepting incoming mail at prison facility—seizure of letter detailing robbery—motion to suppress properly denied

The trial court did not err in denying defendant's motion to suppress a letter he wrote to a prison inmate housed in a high security area which detailed defendant's having committed the crime of armed robbery. Defendant removed the letter from Fourth Amendment protection when he mailed it to an individual he knew to be a prison inmate since he had no reasonable expectation of privacy and since the officer's search and seizure of the letter was reasonable under the circumstances.

Judge WELLS dissents.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 23 October 1981 in Superior Court, MECKLENBURG County. Heard in Court of Appeals 31 August 1982.

After the denial of his motion to suppress, defendant pleaded guilty to armed robbery and appealed, pursuant to G.S. § 15A-979, to this court from a judgment imposing a prison sentence of seven years as a committed youthful offender.

The evidence, adduced from the hearing on the defendant's motion to suppress, the record and the trial judge's findings of fact, reveals the following: In February, 1981 the defendant wrote and mailed a letter to Cornelius Brislin, an inmate of the Pied-

mont Correctional Center, a prison unit of the North Carolina Department of Corrections in Salisbury, North Carolina. The letter arrived at the Salisbury post office and was taken to the prison's mail room by a prison employee. At the mail room the letter was opened, along with all other incoming mail, and inspected for contraband.

After the mail room inspection, the mail belonging to Brislin was delivered to the officer in charge of the "intensive management area." Acting according to routine procedure, the officer opened Brislin's letter and examined it page by page to check for any contraband attached to the pages or hidden around the seals or underneath the stamps. While examining the letter, the officer noticed the words "20 gauge shotgun loaded" at the top of one of the pages and proceeded to read the entire letter. The letter described in detail defendant's having committed the crime of armed robbery. Without delivering the letter to Brislin, the officer gave the letter to Officer William Peay of the Charlotte Police Department. Based on the letter, a warrant was obtained for the defendant's arrest. The defendant was taken into custody and he gave a statement admitting that the robbery had occurred as described in the letter.

The defendant was charged in a proper bill of indictment. Following arraignment, the defendant moved to suppress the letter and the fruits of the letter on grounds that the letter's discovery and use violated the Fourth Amendment of the United States Constitution. Judge Snepp denied the motion, the defendant pleaded guilty and received a sentence of seven years as a committed youthful offender.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr. for the State, appellee.

Thomas D. Windsor for the defendant, appellant.

HEDRICK, Judge.

The only issue which this court must decide in this case is whether the denial of defendant's motion to suppress was proper. The record discloses the defendant wrote and mailed a letter to a prison inmate then housed in a high security area. At the time the defendant wrote and mailed the letter in which he recounted

his criminal act, he was not in the custody of the State, but the letter in question was addressed to an inmate in a North Carolina prison unit as follows: "Cornelius Brislin, 977 Camp Road, Salisbury, N. C. 28144," the mailing address of the Piedmont Correctional Center.

As the defendant contends, the Fourth Amendment does, in some cases, prohibit search and seizure of mail. *Olmstead v. United States*, 277 U.S. 438 (1928). However, the Fourth Amendment protects only against unreasonable searches and seizures, *Terry v. Ohio*, 392 U.S. 1 (1968), and correctional authorities have a recognized right to make reasonable inspection of incoming mail to prison inmates, *Procunier v. Martinez*, 416 U.S. 396 (1974).

A key to determining the reasonableness of a search or seizure is the individual's expectation of privacy. For example, one who knowingly exposes an object to the public in his own home or office removes it from Fourth Amendment protection. *Katz v. United States*, 389 U.S. 347 (1967). Likewise in this case, and especially in light of the above stated law allowing prison officials to make reasonable inspections of inmates' incoming mail, the defendant removed the letter from Fourth Amendment protection when he mailed it to an individual he knew to be a prison inmate. The defendant not only sent the letter to a prison unit but placed the words "twenty gauge shotgun loaded" in clear view at the top of the fourth page. It was this phrase which caught the eye of the officer examining the prisoner's mail. These words along with a recently thwarted escape plan prompted the officer to read the entire letter. Therefore, not only did the defendant have no reasonable expectation of privacy, but also the officer's search and seizure of the letter was reasonable under the circumstances. He inadvertently uncovered the information in the process of examining the pages of the letter for contraband and read the letter only after detecting words that raised a reasonable suspicion of danger especially in a high security area which recently had discovered one escape plot.

We note that this is not an instance where a prisoner is complaining that his outgoing mail has been censored. The addressee has asserted no right nor made any complaint. This is a case where the author of a letter sent to an inmate in a penal institution is asserting that he had a protected reasonable expectation

of privacy under the Fourth Amendment. We hold that such an expectation of privacy is not warranted and cannot be recognized here. To the contrary, once the letter left the defendant's hand, headed for delivery to a prison unit, the defendant's expectation should at least have been that the letter would be opened and examined for contraband or any other noticeable characteristics which posed a threat to prison security. We find that the trial judge properly denied the motion to suppress.

Affirmed.

Judge ARNOLD concurs.

Judge WELLS dissents.

JOSEPH DANIEL GAY AND MARILYNN F. GAY v. REESE B. WALTER

No. 818SC126

(Filed 21 September 1982)

Automobiles and Other Vehicles § 88.5— instruction on violation of left turn statute improper

In an action arising from an automobile accident in which defendant's evidence tended to show that as defendant approached the intersection, plaintiff's car, which was parked at the curb in the right lane, suddenly turned left in front of defendant, and plaintiff's evidence tended to show that the driver of plaintiff's car was approaching the intersection in the right-hand lane, intending to turn left at the intersection, it was error for the trial court to instruct on G.S. § 20-153(b), the statute dealing with left turns at intersections.

APPEAL by plaintiffs from *Llewellyn, Judge*. Judgment entered 18 September 1980 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 September 1981. Reheard 14 September 1982.

Plaintiffs appealed from judgment entered on a jury verdict of contributory negligence in their action to recover for property damage and personal injuries caused by a collision between plaintiffs' and defendant's automobiles at a street intersection in the city of Kinston.

In our initial opinion, filed 3 November 1981 and reported at 58 N.C. App. 360, 283 S.E. 2d 797 (1981), we found no error in the trial. We allowed plaintiffs' petition to rehear.

White, Allen, Hooten, Hodges & Hines, P.A., by John M. Martin, for plaintiff-appellants.

Jeffress, Morris, Rochelle & Duke, P.A., by Thomas H. Morris, for defendant-appellee.

WELLS, Judge.

In their petition to rehear, plaintiffs contend that we erred in finding no error in the trial court's jury instructions on the application to G.S. 20-153(b) to the facts of this case. We agree with plaintiffs' argument and award a new trial. The evidence, as summarized in our previous opinion, showed that the collision between plaintiffs' and defendant's automobiles occurred on a two-lane street in Kinston, near an intersection. Both cars were going in the same direction. Plaintiffs' evidence tended to show that the driver of plaintiffs' car was approaching the intersection in the right-hand lane, intending to turn left at the intersection. Defendant's evidence tended to show that as defendant approached the intersection, plaintiffs' car, which was parked at the curb in the right lane, suddenly turned left in front of defendant and that defendant could not avoid colliding with plaintiffs' car. The sole issue we now address is whether under this evidence, an instruction on the requirements of G.S. 20-153(b) is appropriate.[1]

While subsection (a) of the Statute speaks in terms describing a portion of a roadway: "right-hand curb or edge", Subsection (b) speaks in terms of the "left-hand lane". The logical driver might expect another driver preparing to turn left at an intersec-

1. G.S. § 20-153. Turning at intersections.—(a) Right Turns.—Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.

(b) Left Turns.—The driver of a vehicle intending to turn left at any intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and, after entering the intersection, the left turn shall be made so as to leave the intersection in a lane lawfully available to traffic moving in such direction upon the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

tion on a two-lane street to approach the intersection in the portion of the roadway nearest the center line on the left, but this is not what the Statute says. The Statute as now worded, and as it apparently has been since 1955, makes no distinction between two-lane or more than two-lane roadways.

It was error for the trial court to give an instruction on the requirements of G.S. 20-153(b) in this case. For this error there must be a new trial. In all other respects, our previous opinion is affirmed.

New trial.

Chief Judge MORRIS and Judge WHICHARD concur.

SUSAN WOOD PIERCE v. ERVIN CRAIG PIERCE

No. 8118DC1237

(Filed 21 September 1982)

1. **Abatement § 3; Divorce and Alimony § 24.3; Judgments § 11— confession of judgment for child support—judgment binding—subsequent action to enforce separation agreement abated**

Where a judgment by confession was entered against defendant concerning child custody and support, it was error for the court not to abate a subsequent action for custody since the parties were bound by the judgment by confession until the court made some order for custody and since the same parties had the same cause of action pending. G.S. 1A-1, Rule 68.1.

2. **Divorce and Alimony § 27— child support action—award of attorney's fees—no finding of insufficient means**

In an action for child support, the trial court erred in entering an award of attorney's fees for plaintiff where the court did not find as a fact that the plaintiff did not have sufficient means to defray the expenses of counsel.

3. **Contempt of Court § 8— punishing summarily for contempt—error**

The court erred in punishing the defendant summarily for contempt since G.S. 5A-14 requires that before the court may punish a person summarily for contempt, the court must give the person notice of the charges and an opportunity to respond, and the record disclosed that neither was given to the defendant.

APPEAL by defendant from *Cecil, Judge*. Judgment entered 18 September 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 3 September 1982.

The parties to this dispute executed a separation agreement on 23 December 1980 under which the plaintiff received custody of the parties' minor child. The separation agreement also provided that the defendant would pay $55.00 per week to the plaintiff for the support of the child and that he would assume certain other obligations. On 30 December 1980 a judgment by confession was entered against the defendant under the terms of which the plaintiff received custody of the child and defendant was ordered to pay $55.00 per week to the plaintiff and he was ordered to assume the other obligations as provided in the separation agreement. On 28 May 1981 an order was issued to the defendant to show cause why he should not be held in contempt for violating the judgment by confession. On 28 May 1981 the plaintiff filed a civil action to enforce the separation agreement. She asked for custody of the child, attorney fees, and an equitable decree ordering the defendant to perform the separation agreement. In his answer the defendant moved to dismiss the complaint on the ground it failed to state a claim upon which relief can be granted.

The court held a hearing on 15 September 1981. The court on its own motion consolidated the civil action and the judgment by confession. It did not consider the contempt citation but found the defendant had not complied with the terms of the separation agreement. The court awarded custody of the child to the plaintiff. It made findings of fact as to the needs of the child and the separate estates of the parties and ordered the defendant to pay $280.00 per month for child support. The court also ordered the defendant to comply with the other provisions of the separation agreement and to pay $175.00 in attorney fees for the plaintiff.

After the hearing was completed, the court entered an order in which it found that the hearing was set for 1:30 p.m. on 15 September 1981 and the defendant did not appear in court until 1:55 p.m.; that the defendant did not offer any excuse for being late, which tardiness delayed and impeded the court. The court held the defendant in contempt and ordered him to forfeit $25.00 to Guilford County.

The defendant appealed.

Byerly and Byerly, by W. B. Byerly, Jr., for plaintiff appellee.

Wyatt, Early, Harris, Wheeler and Hauser, by A. Doyle Early, Jr., for defendant appellant.

WEBB, Judge.

[1] We hold it was error not to dismiss the action to enforce the separation agreement. A judgment by confession had been entered against the defendant pursuant to G.S. 1A-1, Rule 68.1. This gave the plaintiff a judgment on all issues raised in the complaint. *See Cromer v. Cromer*, 49 N.C. App. 403, 271 S.E. 2d 541 (1980), *rev'd on other grounds*, 303 N.C. 307, 278 S.E. 2d 518 (1981) and *Whitehead v. Whitehead*, 13 N.C. App. 393, 185 S.E. 2d 706 (1972). When the relief sought in an action has been granted, the action should be dismissed. *See In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978) and *Crew v. Thompson*, 266 N.C. 476, 146 S.E. 2d 471 (1966). The judgment by confession purported to grant custody of the child to the plaintiff. This judgment did not deprive the district court of jurisdiction to determine custody, *Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E. 2d 640 (1979), *cert. denied*, 298 N.C. 305, 259 S.E. 2d 918 (1979), but the parties, having agreed to it, were bound by its provisions until the court made some order for custody. *See Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). The judgment by confession placed the custody issue before the court so that it retained jurisdiction to determine custody. It was error not to abate the subsequent action for custody. *See* 1 Strong's N.C. Index 3d, *Abatement* § 3 (1976) and the cases cited therein for a discussion of the abatement of an action when the same parties have the same cause of action pending. The court upon remand may determine whether the defendant is in contempt of court for violating the judgment by confession.

[2] The defendant also assigns error to the award of attorney fees to the plaintiff. We believe this assignment of error has merit. The court did not find as a fact that the plaintiff did not have sufficient means to defray the expenses of counsel. It was error to award counsel fees without such a finding. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980).

[3] The defendant also assigns error to the court's finding him in contempt for being late to court. We believe this assignment of error has merit. The court punished the defendant summarily for contempt. G.S. 5A-14 requires that before the court may punish a person summarily for contempt, the court must give the person "summary notice of the charges and a summary opportunity to respond . . . ." The record discloses that no notice or opportunity to respond was given to the defendant. It was error to hold him in contempt.

We reverse and remand for an order consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIAM JACKSON WILSON

No. 8224SC134

(Filed 21 September 1982)

Appeal and Error § 45; Criminal Law §§ 159.1, 166— filing stenographic transcript of trial proceedings—dismissal for failure to follow rules

Defendant's appeal was subject to dismissal when he chose to file a stenographic transcript of the trial proceedings but violated the provisions of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure by failing to produce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions presented in defendant's brief.

APPEAL by defendant from *Howell, Judge*. Judgment entered 12 September 1981 in Superior Court, WATAUGA County. Heard in the Court of Appeals 14 September 1982.

Defendant was convicted of felonious breaking or entering and felonious larceny. From judgments entered on the verdicts, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Edwin D. Taylor, for defendant-appellant.

WELLS, Judge.

In his record on appeal, defendant chose to file a stenographic transcript of the trial proceedings. In his appeal, defendant has brought forth six assignments of error, at least five of which require a careful examination of the trial record. In violation of the provisions of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure, defendant did not reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions presented in defendant's brief. It is imperative that defendants using the stenographic transcript alternative allowed by Rule 9(c)(1) carefully follow the requirements of Rule 28(b)(4) in order that this Court not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task. We note that this omission is occurring with alarming frequency in appeals filed since the effective date of the Rule change allowing the use of stenographic transcripts. Such abuses, if allowed to continue, will significantly impede the work of this Court. Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

For defendant's failing to observe the requirements of Rule 9(c)(1) and Rule 28(b)(4), this appeal is

Dismissed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 AUGUST 1982

IN RE BRINDLE No. 8122DC1411	Davidson (79J9)	Affirmed
IN RE HARRIS No. 8112DC1054	Cumberland (81J162) (81J163)	Affirmed
MERRITT v. CP&L No. 819SC587	Person (80CVS281)	Affirmed
PRIDE v. CASARD FURNITURE No. 8210IC24	Industrial Commission (H-4669)	Affirmed
SPENCER v. ACME-McCRARY No. 8210IC20	Industrial Commission (G-9913)	Affirmed
STATE v. JOHNSON No. 815SC1401	New Hanover (81CRS2298)	No Error
STATE v. PORTLOW No. 8126SC1122	Mecklenburg (81CRS14089)	No Error
STATE v. WALSER No. 8122SC973	Davidson (80CRS11722) (80CRS11723)	No Error

FILED 7 SEPTEMBER 1982

CLONTZ v. CLONTZ No. 8225DC15	Burke (80CVD1209)	Affirmed
HALLAN v. HALLAN No. 8114DC607	Durham (80CVD2532)	Affirmed
IN RE BRADY No. 8211SC19	Johnston (81CVS1106)	Affirmed
IN RE FARISH No. 8211SC69	Johnston (79CVS1550)	No Error
IN RE KNIGHT No. 8228DC71	Buncombe (81J1)	Affirmed
IN RE TUCKER No. 8129DC993	Henderson (78CVD796) (78CVD797) (78CVD798)	Affirmed

LOCKAMY v. BOLTON No. 814DC1153	Sampson (80CVD137)	Affirmed in part, Reversed in part
McCAULEY v. AUSTIN No. 8120SC1151	Union (78CVS578)	No Error
OWENS v. INSURANCE CO. OF NORTH AMERICA, INC. No. 8128DC1412	Buncombe (79CVD1367)	Affirmed
PRESCOTT v. PRESCOTT No. 8121DC1011	Forsyth (78CVD2962)	Reversed & Remanded
RICE v. ALLIED CHEMICAL CORP. No. 8119SC1335	Randolph (81CVS347)	Affirmed
STATE v. BREWINGTON No. 818SC1213	Wayne (81CRS4024)	No Error
STATE v. FOSTER No. 8226SC92	Mecklenburg (81CRS28962)	No Error
STATE v. HAITHCOX No. 8119SC1229	Randolph (80CRS9175)	No Error
STATE v. McCLOUD No. 825SC81	New Hanover (81CRS8688) (81CRS8689)	No Error
STATE v. McMILLIAN No. 8213SC30	Brunswick (81CRS332)	No Error
STATE v. MYRICK No. 8225SC16	Catawba (81CRS824)	No Error
STATE v. STONE No. 8116SC1291	Robeson (81CRS3342)	Affirmed
STATE v. SUMMEY No. 8127SC1160	Gaston (81CRS6507)	No Error
STATE v. TILLMAN No. 8112SC1283	Cumberland (80CRS40713)	No Error
STATE v. WILLIAMS No. 811SC1150	Currituck (81CRS544)	No Error
TATE v. GARDNER No. 8118DC891	Guilford (80CVD796)	Appeal Dismissed
TURNER v. BROOKS No. 8121SC985	Forsyth (79CVS2559)	No Error

FILED 21 SEPTEMBER 1982

IN RE DAVIS No. 8222DC36	Davie (81-J-19)	Reversed and Remanded
MITCHELL v. MITCHELL No. 8110DC1258	Wake (81CVD3801)	Affirmed
SIBBETT v. SIBBETT No. 8216DC118	Robeson (81CVD603)	Affirmed
STATE v. ATKINS No. 8211SC233	Harnett (81CRS328) (81CRS329)	No Error
STATE v. BIVINS No. 8227SC117	Gaston (81CRS19711)	Dismissed
STATE v. BLACKMON No. 8226SC104	Mecklenburg (81CRS42546)	No Error
STATE v. CLEMMONS No. 824SC77	Onslow (81CRS5775)	No Error
STATE v. GRIFFIN No. 8226SC44	Mecklenburg (81CRS42547)	No Error
STATE v. HILL No. 8229DC121	Rutherford (81J48)	Affirmed
STATE v. HYATT No. 8230SC25	Jackson (77CRS3257)	Affirmed
STATE v. JONES No. 8220SC126	Union (81CRS5630)	No Error
STATE v. LAWTER No. 8229SC177	Rutherford (81CRS1823)	No Error
STATE v. MAY No. 8215SC123	Alamance (78CRS15147)	Affirmed
STATE v. RICHARDSON No. 824SC85	Onslow (81CRS4873) (81CRS4874)	No Error
STATE v. WILSON No. 8210SC192	Wake (81CRS38643)	No Error
STATE v. WOOLARD No. 812SC1435	Beaufort (81CRS3044) (81CRS3045)	No Error

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

ABATEMENT

§ 3. Pendency of Prior Action

Where a judgment by confession was entered against defendant concerning child custody and support, it was error for the court not to abate a subsequent action for custody. *Pierce v. Pierce*, 815.

ADMINISTRATIVE LAW

§ 3. Authority of Administrative Agencies

Plaintiffs failed to state a claim for relief in an action involving an "equalizing formula" adopted by the Social Services Commission pursuant to G.S. 108A-92 for distribution of reserved public assistance funds to counties according to their needs. *Alamance County v. Dept. of Human Resources*, 748.

ADOPTION

§ 2.1. Consent to Adoption

In an action in which the adoptive father moved to dismiss the adoption proceeding on the grounds that he and his wife had permanently separated, the trial court properly denied the natural mother's motion to intervene. *In re Kasim*, 36.

Where a natural mother gave her consent for a couple to adopt her child and, after an interlocutory decree granting tentative approval for the adoption of the child was filed, one spouse withdrew from the adoption proceeding, the withdrawal of such petitioner from the adoption petition did not, in and of itself, require dismissal of the proceeding. *Ibid.*

ANIMALS

§ 8. Ordinances Relating to Animals

In an action where plaintiff town sought a permanent injunction "directing defendant to remove all animals other than specified domestic house pets from her premises" pursuant to an ordinance, where defendant demonstrated the facts necessary to make the legal determination that her animals (two goats and a pony) were "house pets" within the meaning of the ordinance and plaintiff failed to show contrary material facts, the trial judge properly granted defendant's motion for summary judgment. *Town of Atlantic Beach v. Young*, 597.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

In an action stemming from objections to the appointment of an administratrix of an estate, an appeal from an order of the trial court setting a trial by jury of an issue of fact raised by the "pleadings" and evidence before the clerk was premature. *In re Collins*, 568.

Order denying a stay of an order of the Commissioner of Motor Vehicles which revoked an additional Jeep franchise affected a substantial right and was immediately appealable. *American Motors Sales Corp. v. Peters*, 684.

§ 6.6. Appeals Based on Motions to Dismiss

An immediate appeal lies from the trial court's refusal to dismiss a suit against the State on the ground of governmental immunity. *In re Huyck Corp. v. Mangum, Inc.*, 532.

APPEAL AND ERROR—Continued

§ 6.8. Appeals on Motions for Nonsuit or Directed Verdict

The denial of defendants' motion for directed verdict was not immediately appealable. *Sizemore v. Raxter*, 236.

§ 14. Appeal and Appeal Entries

Where the record reveals that orders from which plaintiff attempts to appeal were entered over one month before notice of appeal was given, under G.S. § 1-279(c) the appellate court obtained no jurisdiction of the appeal since notice of appeal was not given within 10 days after the entry of judgment. *Woodworth v. Woodworth*, 237.

§ 16. Powers of Trial Court after Appeal

Plaintiff's attempted appeal from an interlocutory order in which the court delayed ruling on plaintiff's motion for an assignment of wages was a nullity and did not deprive the trial court of jurisdiction to hear plaintiff's motion. *Harris v. Harris*, 175.

§ 45. Contents of Brief

Defendant's appeal was subject to dismissal when he chose to file a stenographic transcript of the trial proceedings but violated the provisions of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure by failing to produce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions presented in defendant's brief. *S. v. Wilson*, 818.

§ 68. Law of the Case

The decision of the Supreme Court on a prior appeal became the law of the case on the issue of whether plaintiffs owned submerged land. *Development Corp. v. James*, 506.

ARREST AND BAIL

§ 11. Liabilities on Bail Bonds

The liability of the sureties upon an appearance bond terminated upon entry of judgment in the superior court. *S. v. Corl*, 107.

ARSON

§ 4.1. Sufficiency of Evidence

The State's circumstantial evidence was sufficient for the jury in a prosecution for the burning of an uninhabited dwelling. *S. v. Brooks*, 407.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

In an action based upon the alleged negligence of an attorney in failing to file a financing statement or otherwise perfect a security interest, the trial court erred in dismissing plaintiff's action against the attorney for the reason that the statute of limitations had expired. *Sunbow Industries, Inc. v. London*, 751.

Summary judgment was properly entered for defendant attorneys in a malpractice action involving a "wrap-around" mortgage on a motel. *Quality Inns v. Booth, Fish, Simpson, Harrison and Hall*, 1.

ATTORNEYS AT LAW—Continued

§ 7.5. Allowance of Fees as Part of Costs

The decision whether to award counsel fees to defendant trustee to be paid out of the trust res in an action to establish that the trust was passive rested within the sound discretion of the trial court. *Riddle v. Riddle*, 594.

AUTOMOBILES AND OTHER VEHICLES

§ 3.5. Instructions in Prosecution for Driving Without Valid License

Trial court's instructions sufficiently apprised the jury that the mailing to defendant of notice of the permanent revocation of his license created only a rebuttable presumption that he received the notice and acquired knowledge of the license revocation. *S. v. Sellers*, 43.

§ 5. Sale of Vehicles Generally

The granting of a franchise in violation of G.S. 20-305(5) would be an unfair act or practice which the Commissioner of Motor Vehicles has the power to prevent under G.S. 20-301. *American Motors Sales Corp. v. Peters*, 684.

The superior court did not err in failing to stay the Commissioner of Motor Vehicles' order revoking an agreement granting an additional Jeep franchise in a certain trade area pursuant to G.S. 20-305(5). *Ibid.*

§ 45. Competency of Evidence Generally

The trial court erred in not allowing examination of plaintiff concerning statements in his verified complaint as to the speed of the vehicle in which he was riding. *Gore v. Williams*, 222.

§ 45.6. Photographs

In a personal injury action occurring before 1 October 1981, two photographs of the intersection at which an accident occurred were admissible for illustrative purposes even though they were taken at a different time of day and under different lighting conditions than the event they illustrated. *Gay v. Walter*, 360.

§ 46. Opinion Testimony as to Speed

A police officer who followed defendants' vehicle for three miles could properly state his opinion as to the speed at which he was traveling when trying to overtake defendants' vehicle. *S. v. Long*, 467.

In a negligence action rising from an automobile collision, the trial court erred in refusing to allow a witness's opinion as to the speed of one defendant's vehicle. *Gore v. Williams*, 222.

§ 47.3. Nonsuit on Basis of Physical Facts

In an action to recover for injuries to a truck driver when he was struck by defendant's automobile as he swung down from behind his tractor cab beside the cab door, the physical evidence, supported by testimony of disinterested witnesses, controlled over plaintiff's conflicting testimony and established that defendant was not negligent and that plaintiff was contributorily negligent as a matter of law. *Helvy v. Sweat*, 197.

§ 56.2. Rear-End Collisions Caused by Defendant's Stopping on Highway

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in stopping partially in the intestate's lane of travel at a crossover between the northbound and southbound lanes of a four-lane highway. *Horne v. Trivette*, 77.

AUTOMOBILES AND OTHER VEHICLES—Continued

§ 88.5. Contributory Negligence in Turning

In a personal injury case where defendant's evidence raised the possibility that plaintiff violated G.S. 20-153(b), which required plaintiff to be in the most left-hand lane of the street, it was not error for the trial judge to instruct on that statute as the trial judge has the duty to instruct the jury on the legal issues raised by the evidence. *Gay v. Walter*, 360.

In an action arising from an automobile accident, it was error for the trial court to instruct on G.S. 20-153(b), the statute dealing with left turns at intersections. *Gay v. Walter*, 813.

§ 90.7. Instructions on Sudden Emergency

The evidence was sufficient to justify the court's instructions on sudden emergency in an action to recover for the death of plaintiff's intestate who was killed when his truck struck the rear of defendant's automobile which had stopped partially in the intestate's lane of travel at a crossover. *Horne v. Trivette*, 77.

§ 95.2. Negligence of Driver Imputed to Passenger; Driver under Control of Passenger

In an action in which the parties stipulated that the third-party defendant driver was acting as the agent of plaintiff at the time of the collision in question, the trial court did not err in submitting an issue as to the negligence of the third-party defendant after the court had dismissed the original defendant's third-party claim against him. *Jones v. Collins*, 753.

§ 114. Instructions in Manslaughter Case

In a prosecution for involuntary manslaughter, the trial court erred in instructing that the jury should consider whether defendant violated G.S. 20-139 by driving under the influence of drugs. *S. v. Atkins*, 146.

§ 126.5. Competency of Statements by Defendant in Driving under the Influence Case

Statements made by defendant in refusing to take a breathalyzer test were not the result of custodial interrogation requiring the Miranda warnings. *S. v. Sellers*, 43.

§ 131. Warrant for Hit and Run Driving

A warrant charging that defendant unlawfully failed to stop at the scene of an accident in which the vehicle driven by defendant was involved was sufficient to charge a crime under G.S. 20-166(b). *S. v. Lucas*, 141.

AVIATION

§ 1. Generally

Plaintiff failed to show an avigation easement over the property in question by prescription. *City of Statesville v. Credit and Loan Co.*, 727.

BANKS AND BANKING

§ 11.2. Liability for Payment of Forged Checks

In an action arising from the payment by bank of thirty-seven forged checks, drawn against the account of plaintiff over a fourteen-month period, the trial court did not err in entering summary judgment in favor of the bank. *Ind-Com Electric Co. v. First Union*, 215.

BROKERS AND FACTORS

§ 6. Right to Commissions

In an action brought by plaintiff real estate broker to recover a commission for the sale of a motel, sale of 100% of the stock in defendant motel constituted a sale by defendant corporation of the property in question for the purposes of determining whether plaintiff was entitled to a commission under an exclusive listing agreement. *Shortt v. Knob City Investment Co.*, 123.

In an action for a real estate commission, there was evidence to support the judge's findings that a four unit apartment house which was included in the sale of a motel was included within the listing agreement. *Ibid.*

In an action for a real estate commission where the trial judge found that plaintiff was entitled to recover a commission from defendant, the judge erred in denying plaintiff prejudgment interest. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

The trial court did not err in allowing a co-defendant's girlfriend to testify as to statements made by the co-defendant in defendant's presence since the statements incriminated both defendant and co-defendant, defendant was in a position to hear and understand the co-defendant's statement, and the defendant had the opportunity to speak but did not deny the co-defendant's statement. *S. v. Whitley*, 539.

§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally

In a prosecution for breaking or entering, where the main evidence upon which the State relies is fingerprint evidence, there is no rule that when the sole occupant of a house has testified that he or she does not know the defendant and to his or her knowledge the defendant has never been in his or her home, the State must then put on evidence from every person who might have brought a visitor to the house that he or she has not invited the defendant to the house. *S. v. Berry*, 355.

§ 7. Instructions on Lesser Included Offenses

The trial court did not err in failing to submit to the jury misdemeanor breaking or entering in addition to felonious breaking or entering. *S. v. Berry*, 355.

CARRIERS

§ 2.7. Granting of Operating Authority; Sufficiency of Findings

Findings by the Utilities Commission supported its granting of a permit to the applicant to act as a contract carrier of bank documents and other commercial papers within this State. *State ex rel. Utilities Comm. v. Pony Express Couriers*, 218.

CEMETERIES

§ 3. Desecration of Graves

The State's evidence was sufficient for the jury in a prosecution for being an accessory after the fact to crimes of disturbing graves. *S. v. Lewis*, 348.

An evidential allegation in an indictment for being an accessory after the fact to the crime of disturbing graves was mere surplusage and should be disregarded. *Ibid.*

CONSPIRACY

§ 2.1. Civil Conspiracy; Sufficiency of Evidence

In an action by two podiatrists stemming from the denial of hospital privileges, there was insufficient evidence beyond mere suspicion or conjecture for the jury to infer that two orthopedists agreed to boycott the hospitals from which the podiatrists' privileges were denied causing plaintiffs' privileges therein to be terminated. *Cameron v. New Hanover Memorial Hospital*, 414.

§ 6. Criminal Conspiracy; Sufficiency of Evidence

Evidence at trial was sufficient for the jury to infer "a mutual, implied understanding" between defendant and another person "to do an unlawful act." *S. v. Christopher*, 788.

§ 7. Instructions

In a prosecution for conspiracy to sell and deliver over 50 pounds of marijuana, the trial judge erred in instructing that defendant could be convicted if he conspired only with an undercover agent to sell and deliver marijuana. *S. v. Hammette*, 587.

The trial court correctly applied the law of conspiracy to the evidence presented on the element of conspiracy which requires that the defendant and his co-conspirator intended at the time their agreement to commit larceny was made that it would be carried out. *S. v. Christopher*, 788.

CONSTITUTIONAL LAW

§ 48. Effective Assistance of Counsel

There was no error in the denial of defendant's request to replace his attorney. *S. v. Yancey*, 52.

§ 66. Presence of Defendant at Proceedings

In a prosecution for manufacture of marijuana and felonious possession of marijuana, defendant's counsel had the power to waive the defendant's presence at a suppression hearing. *S. v. Piland*, 95.

§ 67. Identity of Informant

Defendants' due process rights were not violated by the trial court's denial of their request for a recess or a continuance for the purpose of interviewing a confidential informant whose name had been furnished to them immediately prior to trial. *S. v. Tate*, 494.

§ 68. Right to Call Witnesses and Present Evidence

Defendant's constitutional right to present witnesses to establish his defense was violated by the prosecution's intimidation of defendant's alibi witness which resulted in the witness returning to the stand and repudiating his earlier testimony exculpating defendant. *S. v. Mackey*, 385.

§ 71. Inspection of Notes Used or Prepared by Witnesses

Defendant had no right to inspect a police officer's preliminary report which was not used to refresh his recollection at trial, but the court should have allowed defense counsel to examine pages of a supplemental report used by the officer to refresh his recollection. *S. v. Tate*, 494.

CONSUMER CREDIT

§ 1. Generally

Plaintiffs' claim to recover allegedly unauthorized default charges assessed by defendant bank against plaintiffs' installment note account in violation of the Retail Installment Sales Act was properly dismissed. *Steed v. First Union National Bank*, 189.

CONTEMPT OF COURT

§ 7. Punishment for Contempt

The court erred in punishing the defendant summarily for contempt without notice of the charges and an opportunity to respond. *Pierce v. Pierce*, 815.

CONTRACTS

§ 6. Contracts Against Public Policy

A note and deed of trust signed by the seventy-year-old respondent were void as against public policy where there was an implied agreement that if respondent signed the documents, there would be no further prosecution on criminal charges against her son for two worthless checks given by the son to the beneficiary. *Frye v. Sovine*, 731.

§ 16. Conditions

There was no condition precedent to defendants' obligation to repay a loan. *Stewart v. Maranville*, 205.

§ 16.1. Time of Performance

In an action in which plaintiff alleged he loaned defendant $5,000 pursuant to a verbal agreement in 1971 and another $5,000 pursuant to a verbal agreement in 1973, the trial court erred in dismissing plaintiff's complaint as being barred by the statute of limitations. *Rawls v. Lampert*, 399.

§ 27.1. Sufficiency of Evidence of Existence of Contract

Summary judgment was properly entered for plaintiff in an action to recover funds loaned to defendants for the purpose of preventing foreclosure of defendants' property. *Stewart v. Maranville*, 205.

§ 34. Interference with Contractual Rights; Sufficiency of Evidence

In an action by two podiatrists against two orthopedists, plaintiffs failed to prove that the orthopedists' actions relating to the podiatrists losing their hospital privileges constituted a wrongful interference with their business relations, contractual rights, and prospective advantage. *Cameron v. New Hanover Memorial Hospital*, 414.

CORPORATIONS

§ 12. Transactions Between Corporation and Its Officers or Agents

In an action by a minority stockholder against a majority stockholder, the trial court erred in finding as a matter of law "no actionable breach of fiduciary responsibility" on the part of the majority stockholder. *Meiselman v. Meiselman*, 758.

§ 13. Liability of Officers for Mismanagement, Fraud, and the Like

Considering the range of options available to our courts under G.S. 55-125.1, in an action by a minority stockholder of a closely held corporation, the trial court

misapplied the applicable law and abused its discretion by concluding that relief, other than dissolution, under G.S. 55-125.1 was not reasonably necessary for plaintiff's protection. *Meiselman v. Meiselman*, 758.

§ 18.1. Transfer of Stock; Actions Against Stockholders

The trial court erred in directing the executor of an estate to convey the deceased's stock to the corporate plaintiff pursuant to a stock purchase agreement where there was an issue as to whether the book value of the corporation, upon which the price of the stock was based, was properly determined according to the agreement. *Miller Machine Co. v. Miller*, 300.

In an action arising from a stock purchase agreement, failure to tender payment within the time specified in the agreement was not a material breach of the contract. *Ibid.*

In an action which evolved from a stock purchase agreement, requesting specific performance of the agreement was appropriate even though plaintiffs asserted ownership to a part of the stock in a separate action since it is not inconsistent to determine first the ownership of the stock before tendering the consideration for it. *Ibid.*

COURTS

§ 9.4. Review of Rulings of Another Judge; Summary Judgment

In actions between a builder and property owners where a superior court judge denied the builder's motion to dismiss the property owner's complaint while treating it as a motion for summary judgment, it was error for a subsequent judge to reconsider this matter and grant summary judgment in favor of the builder. *Stines v. Satterwhite*, 608.

Each defendant is entitled to have his motions considered and ruled upon separately; therefore, it was not error for one judge to grant one defendant's motion for summary judgment after another judge had denied another defendant's motion for summary judgment. *Urbano v. Days Inn*, 795.

CRIME AGAINST NATURE

§ 2. Indictment

Defendant's motion for appropriate relief from his conviction of crime against nature on the ground that he was indicted for a first degree sexual offense and crime against nature is not a lesser included offense thereof is denied. *S. v. Barrett*, 515.

CRIMINAL LAW

§ 11. Accessories after the Fact

Defendant was not prejudiced by the trial court's erroneous instruction that defendant would be guilty of accessory after the fact to the crime of disturbing a grave if he assisted the perpetrators in attempting to escape detection "by accepting part of the proceeds of the crime of disturbing a grave." *S. v. Lewis*, 348.

§ 33. Facts Relevant to Issues in General

The making of an offer to compromise may be considered as substantive evidence of guilt if the offer was made by the defendant, at his request, or with his authorization. *S. v. Brewington*, 650.

CRIMINAL LAW—Continued

§ 42.1. Articles Found at Crime Scene

Two human skulls allegedly taken from graves were properly admitted in a prosecution for accessory after the fact to crimes of disturbing graves. *S. v. Lewis*, 348.

§ 43.4. Inflammatory Photographs

Defendants were not prejudiced by the admission of three irrelevant photographs depicting minor cuts inflicted on a rape victim by a third party. *S. v. Wilhite*, 654.

§ 43.5. Admissibility of Sound Motion Pictures or Video Tapes

A television news film was properly admitted to illustrate a sheriff's testimony in a prosecution for accessory after the fact to crimes of disturbing graves. *S. v. Lewis*, 348.

§ 46.1. Competency of Evidence of Flight

An officer was properly permitted to testify that after being stopped, defendants jumped out of their vehicle and attempted to run away. *S. v. Long*, 467.

§ 50.1. Opinion Testimony by Expert

The trial court did not err in refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. *S. v. Fox*, 231.

A vehicle body repairman was properly permitted to state his opinion that he could tell that there had just been an accident because there were fresh paint chips on a dented automobile fender. *S. v. Young*, 83.

§ 50.2. Opinion Testimony by Nonexpert

An SBI agent was properly permitted to testify as to the worldwide transmission capabilities of an amateur radio found in a truck hauling marijuana. *S. v. Long*, 467.

§ 60.5. Sufficiency of Fingerprint Evidence

In a prosecution for breaking or entering, where the main evidence upon which the State relies is fingerprint evidence, there is no rule that when the sole occupant of a house has testified that he or she does not know the defendant and to his or her knowledge the defendant has never been in his or her home, the State must then put on evidence from every person who might have brought a visitor to the house that he or she has not invited the defendant to the house. *S. v. Berry*, 355.

§ 64. Evidence as to Intoxication

The trial court did not abuse its discretion in finding that a hospital had complied with an order in which the hospital was asked to determine, in part, if defendant's body contained a hallucinogenic drug. *S. v. McRae*, 225.

§ 66.3. Pretrial Lineups

The trial court did not err in denying defendant's motion to suppress the identification testimony of a witness and in denying defendant's motion for a lineup. *S. v. Yancey*, 52.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification

The trial court's findings were sufficient to support its conclusion that a rape victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification. *S. v. Young*, 83.

CRIMINAL LAW—Continued

§ 71. Shorthand Statement of Fact

A witness's testimony that paint chips he observed on a car bumper were "fresh" was competent as a shorthand statement of fact. *S. v. Young*, 83.

§ 73. Hearsay Testimony

A witness's testimony as to the time a store closed based upon his reading of a coded disk from an automatic time-lock device attached to the door of the store did not violate the hearsay rule. *S. v. Lang*, 117.

§ 75.7. Necessity for Miranda Warnings; Custodial Interrogation

Routine questions posed to defendant by the arresting officer asking him his name, address, date of birth, height, weight, and place of employment did not constitute the type of interrogation required to be preceded by the Miranda warnings although defendant's address was relevant to a charge against him of driving while his license was permanently revoked. *S. v. Sellers*, 43.

Statements made by defendant in refusing to take a breathalyzer test were not the result of custodial interrogation requiring the Miranda warnings. *Ibid.*

Where an officer told defendant that he needed him to sign a waiver of rights form in order to question him about a break-in, and the officer further informed defendant of the presence of his fingerprints on stolen merchandise, the officer simply gave defendant the minimal information necessary for him to make an intelligent waiver and subsequent unsolicited statements by defendant were properly admitted. *S. v. Crawford*, 160.

§ 75.10. Waiver of Constitutional Rights Generally

The trial court properly admitted defendant's incriminating statement made during police interrogation after defendant had signed a waiver of rights form. *S. v. Mackey*, 385.

§ 77.1. Admissions of Defendant

The trial court did not err in allowing a co-defendant's girlfriend to testify as to statements made by the co-defendant in defendant's presence since the statements incriminated both defendant and co-defendant, defendant was in a position to hear and understand the co-defendant's statement, and the defendant had the opportunity to speak but did not deny the co-defendant's statement. *S. v. Whitley*, 539.

§ 80. Books, Records and Private Writings

An insurance company document containing a statement by defendant that his car had been stolen on the day of the alleged crimes was not admissible under the business entry exception to the hearsay rule. *S. v. Young*, 83.

The trial court did not err in denying defendant's motion to suppress a letter he wrote to a prison inmate housed in a high security area which detailed defendant's having committed the crime of armed robbery. *S. v. Kennedy*, 810.

§ 80.2. Inspection of Private Writings

Defendant had no right to inspect a police officer's preliminary report which was not used to refresh his recollection at trial, but the court should have allowed defense counsel to examine pages of a supplemental report used by the officer to refresh his recollection. *S. v. Tate*, 494.

CRIMINAL LAW—Continued

§ 85.2. State's Character Evidence Relating to Defendant

In a prosecution for second degree murder where two State's witnesses were asked whether they knew defendant's character and reputation in the community, it was not necessary to limit the question to a particular community. *S. v. Caudle*, 89.

The trial court did not err in admitting the statements of a witness showing specific threats and actions by defendant against her and her family. *Ibid.*

§ 86.1. Impeachment of Defendant

Where a witness for the State testified that she had seen the defendant in court on Monday, defendant testified that he had not been in court on Monday, and after defendant rested, the State called a deputy sheriff who testified he had brought the defendant to the courtroom on Monday, the court did not err in failing to allow the defendant to put on evidence to show he was not in the courtroom and to contradict the testimony of the deputy sheriff. *S. v. Yancey*, 52.

§ 91.6. Continuance Because Evidence not Provided by State

Defendants' due process rights were not violated by the trial court's denial of their request for a recess or a continuance for the purpose of interviewing a confidential informant whose name had been furnished to them immediately prior to trial. *S. v. Tate*, 494.

§ 92.1. Consolidation of Charges Against Multiple Defendants

The defenses of defendant and his two codefendants were not antagonistic so as to require separate trials because defendant testified at the trial and the two codefendants did not testify. *S. v. Wilhite*, 654.

§ 102.3. Cure of Impropriety in Jury Argument

Impropriety in the district attorney's argument outside the record that a witness had seen defendant sell marijuana to a third person was cured by the trial court's actions. *S. v. Paul*, 723.

§ 102.5. Improper Questions in Cross-Examination of Witness

Although the trial judge erred in overruling an objection to a question of a defense witness, the defendant did not move for a mistrial on the basis of the question, and the question did not reach the level of gross impropriety or the level of inflammatory impact which would require an award of a new trial. *S. v. Proctor*, 631.

§ 102.6. Particular Comments in Argument to Jury

The prosecutor's jury argument that the absence of resistance by the prosecutrix to an act of sexual intercourse was not exculpatory of defendant since defendant might have murdered her had she resisted was not improper. *S. v. Young*, 83.

§ 111.1. Particular Miscellaneous Instructions

Trial court's statement to prospective jurors that defendants were charged with "conspiracy and trafficking in marijuana" met the statutory requirement that the judge briefly inform prospective jurors of the charges against each defendant. *S. v. Long*, 467.

Any prejudice in the court's instruction prior to trial that one defendant was also charged with two other crimes for which he was not on trial was cured when the trial court removed those counts and instructed the jury not to consider them. *Ibid.*

CRIMINAL LAW—Continued

The trial court did not err in reading verbatim, at the beginning of the charge, two indictments against defendant. *S. v. Whitley*, 539.

§ 113.9. Cure of Misstatement in Instructions

Although the trial court erred in stating in his summary of the evidence to the jury that the vehicle containing stolen merchandise was owned by an occupant of the same residence of defendant, the error was cured after defendant made a timely objection and the court immediately corrected its instruction and told the jury to disregard the court's recollection. *S. v. Crawford*, 160.

§ 115.1 Instructions on Lesser Degrees of Crime

In a prosecution for kidnapping and felonious larceny, the trial judge properly failed to instruct on forcible trespass and unauthorized use of a motor vehicle. *S. v. McRae*, 225.

§ 116. Charge on Failure of Defendant to Testify

The trial court did not err in failing to instruct the jury regarding defendant's failure to testify absent a special request for such an instruction. *S. v. Brooks*, 407.

§ 118. Charge on Contentions of the Parties

The trial court erred in failing to state defendant's contentions after stating the contentions of the State and a codefendant. *S. v. Tate*, 494.

§ 121. Instructions on Defense of Entrapment

The trial court was not required to instruct on the defense of entrapment in the final mandate to the jury. *S. v. Tate*, 494.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

The trial court did not coerce guilty verdicts by twice requiring the jury to continue deliberations after it had reported an inability to agree. *S. v. Long*, 467.

The trial judge did not coerce a guilty verdict where the foreman reported that the jury was unanimous on one count but still divided on the other, the judge instructed the jury to have a short conference about whether an opportunity to deliberate further would be of help to them, and the jury announced shortly thereafter that they had reached a verdict on the second count. *S. v. Paul*, 723.

§ 126.3. Acceptance of Verdict

G.S. 15A-1237(b), requiring that a verdict be returned by the jury in open court, was not violated when the trial judge took the verdict sheet from the jury at the door of the jury room after being informed that they had reached a verdict and then read the verdict in open court. *S. v. Caudle*, 89.

§ 131.2. New Trial for Newly Discovered Evidence; Insufficient Showing

Defendants were not entitled to a new trial on the basis of newly discovered evidence which merely corroborated their own trial testimony. *S. v. Long*, 467.

§ 138. Severity of Sentence; Fair Sentencing Act

The trial court did not abuse its discretion in failing to reduce the term of imprisonment imposed for armed robbery after it deleted one of the aggravating factors it had found. *S. v. Davis*, 330.

The trial judge is required to set out in the judgment only the aggravating and mitigating factors which he found to be supported by a preponderance of the evidence. *Ibid.*

CRIMINAL LAW—Continued

§ 138.1. More Lenient Sentence to Codefendant

The trial court did not abuse its discretion in imposing harsher punishments upon defendant for being an accessory after the fact to the crime of disturbing graves than that imposed upon the actual perpetrators. *S. v. Lewis*, 348.

§ 138.2. Cruel and Unusual Punishment

Minimum sentences of sixteen years and fines of $200,000 imposed upon defendants for trafficking in more than 10,000 pounds of marijuana were not cruel and unusual punishment. *S. v. Long*, 467.

§ 143.2. Probation Revocation Hearing

There was no merit to defendant's contention that she received inadequate notice and hearing concerning revocation of her probation. *S. v. Coltrane*, 210.

In a prosecution for a probation violation where defendant was alleged to have willfully violated the terms of her probation by failing to secure employment although employment was available, there was no merit to defendant's contentions that a 28 September 1981 order was invalid because defendant did not have the opportunity to present evidence and qualify and examine witnesses. *Ibid.*

§ 143.6. Findings Concerning Probation Violation

Evidence was sufficient to support the trial judge's finding that defendant willfully and without lawful excuse violated a condition of his probation by refusing to attend and complete a treatment program. *S. v. Lucas*, 141.

§ 144. Modification of Judgment in Trial Court

The trial court had the authority during the session to change a judgment in an armed robbery case by deleting one of its findings with respect to aggravation even though notice of appeal had been entered by defendant. *S. v. Davis*, 330.

§ 146.4. Appeal of Constitutional Questions

The constitutionality of the crime against nature statute was not properly presented. *S. v. Barrett*, 515.

§ 158.1. No Consideration of Matters Outside Record

The admissibility of a photograph could not be determined on appeal where it was not included in the record on appeal as required by App. R. 9(b)(3). *S. v. Long*, 467.

§ 159.1. Transcript of Evidence

Defendant's appeal was subject to dismissal when he chose to file a stenographic transcript of the trial proceedings but violated the provisions of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure by failing to produce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions presented in defendant's brief. *S. v. Wilson*, 818.

§ 169.6. Harmless and Prejudicial Error in Exclusion of Evidence

The exclusion of testimony will not be held prejudicial where the record fails to show what the excluded testimony would have been. *S. v. Long*, 467.

When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. *S. v. Wilhite; S. v. Rankin; S. v. Rankin*, 654.

CRIMINAL LAW—Continued

§ 171.1. Error Relating to One Count Where Only One Sentence Is Imposed

Although the court vacated a verdict on a receiving charge as a result of error in defendant's trial, the judgment appealed from was not disturbed since the trial court consolidated the conspiracy and receiving charges for purposes of judgment and imposed a sentence which was within the parameters of the punishment authorized for the crime of conspiracy to commit larceny. *S. v. Christopher*, 788.

DAMAGES

§ 6. Special Damages

In an action concerning a breach of warranty, the trial court properly failed to instruct on incidental and consequential damages where the record contained no competent evidence which sustained the allegations asserted in the third-party defendant's counterclaim. *Piedmont Plastics v. Mize Co.*, 135.

§ 11.2. Circumstances Where Punitive Damages Inappropriate

There can be no recovery for punitive damages against the personal representative of the deceased wrongdoer. *Thorpe v. Wilson*, 292.

DEATH

§ 7. Damages for Wrongful Death

In a wrongful death action arising from a school bus accident in which plaintiff's son was killed, the Industrial Commission erred in awarding plaintiff, as administrator of his son's estate, a wrongful death recovery of $30,000 and in additionally awarding him, individually, the medical and funeral expenses he incurred as the result of his son's death. *Boulton v. Onslow Co. Bd. of Education*, 807.

§ 7.4. Competency of Evidence of Damages

The trial court in a wrongful death case properly permitted an expert in economics to testify as to the present monetary value of the future net income plaintiff's intestate could have earned had she not been killed and the present monetary value of the household services lost to the intestate's parents. *Thorpe v. Wilson*, 292.

§ 7.7. Instructions

It is reversible error for the court to instruct the jury that damages awarded in a wrongful death action are exempt from federal and state income taxes. *Scallon v. Hooper*, 551.

DEEDS

§ 14.1. Mineral Rights

In an action to remove a cloud on plaintiffs' title to land conveyed in 1946, the trial court properly entered summary judgment for defendants where the habendum limited the granting clause by containing a reservation which could be read as limiting the fee conveyed to a fee in the surface of the lands described. *Frye v. Arrington*, 180.

§ 15.1. Defeasible Fees

Where plaintiffs claim their title through a Bertha Murdock, and Bertha held "an estate in fee simple . . . defeasible upon [her] death . . . without bodily heirs," she held only a defeasible fee. *City of Statesville v. Credit and Loan Co.*, 727.

DIVORCE AND ALIMONY

§ 16.1. Grounds for Alimony Without Divorce

The evidence and findings supported the court's conclusion that plaintiff's conduct constituted indignities to the person of defendant so as to render her condition intolerable and her life burdensome. *Harris v. Harris*, 314.

§ 16.4. Effect of Separation on Alimony Without Divorce

Where a separation agreement gave the wife the right to sue for alimony or other relief upon the husband's breach of any provision of the agreement, the husband's failure to make child support payments gave the wife the right to bring an action for alimony even though the agreement was fully executed regarding property rights. *Harris v. Harris*, 314.

§ 16.8. Ability to Pay

Although the trial court should have indicated in an alimony order that its findings as to the wife's dependency were based on the status of the parties at the time of the hearing, the failure to do so was not error in this case. *Harris v. Harris*, 314.

Plaintiff was not prejudiced by the court's finding in an alimony order that he was capable of earning more money as an accountant than he earned from his salary with a hospital system. *Ibid.*

Unless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the "capacity to earn" rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made. *Whedon v. Whedon*, 524.

§ 16.9. Amount and Manner of Payment of Alimony

Trial court's order that plaintiff husband pay defendant wife $1,259 per month as permanent alimony until defendant vacated the marital home and $1,467 thereafter was supported by the court's findings. *Whedon v. Whedon*, 524.

Trial court erred in ordering plaintiff husband to pay income taxes on defendant wife's alimony. *Ibid.*

Trial court's order that the husband pay the wife's automobile liability and collision insurance was proper, and the court's order that the husband pay one amount of alimony if defendant lives in the marital residence and another amount if she moves therefrom was not void as a conditional or alternative judgment. *Ibid.*

Trial court did not err in granting sequestration of the marital residence to defendant wife and in ordering plaintiff husband to pay the mortgage payments, ad valorem taxes and hazard insurance on the residence. *Ibid.*

In an action for alimony and divorce, a $30,000 lump sum award, representing the wife's recoupment of alimony that she should have been paid prior to the hearing, was supported by the findings and was not unreasonable. *Stickel v. Stickel*, 645.

In an action for alimony and divorce, the trial court did not err by ordering defendant to pay all real estate taxes and insurance on the house and medical insurance for plaintiff. *Ibid.*

§ 18.8. Competency of Evidence

In an action for divorce and alimony, the trial court did not violate the best evidence rule by allowing plaintiff to introduce into evidence financial lists, or summaries, prepared from checks and itemized expenditures, which she used to show her past and future living expenses. *Stickel v. Stickel*, 645.

DIVORCE AND ALIMONY—Continued

§ 18.16. Attorney's Fees

Trial court in an alimony action properly allowed counsel fees for work by defendant wife's attorneys prior to the filing of pleadings. *Whedon v. Whedon*, 524.

An award of counsel fees to defendant wife in an alimony action was not erroneous because defendant was represented by two attorneys. *Ibid.*

The trial court conducted a sufficiently broad inquiry into the matter of attorney fees in an alimony action. *Ibid.*

§ 19. Modification of Decree

It was not a denial of equal protection for the trial court to consider plaintiff's earning capacity but not to consider defendant's earning capacity in modifying an alimony decree. *Broughton v. Broughton*, 778.

The trial court did not err in awarding attorney's fees to defendant for the motion directed at increased alimony. *Ibid.*

Admission of testimony concerning the income and estate of plaintiff's present wife and consideration of that evidence in determining plaintiff's ability to pay increased alimony was not error. *Ibid.*

§ 19.4. Sufficiency of Showing of Changed Circumstances

In an action for modification of an alimony award, the trial court did not err in finding changed circumstances sufficient to support an increase in alimony. *Broughton v. Broughton*, 778.

The trial court erred in entering a finding concerning plaintiff's earning capacity in an action for modification of alimony where there were no facts showing a deliberate attempt to suppress his earnings. *Ibid.*

§ 19.5. Effect of Separation Agreement on Modification of Alimony

A prior Court of Appeals decision was binding on the issue of the validity of a provision in a separation agreement requiring defendant to pay plaintiff a sum equal to 50% of his Army retirement pay and prohibited the trial court from reducing the percentage of defendant's retirement pay to which plaintiff was entitled. *Harris v. Harris*, 175.

§ 19.7. Review of Motions to Modify

In a suit concerning modification of alimony, several findings concerning plaintiff's net worth, plaintiff's average income, the consumer price indexes, defendant's needs, and the amount of alimony awarded were supported by competent evidence and therefore are conclusive on appeal. *Broughton v. Broughton*, 778.

§ 21. Enforcement of Alimony Award

An assignment to plaintiff wife of defendant husband's military retirement pay pursuant to a court-ordered specific performance of a separation agreement would conflict with federal law and threaten harm to substantial federal interests. *Harris v. Harris*, 175.

§ 24.3. Effect of Child Support Order

Where a judgment by confession was entered against defendant concerning child custody and support, it was error for the court not to abate a subsequent action for custody. *Pierce v. Pierce*, 815.

§ 24.11. Review of Child Support Orders

In a civil contempt action arising from plaintiff's failure to pay child support, findings that the plaintiff had resources upon which to pay at least a portion of his

EVIDENCE—Continued

§ 29.2. Business Records

Minutes of medical staff meetings which are made in the regular course of a hospital's business are admissible under the "business records" exception. *Cameron v. New Hanover Memorial Hospital*, 414.

In an action by two podiatrists against a hospital, the trial court properly excluded minutes of medical staff meetings where they were not adequately authenticated. *Ibid.*

The trial court did not err in finding that a tally sheet showing records of service calls did not fall within the business records exception to the hearsay rule. *Piedmont Plastics v. Mize Co.*, 135.

Admission of a tally sheet which showed records of service calls was not required by the cases regarding admission of ledger sheets. *Ibid.*

§ 29.3. Hospital Records

The trial judge correctly denied plaintiffs' request to review minutes of hospital meetings which recorded good faith communications of the hospital committee in which those present had a corresponding interest in the administration of the hospital. *Cameron v. New Hanover Memorial Hospital*, 414.

§ 29.4. Published Treatises, Periodicals or Pamphlets

Although, under G.S. 8-40.1, plaintiff had failed to lay a proper foundation for the reading of a medical text, the error was not prejudicial. *Gunther v. Blue Cross/Blue Shield*, 341.

§ 31. Best Evidence Rule

In an action for divorce and alimony, the trial court did not violate the best evidence rule by allowing plaintiff to introduce into evidence financial lists, or summaries, prepared from checks and itemized expenditures, which she used to show her past and future living expenses. *Stickel v. Stickel*, 645.

§ 42. Shorthand Statements of Fact

Testimony that "the truck swerved to the right as much as he possibly could" was admissible as a shorthand statement of fact. *Horne v. Trivette*, 77.

§ 45. Evidence as to Value

The trial court did not err in allowing a witness to testify as to the fair market value of plaintiff's property in an action concerning the modification of an alimony award. *Broughton v. Broughton*, 778.

§ 48.3. Failure to Object to Qualification of Expert

Where petitioners failed to challenge the competency of the testimony of a licensed registered engineer and land surveyor, and where the record shows that the trial judge properly could have found the witness to be an expert, petitioners waived their objection and it will not be considered on appeal. *Scovill Mfg. Co. v. Town of Wake Forest*, 15.

§ 56. Expert Testimony as to Value

The trial court properly refused to permit a realtor to state his opinion as to the rental value of plaintiffs' submerged land. *Development Corp. v. James*, 506.

EXECUTORS AND ADMINISTRATORS

§ 13. Sale of Real Property

A will gave the executors the authority to sell testator's property only to facilitate the settling of the estate, and a sale by the executors for the reason that it would facilitate the settlement of a special proceeding for the partition of land was not a valid exercise of the power of sale. *James v. James*, 371.

§ 19.1. Time for Filing Claims Against the Estate

The failure of plaintiff to file a wrongful death claim against a decedent's estate within six months as required by statute in 1976 did not bar the claim where plaintiff was seeking to collect damages out of an automobile insurance policy. *Thorpe v. Wilson*, 292.

FRAUDULENT CONVEYANCES

§ 3. Action to Set Aside Conveyances as Fraudulent

In an action to set aside the allegedly fraudulent conveyance of notes, the trial court's instruction that "first there must be a voluntary conveyance" was not prejudicial error. *Flack v. Garriss*, 573.

§ 3.4. Sufficiency of Evidence

An action concerning the allegedly fraudulent conveyance of notes was properly dismissed as to defendant attorney. *Flack v. Garriss*, 573.

HOMICIDE

§ 19.1. Evidence of Character or Reputation

Defendant failed to show error in the exclusion of testimony by one of his witnesses that the witness had once had to shoot the deceased to keep from being cut by him. *S. v. Caudle*, 89.

§ 21.8. Sufficiency of Evidence of Second Degree Murder Where Defendant Pleads Self-Defense

In a prosecution for second degree murder where the state introduced into evidence statements by defendant tending to show that he had gotten a rifle out of the trunk of his car and shot the deceased in self-defense but also introduced evidence which contradicted defendant's statement that he shot the deceased in self-defense, the trial court did not err in denying his motion to dismiss at the end of all the evidence. *S. v. Caudle*, 89.

§ 26. Instructions on Second Degree Murder

In a prosecution for second degree murder the trial court properly instructed the jury, upon inquiry by them as to whether malice is possible in a person "under the strong influence of alcohol," that voluntary intoxication is generally not a legal excuse for crime and that defendant's intoxication, if any, would have no bearing on their determination of his guilt or innocence of second degree murder or voluntary manslaughter. *S. v. Caudle*, 89.

§ 27. Instructions on Manslaughter Generally

In a prosecution for involuntary manslaughter, the trial court erred in instructing that the jury should consider whether defendant violated G.S. 20-139 by driving under the influence of drugs. *S. v. Atkins*, 146.

HOMICIDE—Continued

§ 27.2. Instructions on Involuntary Manslaughter

The trial court did not err in failing to submit a charge of involuntary manslaughter where the defendant's own evidence showed he invited the deceased into the water and refused to help him when the defendant saw he was drowning. *S. v. Willoughby*, 746.

§ 28.8. Instructions on Defense of Accidental Death

In an action in which defendant was tried for the second degree murder of a man whom defendant was charged with drowning, the trial court did not err in failing to charge the jury on the defense of accident. *S. v. Willoughby*, 746.

HOSPITALS

§ 6. Regulation of Physicians and Other Medical Personnel

Standards established by a hospital were not arbitrary or capricious where they required podiatrists to complete a year of residency, be board eligible pursuant to certification from the American Board of Podiatric Surgery, and be Fellows in the American College of Foot Surgeons since the standards were reasonably related to the operation of the hospital. *Cameron v. New Hanover Memorial Hospital*, 414.

G.S. 90-202.12 which states that patients have the freedom to choose a qualified "provider of care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician" does not require a hospital to grant staff privileges regardless of the standards set by its board of trustees which are reasonably related to the operation of the hospital. *Ibid.*

HUSBAND AND WIFE

§ 11.1. Operation and Effect of Separation Agreement

Where a separation agreement gave the wife the right to sue for alimony or other relief upon the husband's breach of any provision of the agreement, the husband's failure to make child support payments gave the wife the right to bring an action for alimony even though the agreement was fully executed regarding property rights. *Harris v. Harris*, 314.

INDEMNITY

§ 2. Construction and Operation Generally

Where plaintiff's employee was injured while working on a spur track serving defendant's plant, the trial court erroneously entered summary judgment for defendant since there were issues as to plaintiff's negligence and subsequent liability to its employee as determined by the standards imposed by the FELA; as to whether plaintiff's liability was occasioned by defendant's negligence; and as to defendant's liability, if so, to plaintiff, pursuant to an indemnity agreement. *Southern Railway Co. v. ADM Milling Co.*, 667.

INDICTMENT AND WARRANT

§ 9.3. Surplusage

An evidential allegation in an indictment for being an accessory after the fact to the crime of disturbing graves was mere surplusage and should be disregarded. *S. v. Lewis*, 348.

INDICTMENT AND WARRANT—Continued

§ 17.2. Variance as to Time

Where indictments alleged that defendant conspired to commit felonious larceny and feloniously received stolen goods, and there was variance between the date alleged in the indictment and the date proved at trial, the discrepancy was fatal as to the receiving charge but not as to the conspiracy charge. *S. v. Christopher*, 788.

§ 17.4. Variance as to Ownership

Defendant was not prejudiced by any variance between the indictment and proof as to the ownership of stolen hams. *S. v. Christopher*, 788.

INFANTS

§ 3. Right of Infant to Recover for Torts

Where plaintiff was injured while a passenger in a car driven by her mother on 22 September 1975, and there was no genuine issue regarding the material fact that plaintiff was an unemancipated minor at the time of her injury, the law is clear that at the time of the accident the suit was barred by the parent-child immunity doctrine. *Cassidy v. Cheek*, 742.

INJUNCTIONS

§ 8. Enjoining Interference With Franchise

Order denying a stay of an order of the Commissioner of Motor Vehicles which revoked an additional Jeep franchise affected a substantial right and was immediately appealable. *American Motors Sales Corp. v. Peters*, 684.

§ 13.1. Reasonable Apprehension of Irreparable Injury

The trial court did not err in the denial of a preliminary injunction to restrain defendant from continued breach of covenants not to compete and not to use or disclose confidential information. *A. E. P. Industries v. McClure*, 155.

An order temporarily restraining the N.C. Milk Commission from holding a public hearing concerning plaintiff's milk prices was properly dissolved. *Coble Dairy v. State ex rel. Milk Commission*, 213.

INNKEEPERS

§ 5. Liability for Personal Injuries

An owner of a motel was under a duty to plaintiff to exercise reasonable care to protect plaintiff from criminal acts of third persons on defendant's motel premises, and summary judgment was improvidently entered on plaintiff's claim for relief based upon defendant's negligence. *Urbano v. Days Inn*, 795.

G.S. 72-1(a) does no more than state the common law duty of an innkeeper to provide suitable lodging for guests and carries with it no warranty of personal safety. *Ibid.*

INSURANCE

§ 2.3. Action Against Agent for Failure to Procure Insurance

In actions arising from an automobile accident whereby plaintiffs obtained default judgments against the tort-feasor and they sought to enforce the judgment

KIDNAPPING

§ 1.1. Competency of Evidence

A trial on a charge of kidnapping for the purpose of committing the felony of rape is not subject to the rape victim shield statute, and the defendant in such a prosecution was prejudiced when the trial court refused to permit defendant to impeach the credibility of the prosecutrix by cross-examining her about alleged acts of prostitution. *S. v. Wilhite*, 654.

§ 1.2. Sufficiency of Evidence

The trial court did not err in failing to dismiss a kidnapping charge. *S. v. McRae*, 225.

§ 1.3. Instructions

In a prosecution for kidnapping for the purpose of facilitating the commission of assault with intent to commit rape, the trial court erred in failing to submit the lesser offense of false imprisonment where the evidence showed that defendant fondled the prosecutrix but at no time stated that he wanted to have sexual intercourse with her. *S. v. Lang*, 117.

LARCENY

§ 4.2. Indictment; Ownership of Property

An indictment charging the larceny of property of "Granville County Law Enforcement Association" was fatally defective in failing to allege the ownership of the property in a legal entity capable of owning property. *S. v. Strange*, 756.

§ 5. Presumptions from Possession of Recently Stolen Property

In a prosecution for breaking and entering and larceny, the trial court clearly conveyed to the jury in its charge that the jury must find beyond a reasonable doubt that defendant possessed the same property that was stolen when it charged on the doctrine of recent possession. *S. v. Whitley*, 539.

§ 7. Sufficiency of Evidence of Larceny Generally

The evidence was insufficient to support defendant's conviction of larceny of a boat. *S. v. Jackson*, 738.

§ 7.6. Misdemeanor Larceny; Felonious Larceny Not Involving Breaking and Entering

Evidence that defendant removed tires and wheels from cars belonging to a car dealer at least a fraction of an inch was sufficient to support a conviction of larceny. *S. v. Gray*, 102.

In a prosecution for misdemeanor larceny, the evidence was sufficient to establish defendant's identity as the perpetrator of the crime. *S. v. Brewington*, 650.

§ 8. Instructions

Trial court in a prosecution for felonious larceny of automobile tires did not err in refusing to instruct on attempted larceny. *S. v. Gray*, 102.

In a prosecution for felonious breaking or entering and felonious larceny where the evidence showed that four items were taken from a house, the court did not deprive the defendant of a unanimous jury verdict when he instructed the jury that they could find the defendant guilty if they found he had taken any one of the items. *S. v. Yancey*, 52.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

In an action based upon the alleged negligence of an attorney in failing to file a financing statement or otherwise perfect a security interest, the trial court erred in dismissing plaintiff's action against the attorney for the reason that the statute of limitations had expired. *Sunbow Industries, Inc. v. London*, 751.

MASTER AND SERVANT

§ 38. F.E.L.A.; Negligence of Railroad Employer

Where plaintiff's employee was injured while working on a spur track serving defendant's plant, the trial court erroneously entered summary judgment for defendant since there were issues as to plaintiff's negligence and subsequent liability to its employee as determined by the standards imposed by the FELA; as to whether plaintiff's liability was occasioned by defendant's negligence; and as to defendant's liability, if so, to plaintiff, pursuant to an indemnity agreement. *Southern Railway Co. v. ADM Milling Co.*, 667.

§ 55.1. Necessity for, and What Constitutes, Accident

In a workers' compensation proceeding, the Commission's findings that plaintiff's injury was not the result of an accident was supported by the evidence. *Davis v. Raleigh Rental Center*, 113.

§ 55.3. Particular Injuries as Constituting Accident

Plaintiff did not suffer a back injury by accident when her ankle, for some unexplained reason, gave way as she lifted a bundle of jeans and she felt a stinging sensation in her back. *Norris v. Kivettco, Inc.*, 376.

§ 60.4. Injuries During Recreation or Amusement

The Industrial Commission correctly ordered an award of workers' compensation to plaintiff for an injury to her ankle sustained while she was dancing at a Christmas party sponsored by defendant-employer for its employees. *Martin v. Mars Mfg. Co.*, 577.

§ 68. Occupational Diseases

In a workers' compensation proceeding where an occupational disease was alleged and where the record contained conflicting evidence concerning the claimant's capacity to work because of her disability, the Commission erred in failing to make the necessary findings of fact as to plaintiff's earning capacity. *Priddy v. Cone Mills Corp.*, 720.

Plaintiff presented sufficient evidence of an impairment of his wage-earning capacity because of an occupational lung disease to support an award of compensation for disability from such disease. *Hundley v. Fieldcrest Mills*, 184.

§ 69. Amount of Recovery of Workers' Compensation

In a workers' compensation proceeding, the Industrial Commission did not err in failing to give effect to an agreement for compensation signed by the parties. *Baldwin v. Piedmont Woodyards, Inc.*, 602.

§ 71.1. Computation of Average Weekly Wage

In a workers' compensation proceeding where the decedent did not receive wages from defendant but sold pulpwood to defendant for a certain price per cord, decedent's average weekly wages should have been computed by determining the income received from defendant minus certain expenses incurred in producing revenue. *Baldwin v. Piedmont Woodyards, Inc.*, 602.

MUNICIPAL CORPORATIONS

§ 2.1. Compliance With Statutory Requirements for Annexation

In holding that 65.05% of the residential and undeveloped lots in an area to be annexed consisted of lots and tracts of five acres or less in size, the trial judge did not err in finding that one petitioner's land was comprised of six separate lots rather than one tract of 9.5 acres. *Scovill Mfg. Co. v. Town of Wake Forest,* 15.

There was no merit to petitioners' contention that the trial judge's order did not contain a "direct statement" that the ordinance described the external boundaries of the annexed area by metes and bounds. *Ibid.*

In an annexation proceeding, petitioners failed to show error in a surveyor's testimony concerning his use of a planimeter in determining the acreage of the proposed annexation area. *Ibid.*

§ 2.2. Requirements of Use and Size of Tracts

An ordinance concerning annexation did not comply with G.S. 160A-37(e)(1) where it did not state that 60 percent of the net residential and undeveloped land in the proposed annexation area was subdivided into lots and tracts of five acres or less; however, the failure to comply did not result in its invalidation. *Scovill Mfg. Co. v. Town of Wake Forest,* 15.

In an annexation proceeding, an area to be annexed which was comprised of a utility easement was properly classified as property in use for industrial purposes. *Ibid.*

§ 2.3. Other Annexation Requirements

Although petitioners were correct that a survey map of the area to be annexed, which was not prepared under a court order, was incorrectly admitted into evidence, they failed to make a timely request at trial to limit the use of the exhibit. *Scovill Mfg. Co. v. Town of Wake Forest,* 15.

§ 2.5. Effect of Annexation

In an annexation proceeding, petitioners failed to show that they will suffer material injury by reason of the proposed annexation. *Scovill Mfg. Co. v. Town of Wake Forest,* 15.

§ 8.2. Violation and Enforcement of Ordinances

In an action where plaintiff town sought a permanent injunction "directing defendant to remove all animals other than specified domestic house pets from her premises" pursuant to an ordinance, where defendant demonstrated the facts necessary to make the legal determination that her animals (two goats and a pony) were "house pets" within the meaning of the ordinance and plaintiff failed to show contrary material facts, the trial judge properly granted defendant's motion for summary judgment. *Town of Atlantic Beach v. Young,* 597.

§ 9.1. Police Officers and Chief of Police

Civil service statutes and regulations did not require a competitive examination for promotion to the position of assistant chief of the Mecklenburg County Police Department. *Canipe v. Abercrombie,* 395.

Findings made by the Raleigh Civil Service Commission would support only the conclusion that the chief of police relied on merit and fitness in promoting two officers other than respondent to the rank of captain. *In re Williams,* 273.

MUNICIPAL CORPORATIONS—Continued

§ 12. Liability for Torts; Governmental or Proprietary Functions

The trial court properly overruled defendant's motion for summary judgment on grounds that defendant had governmental immunity against a tort claim which evolved from plaintiff stepping in a hole on a sidewalk. *Jones v. City of Burlington*, 193.

§ 14.1. Negligence in Maintaining Streets and Sidewalks

G.S. 160A-298(c) allows a city to exercise its discretion in requiring improvements at railroad crossings but it is not under an obligation to do so. *Cooper v. Town of Southern Pines*, 170.

In an action arising from an accident between an automobile and a train, the trial court erred in directing a verdict for the town. *Ibid.*

§ 14.3. Duty of Reasonable Inspection of Streets and Sidewalks

In an action in which plaintiff sought damages for injuries sustained when she slipped into a narrow, deep hole which existed on defendant's grass sidewalk, the findings of fact made by the trial court clearly supported its conclusion that defendant was negligent and that plaintiff was injured as a result of that negligence. *Jones v. City of Burlington*, 193.

§ 22. Formation and Construction of Contracts

In an action instituted by plaintiff to recover fire hydrant rental charges in arrears, defendant was not obligated by statute or by written contract to pay for fire protection; however, competent evidence at trial supported the view that an implied agreement existed. *Orange Water & Sewer v. Town of Carrboro*, 676.

§ 30.13. Regulation of Billboards and Outdoor Advertising Signs

A town had the authority to prohibit outdoor advertising in areas zoned commercial and industrial and to provide compensation for removed signs by amortization. *Givens v. Town of Nags Head*, 697.

The owners of outdoor advertising signs required by a town ordinance to be removed were not entitled to cash compensation for the removed signs. *Ibid.*

A town ordinance prohibiting off-premises commercial signs constituted a valid exercise of the police power, did not infringe on First Amendment freedom of speech rights, and did not violate equal protection. *Ibid.*

§ 30.18. Amortization of Nonconforming Use

A town ordinance prohibiting off-premises commercial signs and requiring their removal within a period of five and one-half years was not confiscatory and was reasonable. *Givens v. Town of Nags Head*, 697.

NARCOTICS

§ 1. Substances Included in Narcotic Drug Act

Where an indictment charged defendant with trafficking in cocaine in violation of G.S. 90-95(h)(3), and the State filed a bill of particulars in response to a request by defendant which stated that the substance was "cocaine which is a derivative of coca leaves," the trial court did not err in failing to grant defendant's motion to dismiss on the grounds that "a derivative of coca leaves" is not included within the language of G.S. 90-95(h)(3). *S. v. Proctor*, 631.

NARCOTICS—Continued

§ 1.2. Professional Dispensation of Narcotics

G.S. 90-101(g) and (h) which allow a physician to possess a narcotic in pharmaceutical form could not lead a physician of common intelligence to believe he could grow marijuana and possess it in its raw form and are not unconstitutionally vague. *S. v. Piland,* 95.

§ 1.3. Elements of Offenses

Possession of more than one ounce of marijuana is not a lesser included offense of possession of marijuana with intent to sell. *S. v. Gooche,* 582.

§ 2. Indictment

An indictment was sufficient to charge defendant with both possession of marijuana with intent to sell or deliver and possession of more than one ounce of marijuana, and the trial court properly submitted both crimes as alternative verdicts. *S. v. Gooche,* 582.

§ 3.1. Competency of Evidence

The State was properly permitted to exhibit to the jury one of the 172 bales of marijuana which defendants were charged with possessing to illustrate how each of the bales had been dissected to determine whether it contained marijuana throughout. *S. v. Long,* 467.

The trial judge did not err in admitting cocaine into evidence where an SBI chemist failed to identify the cocaine as a derivative of coca leaves. *S. v. Proctor,* 631.

§ 3.3. Opinion Testimony

Lay opinion testimony was insufficient to support an instruction on driving under the influence of drugs in an involuntary manslaughter case. *S. v. Atkins,* 146.

§ 4. Sufficiency of Evidence Generally

The State's evidence was sufficient for the jury in a prosecution for trafficking in marijuana by hauling more than 10,000 pounds of marijuana in a truck. *S. v. Long,* 467.

§ 4.3. Sufficient Evidence of Constructive Possession

The State's evidence was sufficient to support defendant's conviction for felonious possession of cocaine found in an apartment rented by defendant. *S. v. Tate,* 494.

§ 4.4. Insufficient Evidence of Constructive Possession

The State's evidence was insufficient to show that defendant occupied or was in control of the premises in question and that he was thus in constructive possession of heroin found in an abandoned house behind a dwelling. *S. v. Williams,* 307.

§ 4.5. Instructions Generally

In a prosecution for the manufacture of marijuana and felonious possession of marijuana where the defendant was a medical doctor who contended he grew the marijuana for the benefit of his patient, the trial court properly failed to submit to the jury the defense of necessity. *S. v. Piland,* 95.

In a prosecution for the manufacture of marijuana and felonious possession of marijuana, G.S. 90-87(15), concerning the preparation or compounding of a controlled substance, had no application to defendant's case. *Ibid.*

NARCOTICS – Continued

§ 4.6. Instructions as to Possession

The trial court in a prosecution for possession of more than one ounce of marijuana did not err in instructing the jury that 59.9 grams was in fact more than one ounce. *S. v. Gooche*, 582.

§ 5. Verdict and Punishment

The trial court did not err in failing to reduce defendants' sentence for trafficking in marijuana on the ground they had provided substantial assistance in the identification of a co-conspirator. *S. v. Long*, 467.

Minimum sentences of sixteen years and fines of $200,000 imposed upon defendants for trafficking in more than 10,000 pounds of marijuana was not cruel and unusual punishment. *Ibid.*

Verdicts of not guilty of possession of marijuana with the intent to sell or deliver and guilty of the sale or delivery of marijuana were not inconsistent so as to require the court to set aside the guilty verdict. *S. v. Paul*, 723.

NEGLIGENCE

§ 5. Dangerous Instrumentalities

In an action instituted by plaintiff to recover damages for injuries sustained when he was struck by a crane designed and manufactured by the defendant, plaintiff failed to show that the crane was an inherently dangerous instrumentality. *McCollum v. Grove Mfg. Co.*, 283.

§ 53.1. Degree of Care Owed to Invitee

In an action where plaintiff's employee was injured while working on a spur track serving defendant's plant, the case should have been allowed to proceed to the jury on the theory of common law negligence. *Southern Railway Co. v. ADM Milling Co.*, 667.

§ 55. Pleadings in Actions by Invitees

An owner of a motel was under a duty to plaintiff to exercise reasonable care to protect plaintiff from criminal acts of third persons on defendant's motel premises, and summary judgment was improvidently entered on plaintiff's claim for relief based upon defendant's negligence. *Urbano v. Days Inn*, 795.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

Neither G.S. 7A-289.32(2) nor (4), dealing with termination of parental rights, is unconstitutionally vague. *In re Allen*, 322.

In a proceeding to terminate parental rights, the findings relating to the behavioral and emotional problems of the minor children which were the subject of the proceeding were supported by the evidence. *Ibid.*

The trial court did not err in finding that "respondents had failed to pay a reasonable portion of the costs of the children's care"; however, the trial court should have made separate findings as to the mother's failure to pay. *Ibid.*

The judicial procedure to be used in termination of parental rights cases which is prescribed in G.S. 7A-289.22 *et seq.* does not put the trial court under a 10 day rule to enter a written judgment. *Ibid.*

PARENT AND CHILD—Continued

§ 2.1. Liability of Parent for Injury to Child

Where plaintiff was injured while a passenger in a car driven by her mother on 22 September 1975, and there was no genuine issue regarding the material fact that plaintiff was an unemancipated minor at the time of her injury, the law is clear that at the time of the accident the suit was barred by the parent-child immunity doctrine. *Cassidy v. Cheek*, 742.

PARTIES

§ 5. Representation by Members of a Class

Parties who had suffered no injury could not assert a class action for injury on behalf of others similarly situated. *Steed v. First Union National Bank*, 189.

PARTITION

§ 7. Actual Partition

In a partitioning proceeding where three tracts of land were divided into four equal shares and, by lottery, given to the four tenants in common, there was no error in failing to give one of the tenants in common a tract of land which adjoined his homeplace. *Gray v. Crotts*, 365.

The superior court did not err in confirming the report of the Commissioners in a partitioning proceeding because the actual assignment of the parcels was done by lottery since previous case law specifically approved the assignment of shares to the various tenants in common by the drawing of lots. *Ibid.*

PARTNERSHIP

§ 1.1. Formation of Partnership

Plaintiff's evidence was sufficient to permit the jury to find that plaintiff and the male defendant orally agreed to form a partnership or formed a partnership by their acts and declarations. *Davis v. Davis*, 25.

§ 9.1. Right to Accounting

The trial judge did not err in defining the scope of responsibilities and the powers of a referee appointed to conduct an accounting of partnership profits and assets. *Davis v. Davis*, 25.

The trial judge did not err in ordering defendants to pay all costs of an accounting of the partnership profits and assets. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 2. Licensing and Regulation of Pharmacists

Construing G.S. 90-72 and 90-73 *in pari materia* with G.S. 90-71 and considering the administrative regulations adopted by the Board of Pharmacy pursuant to the authority granted by G.S. 90-57, the terms "drug" and "medicine" in G.S. 90-72 and 90-73 do not have their broad, popularly accepted meanings. These statutes do not invade any area of constitutionally protected freedom, the doctrine of overbreadth has no application to them, and the statutes give a person of ordinary intelligence fair notice of what is forbidden by them. *S. v. White*, 558.

PUBLIC OFFICERS

§ 2. Appointment and Election

Civil service statutes and regulations did not require a competitive examination for promotions to the position of assistant chief of the Mecklenburg County Police Department. *Canipe v. Abercrombie*, 395.

§ 11. Criminal Liability of Public Officers

An indictment charging a magistrate with a violation of G.S. 14-230 in that he willfully and corruptibly violated his oath of office by committing a person to jail without lawful process with the intent to extort from him the sum of $200 was insufficient to support his conviction. *S. v. Greer*, 703.

QUIETING TITLE

§ 2.2. Sufficiency of Evidence

Where both plaintiffs and defendants have record title to land of more than thirty years duration which could be examined without finding an exception, and defendants and their predecessors in title have been in possession for more than thirty years, defendants' title must prevail pursuant to provisions of the Real Property Marketable Title Act. *Heath v. Turner*, 708.

RAILROADS

§ 5.2. Obstructions of Crossings

G.S. 160A-298(c) allows a city to exercise its discretion in requiring improvements at railroad crossings but it is not under an obligation to do so. *Cooper v. Town of Southern Pines*, 170.

In an action arising from an accident between an automobile and a train, the trial court erred in directing a verdict for the town. *Ibid.*

§ 5.3. Contributory Negligence by Vehicle Driver

In an action which evolved from an accident between a train and an automobile, the issue of plaintiff's contributory negligence should be submitted to the jury. *Cooper v. Town of Southern Pines*, 170.

RAPE AND ALLIED OFFENSES

§ 4. Competency of Evidence

Evidence concerning the complainant's prior use of tampons was admissible to provide an alternative explanation for the opening in her hymen. *S. v. Baron*, 150.

§ 4.3. Character or Reputation of Prosecutrix

Evidence tending to show that the prosecutrix in a rape case had worked as a prostitute and that a witness had seen the prosecutrix leave a bar around 2:00 a.m. with a stranger was inadmissible under the rape victim shield statute. *S. v. Wilhite*, 654.

A trial on a charge of kidnapping for the purpose of committing the felony of rape is not subject to the rape victim shield statute. *Ibid.*

The rape victim shield statute did not preclude evidence that the prosecutrix on previous occasions had falsely accused others of improper sexual advances. *S. v. Baron*, 150.

RAPE AND ALLIED OFFENSES—Continued

§ 5. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of first degree rape. *S. v. Wilhite*, 654.

§ 6.1. Submission of Lesser Degrees of the Crime

Defendant's motion for appropriate relief from his conviction of crime against nature on the ground that he was indicted for a first degree sexual offense and crime against nature is not a lesser included offense thereof is denied. *S. v. Barrett*, 515.

RULES OF CIVIL PROCEDURE

§ 13. Counterclaims

In an action between a builder and property owners where the builder sued the owners for materials furnished and labor performed, the property owners did not err in failing to assert the discovery of numerous defects in the construction of their home as a compulsory counterclaim. *Stines v. Satterwhite*, 608.

§ 15. Amended Pleadings

Plaintiff's amendment of his complaint in a wrongful death action to name "Charles E. Wilson, Jr." rather than "Charles E. Wilson, Sr." as the defendant administrator related back to the time of the original complaint pursuant to Rule 15(c). *Thorpe v. Wilson*, 292.

§ 23. Class Actions

Parties who had suffered no injury could not assert a class action for injury on behalf of others similarly situated. *Steed v. First Union National Bank*, 189.

§ 37. Consequences of Failure to Make Discovery

The issuance of an order compelling discovery was not a prerequsite to the entry of default judgments for failure of defendants to respond to plaintiff's interrogatories and requests for admissions. *First Citizens Bank v. Powell*, 229.

The trial court did not err in dismissing plaintiffs' actions against the administrator of an estate for failure to comply with its order to compel discovery. *Carpenter v. Cooke and Carpenter v. Cooke*, 381.

The trial judge did not err in granting defendant's motion for summary judgment where plaintiff filed a voluntary dismissal of an action after her action had been dismissed. *Cassidy v. Cheek*, 742.

In an action instituted to remove cloud on title to land where a trial judge ordered defendant to produce contracts and defendant failed to totally comply with the order, the trial court did not abuse its discretion in finding that defendant had willfully and without justification or excuse failed to comply with the previous judge's order compelling discovery, and the court did not err in imposing appropriate sanctions against the defendant and its counsel pursuant to Rule 37. *Midgett v. Crystal Dawn Corp.*, 734.

§ 41. Dismissal of Actions

The trial judge did not err in granting defendant's motion for summary judgment where plaintiff filed a voluntary dismissal of an action after her action had been dismissed. *Cassidy v. Cheek*, 742.

RULES OF CIVIL PROCEDURE—Continued

§ 59. New Trials

The trial court did not err in the denial of defendants' Rule 59(a)(1) motion for a new trial on the ground that they had been prevented from having a fair trial because the investigating officer failed to disclose the name of an eyewitness to the collision in question until the trial had started. *Horne v. Trivette*, 77.

Trial court did not err in granting plaintiff a new trial on the ground that "the ends of justice will be met" thereby. *Sizemore v. Raxter*, 236.

The trial court in a wrongful death action did not abuse its discretion in setting aside a verdict for plaintiff of $10,000 on the ground the verdict was inadequate and contrary to the greater weight of the evidence. *Scallon v. Hooper*, 551.

§ 68. Offer of Judgment

Where an offer of judgment was made by defendant and the judgment for plaintiff was for less than the sum offered, the trial court should have ordered plaintiff to pay costs incurred only after the offer of judgment. *Scallon v. Hooper*, 551.

SALES

§ 19. Measure of Damages for Breach of Warranty

In an action concerning a breach of warranty, the trial court properly failed to instruct on incidental and consequential damages where the record contained no competent evidence which sustained the allegations asserted in the third-party defendant's counterclaim. *Piedmont Plastics v. Mize Co.*, 135.

§ 22. Personal Injuries from Defective Goods or Materials

In a personal injury action in which plaintiff was struck by a crane designed and manufactured by defendant, plaintiff failed to show any breach of the standard of care owed by the manufacturer. *McCollum v. Grove Mfg. Co.*, 283.

Plaintiff failed to show negligence in the restricted visibility afforded the operator of a crane by the design of that crane. *Ibid.*

Under our case law which follows the "patent danger" rule, a manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. *Ibid.*

§ 23. Inherently Dangerous Articles

In an action instituted by plaintiff to recover damages for injuries sustained when he was struck by a crane designed and manufactured by the defendant, plaintiff failed to show that the crane was an inherently dangerous instrumentality. *McCollum v. Grove Mfg. Co.*, 283.

SCHOOLS

§ 10. Assignment of Pupils

The decision of a county school system to place a hearing impaired child in a regular sixth grade class with support services rather than to provide a grant to subsidize the child's education at an out-of-state residential institution was proper. *Harrell v. Wilson County Schools*, 260.

§ 13.2. Dismissal of Teachers

Plaintiff career teacher's complaint was insufficient to state a claim for relief against defendant board of education for wrongful dismissal for insubordination. *Rhodes v. Board of Education*, 130.

SEARCHES AND SEIZURES

§ 4. Particular Methods of Search; Physical Examination or Tests

A superior court judge erred in entering a nontestimonial identification order to have a defendant charged with involuntary manslaughter examined by a doctor to determine his "visual acuity." *S. v. Whaley,* 233.

§ 12. Stop and Frisk Procedures

An officer had an articulable and reasonable suspicion that defendant might be engaged in criminal activity so as to justify an investigatory stop of defendant's vehicle. *S. v. Fox,* 694.

§ 15. Standing to Challenge Lawfulness of Search

Cause is remanded for a determination as to whether defendant had a sufficient interest in searched premises to attack the constitutionality of the search. *S. v. Nicholson,* 410.

§ 23. Sufficiency of Evidence Generally to Show Probable Cause for Warrant

In a prosecution for trafficking in heroin, a warrant authorizing a search was based upon an affidavit that was sufficient to establish probable cause for the issuance of the warrant. *S. v. Willis,* 617.

§ 24. Sufficient Information from Informants

In a prosecution for breaking and entering and larceny, the trial court properly refused to suppress the fruits of a search made pursuant to a search warrant. *S. v. Whitley,* 539.

§ 26. Insufficient Information from Informants

Information concerning the presence of marijuana in defendant's home which was received from a confidential informant more than a year prior to the issuance of a warrant to search the home was too stale to establish probable cause for issuance of the warrant. *S. v. Lindsey,* 564.

§ 32. Items Which May Be Seized Generally

The trial court did not err in denying defendant's motion to suppress a letter he wrote to a prison inmate housed in a high security area which detailed defendant's having committed the crime of armed robbery. *S. v. Kennedy,* 810.

§ 33. Plain View Rule

In a prosecution for manufacture of marijuana and felonious possession of marijuana where officers had been invited by defendant's neighbor to enter the neighbor's property and view the defendant's property which they did and saw marijuana, it was in plain view of the officers at a place they had a lawful right to be. *S. v. Piland,* 95.

§ 40. Items Which May Be Seized in Search Under a Warrant

Apparatus used in manufacturing cocaine, cash, mail, and photographs of defendants were properly seized under a warrant designating cocaine as the object of the search. *S. v. Tate,* 494.

§ 41. Knock and Announce Requirements

In a prosecution for trafficking in heroin, officers violated the statutory requirements for execution of a search warrant; however, the violation was not substantial enough to require suppression. *S. v. Willis,* 617.

Officers executing a search warrant sufficiently complied with the statutory notice requirement. *S. v. Tate,* 494.

SEARCHES AND SEIZURES—Continued

§ 44. Voir Dire Hearing; Findings of Facts

Court did not err in failing to make findings in denying a motion to suppress seized evidence where there was no conflict in the evidence on voir dire. *S. v. Tate*, 494.

Defendant was not prejudiced by an officer's improper opinion testimony in a hearing on a motion to suppress where there was nothing in the record to rebut the presumption that incompetent evidence was disregarded by the trial judge. *S. v. Fox*, 694.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Plaintiffs failed to state a claim for relief in an action involving an "equalizing formula" adopted by the Social Services Commission pursuant to G.S. 108A-92 for distribution of reserved public assistance funds to counties according to their needs. *Alamance County v. Dept. of Human Resources*, 748.

§ 2. Recovery of Amount Paid to Recipient

The Durham County Department of Social Services was not entitled to assert subrogation rights in a personal injury recovery for Medicaid assistance provided to the minor plaintiff. *Malloy v. Daniel*, 61.

STATE

§ 4. Actions Against the State; Sovereign Immunity

A third party contract action could properly be maintained against the State and the Department of Transportation. *In re Huyck Corp. v. Mangum, Inc.*, 532.

G.S. 136-29 does not prohibit a contractor from filing a third party complaint against the Department of Transportation ancillary to an action in the General Court of Justice brought by a party not privy to the contract. *Ibid.*

§ 12. State Employees

It was reasonable for the Personnel Commission to use Title VII standards in a case in which a state employee had reason to believe his employment was terminated because of his race. *Dept. of Correction v. Gibson*, 241.

In a Title VII case, once the employee carries the initial burden of establishing a prima facie case of racial discrimination and the employer has articulated some legitimate non-discriminatory reason for the employee's rejection, then the employee must prove that the employer's stated reasons for termination were in fact a pretext for racial discrimination, and a black prison employee met his burden of proving such a pretext. *Ibid.*

STATUTES

§ 4.1. Construction in Regard to Constitutionality

Construing G.S. 90-72 and 90-73 *in pari materia* with G.S. 90-71 and considering the administrative regulations adopted by the Board of Pharmacy pursuant to the authority granted by G.S. 90-57, the terms "drug" and "medicine" in G.S. 90-72 and 90-73 do not have their broad, popularly accepted meanings. These statutes do not invade any area of constitutionally protected freedom, the doctrine of overbreadth has no application to them, and the statutes give a person of ordinary intelligence fair notice of what is forbidden by them. *S. v. White*, 558.

TAXATION

§ 31.3. Exemptions from Sales and Use Taxes

An assembled hygroponic growing system for tomatoes was not a "machine" eligible for a reduced use tax. *Deep River Farms v. Lynch, Sec. of Revenue,* 165.

TENANTS IN COMMON

§ 3. Mutual Rights and Liabilities

The clerk of superior court and the trial court had authority to modify a consent order providing for the distribution of proceeds from the rental of land among tenants in common to reflect a change in the interests of the tenants after the order was entered but before the rent was tendered. *James v. James,* 371.

TORTS

§ 4.3. Right to Have Others Joined for Contribution; Nonsuit

In an action in which the parties stipulated that the third-party defendant driver was acting as the agent of plaintiff at the time of the collision in question, the trial court did not err in submitting an issue as to the negligence of the third-party defendant after the court had dismissed the original defendant's third-party claim against him. *Jones v. Collins,* 753.

TRESPASS

§ 8. Damages in General

In an action to recover damages for trespass by floating boathouses on the waters above plaintiffs' submerged land, the trial court erred in instructing that the jury could consider net operating losses of the boathouses in determining fair rental value. *Development Corp. v. James,* 506.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

Where both plaintiffs and defendants have record title to land of more than thirty years duration which could be examined without finding an exception, and defendants and their predecessors in title have been in possession for more than thirty years, defendants' title must prevail pursuant to provisions of the Real Property Marketable Title Act. *Heath v. Turner,* 708.

TRIAL

§ 3. Motions for Continuance

The trial court properly denied plaintiff's motion for a continuance which was made on the grounds that his attorney was ill. *Reece v. Reece,* 404.

§ 11. Argument of Counsel

Defense counsel's argument in a wrongful death action that defendant would be "legally obligated to pay every single dollar of the verdict" and that the jury must deal "cautiously and fairly with the estate and the property of" defendant was improper. *Scallon v. Hooper,* 551.

The district court in an alimony case did not err in limiting concluding arguments of counsel to 10 minutes for each party. *Whedon v. Whedon,* 524.

UNIFORM COMMERCIAL CODE

§ 36. Collection of Checks and Drafts

In an action arising from the payment by bank of thirty-seven forged checks drawn against the account of plaintiff over a fourteen-month period, the trial court did not err in entering summary judgment in favor of the bank. *Ind-Com Electric Co. v. First Union,* 215.

UTILITIES COMMISSION

§ 24. Ratemaking in General

The Utilities Commission was and is without power to include or consider the cost of any portion of purchased power or interchange power in determining a fuel adjustment clause proceeding pursuant to G.S. 62-134(e). *State ex rel. Utilities Commission v. Public Staff,* 453.

The Utilities Commission properly considered an application for a fuel cost-based adjustment in a separate G.S. § 62-134(e) proceeding, rather than consolidating that application with the then-pending general rate case. *State ex rel. Utilities Commission v. Public Staff,* 480.

There is no requirement that the Utilities Commission segregate the total fuel cost per unit for only that electricity consumed by North Carolina retail customers from the systemwide fuel cost per unit in determining the appropriate adjustment in future rates based solely on the increased cost of fuel pursuant to an expedited G.S. § 62-134(e) proceeding. *Ibid.*

The Utilities Commission may, in an expedited G.S. § 62-134(e) proceeding, use the data from the historical test period as a basis for an increase in the future billing period without having to undergo the delay and burden of fine-tuning such data to compensate for any abnormalities during the test period. *Ibid.*

In an expedited fuel adjustment proceeding pursuant to G.S. § 62-134(e), the Utilities Commission may include an adjustment for increased costs incurred by the fuel component of purchased power from other utilities. However, a purchasing utility's increased payments which go towards the selling utility's non-fuel production costs cannot be the basis of an adjustment under G.S. § 62-134(e). *Ibid.*

§ 39. Taxes as Current and Operating Expenses

Consideration by the Utilities Commission of the G.S. § 105-116 additional gross receipts tax in a G.S. § 62-134(3) proceeding was not improper. *State ex rel. Utilities Commission v. Public Staff,* 480.

WATERS AND WATERCOURSES

§ 3. Natural Streams

The owners of submerged land were entitled to enjoy the waters above such land free of defendants' boathouses. *Development Corp. v. James,* 506.

WILLS

§ 36.2. Particular Devises as Creating Defeasible Fee

Where plaintiffs claim their title through a Bertha Murdock, and Bertha held "an estate in fee simple . . . defeasible upon [her] death . . . without bodily heirs," she held only a defeasible fee. *City of Statesville v. Credit and Loan Co.,* 727.

WITNESSES

§ 1.2. Children as Witnesses

The trial court properly denied defendant's motion to quash the State's subpoena for two children, ages three and four, who were in an automobile at the time of an alleged kidnapping. *S. v. McRae*, 225.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina