NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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1. Appointed Judge 27 January 1984 to succeed Samuel E. Britt who retired 31 December 1983.
2. Appointed Judge 20 February 1984.
3. Appointed Emergency Judge 1 January 1984.

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---

1. Retired effective 31 December 1983.
2. Appointed Chief Judge 16 January 1984.
3. Appointed Judge 13 December 1983.
4. Appointed Judge 16 January 1984 to replace Joseph E. Dupree who retired 30 November 1983.
5. Appointed Superior Court Judge 27 January 1984.
6. Resigned effective 31 December 1983.

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Patterson v. Gaston Co.	62 N.C. App. 544	Denied, 309 N.C. 822
Plemmons v. City of Gastonia	62 N.C. App. 470	Denied, 309 N.C. 322
Powell v. Parker	62 N.C. App. 465	Denied, 309 N.C. 322
Pyles v. CP&L Co.	62 N.C. App. 758	Denied, 309 N.C. 322
Raintree Homeowners Assoc. v. Raintree Corp.	62 N.C. App. 668	Denied, 309 N.C. 462
Sanders v. Yancey Trucking Co.	62 N.C. App. 602	Denied, 309 N.C. 462
Sedberry v. Johnson	62 N.C. App. 425	Denied, 309 N.C. 322
Sharpe v. Nationwide Mut. Fire Ins. Co.	62 N.C. App. 564	Denied, 309 N.C. 823
Shutt v. Butner	62 N.C. App. 701	Denied, 309 N.C. 462
State v. Churchill	62 N.C. App. 81	Denied, 309 N.C. 193
State v. Crump	62 N.C. App. 144	Allowed, 309 N.C. 463
State v. Edmonds	62 N.C. App. 551	Denied, 309 N.C. 323
State v. Gonzalez	62 N.C. App. 146	Allowed, 309 N.C. 463
State v. Hough	61 N.C. App. 132	Denied, 308 N.C. 193
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State v. Nickerson	62 N.C. App. 754	Denied, 309 N.C. 323
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State v. Smith	62 N.C. App. 145	Denied, 309 N.C. 323
State v. Steele	62 N.C. App. 145	Denied, 309 N.C. 464 Appeal Dismissed
State v. Tedder	62 N.C. App. 12	Denied, 309 N.C. 324 Appeal Dismissed
State v. Tew	62 N.C. App. 190	Denied, 309 N.C. 464
State v. Thompson	62 N.C. App. 585	Allowed, 309 N.C. 464
State v. Ward	61 N.C. App. 747	Denied, 309 N.C. 825
State v. Wise	62 N.C. App. 328	Denied, 309 N.C. 193
State ex rel. Utilities Comm. v. Seaboard Coast Line Railroad	62 N.C. App. 631	Denied, 309 N.C. 324 Appeal Dismissed
Styleco, Inc. v. Stoutco, Inc.	62 N.C. App. 525	Denied, 309 N.C. 825
Swindell v. Overton	62 N.C. App. 160	Allowed, 309 N.C. 826
Thompson v. Home Insurance Co.	62 N.C. App. 562	Denied, 309 N.C. 324
Weber v. Buncombe Co. Bd. of Educ.	62 N.C. App. 552	Denied, 309 N.C. 826 Appeal Dismissed
White v. Battleground Veterinary Hosp.	62 N.C. App. 720	Denied, 309 N.C. 325

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. FORREST GREEN

No. 822SC1074

(Filed 3 May 1983)

1. Homicide § 15.2— prior argument between defendant and victim—admissible to show motive

In a prosecution for second degree murder, the trial court properly admitted evidence of an argument between defendant and the victim which occurred several days prior to the homicide since the evidence was admissible to show defendant's motive and mental intent or state.

2. Homicide § 19.1— exclusion of testimony concerning character of victim—no evidence of self-defense—exclusion proper

In a prosecution for second degree murder, the trial court properly excluded testimony regarding the general character and reputation of the victim in the community and his reputation as "a violent and dangerous man," where the defendant had introduced no evidence as to self-defense.

3. Criminal Law § 138— manslaughter—aggravating factor—use of deadly weapon—element of offense

Defendant's use of a deadly weapon to shoot his victim, and thereby accomplish the unlawful killing which constituted the offense of manslaughter, could not properly be considered as a factor in aggravation.

4. Criminal Law § 138— manslaughter—aggravating factor—concealment of deadly weapon—properly considered

Where a homicide emanated from a game of cards involving defendant and the victim, evidence that defendant carried a concealed weapon was evidence that he committed a separate criminal offense, G.S. 14-269, without which the offense may have been averted; therefore, concealment of a deadly weapon was properly considered by the court as a factor in aggravation.

5. Criminal Law § 138— Fair Sentencing Act—aggravating factors—prior convictions—necessity of showing representation by counsel and defendant not indigent

Since the burden is on the State to prove that, at the time of the prior convictions, the defendant either was not indigent, was represented by counsel, or waived counsel and since the record contained no evidence regarding these matters, the court could not have found them by a preponderance of the evidence, and the prior convictions of defendant in a homicide case were improperly considered as factors in aggravation.

Judge WEBB concurring.

Judge BRASWELL dissenting.

APPEAL by defendant from *Small, Judge.* Judgment entered 10 June 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 12 April 1983.

Defendant was tried for second degree murder and convicted of manslaughter. The court found certain factors in aggravation and mitigation, found that the factors in aggravation outweighed the factors in mitigation, and sentenced defendant to imprisonment in excess of the presumptive term.

Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

Franklin B. Johnston for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in admitting evidence of, and instructing the jury regarding, an argument between defendant and the victim which occurred several days prior to the homicide. This evidence was admissible to show defendant's motive and mental intent or state, and to indicate the relationship between defendant and the victim. *See State v. Cherry,* 298 N.C. 86, 109, 257 S.E. 2d 551, 565 (1979), *cert. denied,* 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980); *State v. Bailey,* 49 N.C. App. 377, 380-82, 271 S.E. 2d 752, 754-55 (1980), *disc. rev. denied,* 301 N.C. 723, 276 S.E. 2d 288 (1981); *State v. Judge,* 49 N.C. App. 290, 291-92, 271 S.E. 2d 89, 90 (1980). The contention is thus without merit.

[2] Defendant further contends the court erred in excluding testimony regarding the general character and reputation of the victim in the community and his reputation as "a violent and dangerous man." He relies on

> the general rule that where the defendant in a homicide prosecution pleads self-defense and there is evidence which tends to show that the killing was in self-defense, evidence of the character of the deceased as a violent and dangerous fighting person is admissible if such character was known to the defendant or the evidence is wholly circumstantial or the nature of the transaction is in doubt.

State v. Price, 301 N.C. 437, 450, 272 S.E. 2d 103, 112 (1980).

Defendant sought to elicit the testimony excluded here on cross-examination of a State's witness. At that time he had introduced no evidence as to self-defense. A defendant must present viable evidence of the necessity of self-defense as a condition precedent to the admissibility of evidence regarding the general character of the deceased as a violent and dangerous fighting person. *State v. Allmond,* 27 N.C. App. 29, 30-31, 217 S.E. 2d 734, 736 (1975). Because no such evidence had been presented, the court did not err in sustaining the objections to the inquiries in question.

Defendant finally contends the court erred at the sentencing stage in its findings on factors in aggravation, and in finding that the factors in aggravation outweighed the factors in mitigation.

[3] The court found, as a factor in aggravation, that the defendant was armed with or used a deadly weapon. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." G.S. 15A-1340.4(a)(1) (Cum. Supp. 1981). This Court has held use of a deadly weapon improperly considered as a factor in aggravation in second degree murder cases, on the ground that evidence thereof was essential to prove malice, which is an element of second degree murder. *State v. Gaynor,* 61 N.C. App. 128, 130, 300 S.E. 2d 260, 261 (1983); *State v. Keaton,* 61 N.C. App. 279, 300 S.E. 2d 471 (1983). We now consider whether, standing alone, use of a deadly weapon to shoot a victim, and thereby accomplish an unlawful killing, may prop-

erly be considered as a factor in aggravation in manslaughter cases.

Manslaughter "is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury." *State v. Roseboro*, 276 N.C. 185, 194, 171 S.E. 2d 886, 892 (1970), *death sentence reversed*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971). To convict of manslaughter, then, the State must prove an unlawful killing.

The unlawful killing proven here was accomplished by shooting the victim with a gun, a deadly weapon. Evidence of use of the deadly weapon to shoot the victim was thus necessary to prove the unlawful killing, which was the essence of the offense.

The General Assembly has prescribed, for consideration as a factor in aggravation, that "[t]he defendant was armed with or used a deadly weapon at the time of the crime." G.S. 15A-1340.4(a)(1)(i) (Cum. Supp. 1981). We do not believe, however, that it intended this factor to be used to enhance sentences in cases where the offense itself is an unlawful killing accomplished by shooting the victim with a deadly weapon. If the deadly weapon was used in a manner which rendered "[t]he offense . . . especially heinous, atrocious, or cruel," that may properly be considered as a factor in aggravation. G.S. 15A-1340.4(a)(1)(f) (Cum. Supp. 1981). Standing alone, however, we hold that defendant's use of a deadly weapon to shoot his victim, and thereby accomplish the unlawful killing which constitutes the offense of manslaughter, cannot properly be considered as a factor in aggravation.

[4] The court found, as a further factor in aggravation, that the deadly weapon with which defendant was armed was concealed upon his person. While it is somewhat incongruous to disallow, as a factor in aggravation, actual use of the weapon, while allowing its mere concealment, for reasons set forth below we hold that the court could properly consider it.

Concealment of the weapon may well have been a factor in the occurrence of the crime. The homicide here emanated from a game of cards involving defendant and the victim. Had the weapon been visible, the victim might well have altered his behavior toward defendant during the game, or have taken other

precautions which would have prevented the shooting. Evidence that defendant carried a concealed weapon was evidence that he committed a separate criminal offense, G.S. 14-269, without which the offense here might have been averted. We thus hold that this factor was properly considered.

[5] The court finally found, as a factor in aggravation, that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. G.S. 15A-1340.4(e) (Cum. Supp. 1981), in pertinent part, provides:

> No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction.

This Court has indicated that the burden should be on the State to prove that, at the time of prior convictions, the defendant either was not indigent, was represented by counsel, or waived counsel; and that the Court cannot find these matters by a preponderance of the evidence when the record contains no evidence with regard thereto. *State v. Thompson*, --- N.C. App. ---, 300 S.E. 2d 29, 33 (1983). *See also State v. Farmer*, --- N.C. App. ---, 299 S.E. 2d 842 (1983). *See State v. Massey*, 59 N.C. App. 704, 705, 298 S.E. 2d 63, 65 (1982), which indicates the contrary, however.

The record here contains no evidence regarding whether defendant was not indigent, was represented by counsel, or waived counsel at the time of his prior convictions. The court thus could not have found these matters by a preponderance of the evidence, and the prior convictions were therefore improperly considered as factors in aggravation. *State v. Thompson, supra.*[1]

1. The author of the majority opinion, speaking only for himself and not for the majority, states the following with regard to the issue of the burden of proof as to prior convictions:

If I were writing on a clean slate, I would place this burden on the defendant. I so indicated in *State v. Massey*, 59 N.C. App. 704, 705, 298 S.E. 2d 63, 65 (1982).

The statement in *Massey* was not essential to resolution of the issue presented in that defendant's brief, however; and this Court subsequently has held expressly that the State has the burden. *State v. Thompson, supra; State v. Farmer, supra.*

We find no error in the trial. For the reasons stated, the sentence is vacated and the case is remanded for resentencing. *See State v. Ahearn,* 307 N.C. 584, 300 S.E. 2d 689 (1983).

No error; sentence vacated, remanded for resentencing.

Judge WEBB concurs.

Judge BRASWELL dissents.

Judge WEBB concurring.

In light of the footnote to the majority opinion and the dissenting opinion, I file this opinion concurring with the result reached by the majority as to the aggravating factor of prior convictions.

I believe *State v. Thompson,* 60 N.C. App. 679, 300 S.E. 2d 29 (1983) and *State v. Farmer,* 60 N.C. App. 779, 299 S.E. 2d 842 (1983) were decided correctly. G.S. 15A-1340.4(a)(1)o provides that

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In his concurring opinion Judge Webb makes a persuasive case for that position. I remain unconvinced, however. Allocation of the burden of proof in this situation is appropriately for the legislature. While that body has not clearly allocated it, I do not believe it intended to make either absence of indigency or assistance of counsel in indigent situations an "element" of the aggravating factor of prior convictions, thereby placing the burden on the State to prove absence of indigency or assistance of counsel, just as it must prove an element of a criminal offense. I believe, instead, that it intended merely to provide defendants with a means to resist a finding of prior convictions as an aggravating factor in appropriate cases.

Twenty years after *Gideon,* cases in which a defendant was convicted while indigent and unrepresented should be the exception rather than the rule. A defendant generally will know, without research, whether this occurred. In my view it is not the preferable policy to put the State to the burden of producing records, at times from multiple counties or even multiple jurisdictions, to establish something which only rarely will enable a defendant to resist a finding of the prior convictions as an aggravating factor, and which, when it will, is generally within the defendant's knowledge without the necessity of research, possibly in a multiplicity of geographical areas.

If defendant here is to have equal justice with the defendants in *Thompson* and *Farmer,* though, the holdings there must also apply here. Until the General Assembly or the Supreme Court resolves the issue, then, preferably, in my view, by placing the burden on the defendant, I consider myself bound to follow those cases, despite disagreement with the policy they establish.

if there is proof by a preponderance of the evidence that a defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement, this may be considered as an aggravating factor for the imposition of a sentence in excess of the presumptive sentence. G.S. 15A-1340.4(e) provides that a prior conviction which occurred while a defendant was indigent may not be considered unless the defendant was represented by counsel or waived counsel with respect to that prior conviction.

G.S. 15A-1340.4 does not say who has the burden of proving non-indigency, counsel, or waiver of counsel which this section makes an element of the aggravating factor of a prior conviction. We have under our common law and constitutional system required that the State prove the elements of a crime in order to convict a defendant. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). In light of this tradition, I do not believe we should require a defendant to prove the lack of an element in the aggravating factor of a prior conviction. The imposition of a sentence which may be many years in prison in excess of the presumptive sentence is not a trivial matter. I believe the State should be required to prove the elements of an aggravating factor which may trigger extra years in prison.

I do not, as the majority opinion apparently does, agree with the reasoning of the minority. It is not a question of the suppression of evidence of a prior conviction. The evidence of the prior conviction was admitted. This is not enough to support the aggravating factor of a prior conviction, however. This aggravating factor also requires evidence that the defendant either was not indigent or that he was represented by counsel or had waived counsel. There was no such evidence in this case.

I do not believe the admission of a confession at a trial without objection is in any way comparable to the issue which we face. If the defendant does not object to the admission of a confession, he cannot complain about it on appeal. In this case the required evidence was not introduced at all. The "silent record" point does not reward the lazy lawyer any more than a lawyer is ever rewarded when the party with the burden of proof does not present evidence sufficient to meet this burden. I do not believe we have put any affirmative duty on the judge to ask the defend-

ant or anyone else whether he is "unconditionally positive" the defendant was not indigent. The judge should determine the issue on the evidence presented. To say, as does the dissent, that "[t]he record is 'silent' only because the defendant voluntarily chose for it to be 'silent' " begs the question. The defendant did not object to any evidence as to his indigency or waiver of counsel because no such evidence was offered. I do not, as the dissent seems to think, believe there is a "constitutional error" involved. We are concerned with the interpretation of a statute. The statute says the court may not find a prior conviction as an aggravating factor if the defendant was indigent at the time of the conviction unless he was represented by counsel or had waived counsel. The statute does not say who must prove non-indigency, representation by counsel, or the waiver of counsel. Under our tradition of requiring the State to prove what is necessary to send a person to prison, I do not think we should, in this case, require the defendant to prove a negative in an aggravating factor in order not to serve additional years in prison.

Judge BRASWELL dissenting.

I respectfully dissent from that portion of the majority opinion which disallows the use of a prior conviction as an aggravating factor in the sentencing hearing on the ground that the record is silent as to whether the defendant was indigent, represented by counsel or waived counsel at the time of his prior conviction.

It has been 20 years since *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792, 93 A.L.R. 2d 733 (1963), and its enunciation of the constitutional principle of the right to counsel. The doctrine of waiver of right to counsel, and waiver of other constitutional rights, is ageless.

The concept of requiring that an objection or motion to suppress be made whenever counsel or a party desires to challenge the admissibility of evidence is a cornerstone of our trial procedure. To erase the necessity of making an objection or motion to suppress to the admission of evidence of a prior conviction in the sentencing stage of a criminal trial creates an undesirable procedural rule which is not required by statute or constitution. The majority opinion follows a higher standard for the admission

of evidence of prior convictions than for the reception into evidence of proof of any other statutory aggravating factor.

The rule of law on reception of evidence in the sentencing stage of a trial is more relaxed and less stringent than in the case in chief. The sentencing hearing statute, G.S. 15A-1334(b), provides in part: "Formal rules of evidence do not apply at the hearing."

I would also compare the underlying alleged constitutional issue with the subject of confessions. In a criminal trial, the State can offer a confession as substantive evidence of guilt, and the defense counsel may fail (for whatever reason) to object or move to suppress. Counsel will know that the record is silent on whether the officer gave the defendant his *Miranda* warnings and silent on whether the defendant did or did not want a lawyer before confessing, or whether the defendant was indigent. However, our law is that because the defendant did not object or move to suppress the introduction of the confession in the trial division, he may not assign as error on appeal the admission of the confession at trial. The silent record becomes a legally binding waiver of the right to inquire later whether defendant had actually said he wanted an attorney or was indigent. The failure on counsel's part to object to the confession does not require either the District Attorney or Judge to object for the defendant, nor does the failure to object require a suppression hearing.

The "silent record" point, upon which remand is granted, rewards the lazy lawyer who did not object or who did not investigate his client's record. It may be that on remand a defendant will not be found to have been indigent at his prior conviction case, or if indigent, that he waived counsel, and in such situations the remand serves only to delay, is time consuming, and is costly to the State. Our record on appeal does not show any allegation that in fact the appellant was indigent or that on remand he will be successful in eliminating this "prior conviction" from being considered against him as an aggravating factor. Nor should such allegations properly be placed in a record on appeal. This is a subject matter that should have been specifically addressed by the trial judge after an appropriate objection.

Also, the "silent record" point will in the future make the trial judge have the affirmative duty (in order to insure against

needless remands) to ask the defendant, his counsel, and the District Attorney if they are unconditionally positive that the defendant had counsel, or was not indigent, or did not waive his right to counsel concerning the prior conviction. Such a duty should not be placed upon a trial judge. Any duty must be placed on defendant and his counsel by requiring a proper objection or motion to suppress at the sentencing stage.

The record is "silent" only because the defendant voluntarily chose for it to be "silent." Otherwise, he would have objected or moved to suppress. Even when the record is "silent," the power of choice *not* to assign the point as error on appeal remains with the defendant. It is not such a severe constitutional error so as to automatically require a remand for a resentencing hearing when it is raised on appeal for a first time. If the defendant did object at the sentencing stage about no counsel at his prior conviction, then the trial judge would have had the opportunity to ask questions or conduct a *voir dire* as to admissibility. Otherwise, the trial judge is saddled with having violated a defendant's constitutional rights in the admission of evidence when he is innocent of any knowledge that the defendant wishes to raise the issue of "no counsel." As far as the judge knows, the defendant and his counsel were "silent" because none of the defendant's rights were being violated.

The doctrine of waiver ought to apply as a matter of law on these facts. A criminal defendant can lawfully waive a substantive right as well as a procedural right. A constitutional right may also be waived. In 1970 our Supreme Court in *State v. Mitchell*, 276 N.C. 404, 409-10, 172 S.E. 2d 527, 530 (1970), fused these principles into our jurisprudence with these words:

> "It is elementary that, 'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' [Citations omitted.] An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule."

To grant appellate relief by remanding for a hearing, giving due consideration to the record in this case, is to pass upon a constitutional question in the appellate division that was not affirmatively raised and passed upon in the trial division. *See Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976).

The use of a prior conviction for a criminal offense, punishable by more than 60 days' confinement, as an aggravating factor in sentencing is authorized by G.S. 15A-1340.4(a)(1)o. A method by which prior convictions may be proved is set forth in G.S. 15A-1340.4(e). Subsection (e) provides in part:

> "No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing."

I would hold that the above-quoted statute means that the judge can consider the prior conviction if the defendant fails to move to suppress or object or ask for a *voir dire*. The wording of the statute is that "a defendant *may* make a motion to suppress . . . ." (Emphasis added.) For tactical reasons counsel may not wish to suppress and may wish to explain away or simplify that which otherwise could be serious. If there is a motion to suppress, then the State would have the burden of proving the acceptable prior conviction. Absent the motion to suppress or an objection, there is no burden on the State to show on the record, affirmatively and automatically, that the defendant had counsel, waived counsel or was not indigent at his prior conviction.

Although the defendant presents by his third question whether the trial judge committed reversible error "in finding that the aggravating factors outweigh the mitigating factors," in his brief he states, after his discussion of the judge's use of the .38 caliber pistol as an aggravating factor, "The only other factor in aggravation *meets the statutory definition* but seems to be inconsequential in light of the defendant's explanation of such con-

viction." (Emphasis added.) From a reading of the judgment, "the only other factor" left in the case was the evidence of a prior conviction punishable by more than 60 days' confinement. Thus, in his brief the defendant has conceded that in this case this aggravating factor "meets the statutory definition" of the existence of usable evidence of a prior conviction, and should be treated as "inconsequential in light of the defendant's explanation." The explanation of the prior conviction mentioned in defendant's brief shows that in the guilt phase (not sentencing stage) of the trial, and by *redirect* examination, defendant explained that he was convicted for carrying a concealed weapon in 1972 and that the weapon was a knife, something like a motorcycle knife.

The defendant himself makes no point that he ought to have a new sentencing hearing because the judge did not determine the counsel issue for the prior conviction. Neither should this Court make the point for him on this record.

STATE OF NORTH CAROLINA v. MICHAEL TEDDER

No. 8214SC977

(Filed 3 May 1983)

1. **Embezzlement § 5— reasons for opening cash register—testimony competent**

In a prosecution for embezzlement, testimony by the employer's sales manager that an employee would have reason or authority to open the cash register, other than for a sale, in order to obtain change or a check placed under the drawer of the register did not constitute improper opinion testimony and was properly admitted since it was based upon personal knowledge of the witness.

2. **Criminal Law § 73.1— hearsay testimony—admission as harmless error**

Defendant was not prejudiced by the trial court's refusal to strike hearsay testimony that the merchandise number, the department number and the price listed on a cash register tape for the transaction at issue were not the correct numbers and price for the item sold by defendant after the witness admitted that he obtained the numbers and price from another witness on the morning of the trial where other witnesses had earlier presented competent testimony showing the correct numbers and price for the item and the numbers and price placed on the register tape by defendant when he sold the item.

3. Embezzlement § 6— sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of embezzlement where it tended to show that defendant was an employee of a department store during the fall of 1980; on 5 November 1980 he was observed selling a lamp; an immediate check of the cash register tape after this transaction indicated that defendant had entered the wrong employèe, department and merchandise numbers as well as a price lower than the one marked on the lamp; defendant had no authority to mark down the price of merchandise; and prior to the sale of the lamp, defendant sold other merchandise to an employee at the store at less than the marked price.

4. Embezzlement § 6— variance in date of crime not fatal

There was no fatal variance between an indictment charging defendant with embezzlement on 5 November 1981 and evidence showing that the crime occurred on 5 November 1980 where the trial court found that the date on the indictment was "patently a clerical error"; all of the evidence showed that the embezzlement occurred on 5 November 1980, that defendant was employed on this date, and that defendant left his employment in December 1980; and it further appears that defendant was aware of this clerical error in the indictment because of his repeated questioning about the dates of his employment.

5. Criminal Law § 102.6— wrong date in indictment—refusal to permit jury argument about such date

The trial court did not err in refusing to permit defense counsel to argue in his closing jury argument that the State had failed to prove that defendant was an employee on the date alleged in an embezzlement indictment where the court had earlier ruled that the date in the indictment was clerical error, defendant was not prejudiced by the variance between the indictment and the evidence, and there was no evidence of any criminal act occurring on the date alleged in the indictment.

6. Criminal Law § 138— inapplicability of Fair Sentencing Act

The Fair Sentencing Act did not apply to a crime of embezzlement which occurred on 5 November 1980 since it applies only to felonies occurring on or after 1 July 1981. G.S. 15A-1340.1.

7. Criminal Law §§ 142.4, 145— expenses of witnesses—restitution as condition of probation—taxation as costs

The trial court in an embezzlement case erred in ordering defendant, as a condition of probation, to pay the employer restitution for the meals, mileage, travel expenses and telephone calls of two prosecution witnesses. Rather, such expenses should have been labeled as costs, and the trial court had no authority to tax defendant with any of the expenses of one prosecution witness who did not testify at the trial in obedience to a subpoena. G.S. 15A-1343(d) and (e); G.S. 7A-314(a) and (c).

APPEAL by defendant from *McLelland, Judge.* Judgment entered 20 April 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 March 1983.

Defendant was convicted of embezzling merchandise and money from Montgomery Ward Company, Inc. The State's evidence tends to show that in the fall of 1980 Wesley Satterwhite, sales manager for Montgomery Ward, discovered a shortage of inventory in the lamp and giftware department. He immediately notified T. T. Blalock, the store's loss prevention manager, and a surveillance was ordered. On 5 November 1980 Kathy Glascock, a loss prevention specialist with Montgomery Ward, was conducting a surveillance in the store. She observed the defendant, an employee of the store, conversing with a man in the lamp department. The man picked up a beige ceramic lamp and carried it to the cash register. The defendant began ringing up the cash register without looking at the tag on the lamp. The man gave defendant one bill and received change. After defendant stapled a receipt to the lamp, the man left the store. Defendant then opened the register, removed some money and went to the credit center for change. While he was away, Ms. Glascock examined this particular transaction on the tape in the register. She copied the information on the tape and placed a small red asterisk beside the transaction. At the end of the day Ms. Glascock retrieved the tape and turned it over to Blalock.

Evidence for the State further tends to show that the lamp at issue had merchandise, or "SKU", number 006400 and was priced at $47.99. Every employee and department at Montgomery Ward also has a number. Each time a sale is made, the employee must enter his employee number, the number of the department where the merchandise is located and the SKU number of the merchandise on the register tape. The tape retrieved by Ms. Glascock on 5 November 1980 contained the department number for giftware, the SKU number for Corelle dinnerware and the number of an employee who was working with defendant. The price entered on the tape was $8.80, $39.19 less than the marked price for the lamp.

Tammy White testified that she was employed at Montgomery Ward between April and October 1980. During this period defendant sold her a hand fan and dried flowers at prices lower than those marked. Ms. White was later fired, but she promised to repay the difference to the store in return for a promise that she would not be prosecuted. The defendant chose to present no evidence.

From a two year sentence suspended on the condition that he make restitution and pay costs, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

William G. Goldston, for defendant appellant.

BECTON, Judge.

I

Defendant's first five assignments of error raise issues regarding the admissibility of testimony by Satterwhite and Blalock. In Assignments of Error 1, 2 and 3, defendant argues that the court erred in allowing Satterwhite to answer the following three questions: (1) "Are all entries reflected on the (register's) print-out?" (2) "Would an employee have any reason or authority to open the register other than for a sales transaction?" and (3) "And the shortages, inventory shortages, began to stop after the investigation?" He contends that by granting Satterwhite permission to answer these questions, the court allowed him to express improper opinions.

The record reveals that objections to questions (1) and (3) were not made until these questions were answered.

> An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement. Unless prompt objection is made, the opponent will be held to have waived it.

1 *Brandis on North Carolina Evidence,* § 27 at 101 (2d rev. ed. 1982). Here there was no reason for a postponement of the objections, and they are deemed waived. We also note that defendant made neither a motion to strike the answers to these questions nor a request that the jury be instructed to disregard the testimony. The failure to make such motion or request constitutes a waiver of the objections to these answers.

[1] Defendant timely objected to question (2), but his objection was overruled. Satterwhite then answered that an employee would have reason or authority to open the register, other than for a sale, in order to obtain change or any check placed under

the drawer of the register. Defendant argues that this question also elicited improper opinion testimony. There is no merit to this argument. As sales manager for Montgomery Ward, Satterwhite was familiar with the various reasons for opening the register and his answer was based upon personal knowledge. Assuming, *arguendo*, that the question was inadmissible, defendant was required to show that had this question not been allowed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (1978). Defendant has not shown such prejudice.

[2] Assignments of Error 4 and 5 involve testimony by Blalock. During direct examination Blalock testified that the SKU number, the department number and the price listed on the tape for the transaction at issue were not the correct numbers and price for the lamp sold. Defendant objected to the last question concerning the correct price for the lamp, and this objection was overruled. On cross-examination Blalock admitted that he obtained the numbers and price from Satterwhite on the morning of the trial. Defendant then moved to strike Blalock's testimony regarding the numbers and price on the ground that it was hearsay. He now argues that the court's refusal to strike this evidence constitutes prejudicial error and entitles him to a new trial.

The record on appeal shows that Satterwhite earlier presented competent testimony, without objection, that the department number for the lamp was 77, that the SKU number of the lamp was 006400 and that the sales price was $47.99. Glascock had testified earlier to the numbers and price placed on the register tape by defendant when he sold the lamp. In light of this prior testimony, no prejudicial error resulted from Blalock's hearsay testimony. Assignments of Error 4 and 5 are therefore overruled.

II

Defendant argues that the court erred in denying his motions to dismiss on the grounds of either insufficiency of the evidence or fatal variance between the allegations in the indictment and the proof offered at trial. He first argues that there was insufficient evidence to take the case to the jury because the circumstantial evidence failed to exclude any other reasonable hypothesis consistent with innocence.

> The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. (Citations omitted.) In ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, 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. (Citation omitted.)

State v. Smith, 40 N.C. App. 72, 78-79, 252 S.E. 2d 535, 539-40 (1979). When the evidence here is taken in the light most favorable to the State, we find a reasonable inference of defendant's guilt of embezzlement.

Embezzlement consists of four essential elements: (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own use or fraudulently misapplied it. *State v. Ellis*, 33 N.C. App. 667, 236 S.E. 2d 299, *disc. review denied*, 293 N.C. 255, 236 S.E. 2d 708 (1977).

[3] The evidence in the case *sub judice* supports the following findings: Defendant was an employee of Montgomery Ward during the fall of 1980. On 5 November 1980 he was observed selling a lamp. An immediate check of the register tape after this transaction indicated that defendant had entered the wrong employee, department and SKU numbers as well as a price lower than the one marked on the lamp. Defendant had no authority to mark down the price of merchandise. Prior to the sale of the lamp, defendant sold other merchandise to an employee of the store at less than the marked price. These foregoing findings are sufficient to take the case to the jury.

[4] As the second ground for his motion to dismiss, defendant emphasizes that the indictment charged him with the crime of embezzlement on 5 November 1981, while the State's evidence showed that the crime occurred on 5 November 1980. Defendant was not an employee of Montgomery Ward in 1981. The trial court found that the date on the indictment was "patently a clerical error" and refused to dismiss the action because of this variance. Defendant now contends that he relied upon this date in

the indictment to establish an alibi that he was not employed by Montgomery Ward in 1981.

There is no evidence that defendant was prejudiced by the variance. The evidence shows that after an investigation of the transaction occurring on 5 November 1980, defendant was arrested for the crime of false pretense on 5 December 1980. This charge was later dismissed. All of the evidence shows that the embezzlement occurred on 5 November 1980; that defendant was employed on this date; and that defendant left his employment in December 1980. It further appears that defendant was aware of this clerical error in the indictment because of his repeated questioning about the dates of his employment. *See, e.g., 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) (defendant's cross-examination of State's witnesses indicated he was aware of the clerical error in the indictment). Neither of defendant's grounds for dismissal has merit.

[5] Defendant's Assignments of Error 7, 8 and 9 also involve this variance between the indictment and the proof offered by the State. In Assignments of Error 7 and 8 defendant argues that the trial court erred in refusing to allow defense counsel, in his closing jury argument, to argue that the State had failed to prove that defendant was an employee of Montgomery Ward on the date alleged in the indictment. In disallowing this argument, the court informed the jury that it had earlier ruled the date in the indictment to be a clerical error. Defendant moved for a mistrial, and the court denied the motion.

The trial court's ruling constitutes neither an abuse of discretion nor a denial of defendant's constitutional right to effective assistance of counsel. This Court has already concluded that defendant was not prejudiced by the variance between the indictment and the evidence. Furthermore, since there was no evidence of any criminal act occurring on the later date of 5 November 1981, evidence of an alibi for this date would be immaterial, irrelevant and incompetent. Counsel is allowed to argue the law and facts in evidence but may not place before the jury incompetent and prejudicial matters. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law,

or remarks calculated to mislead or prejudice the jury." *Id.* at 516, 212 S.E. 2d at 131. By disallowing defense counsel's argument, the court was merely carrying out this duty.

In Assignment of Error 9 defendant alleges error in the jury charge. He first argues that the trial court erred in instructing the jury that it could find defendant guilty of the offense on 5 November 1980, a date different from that alleged in the indictment. There is no basis for this first argument for the reasons previously discussed. We also find no basis for defendant's contention that the trial court failed to instruct the jury that to find defendant guilty of embezzlement it must be satisfied that he fraudulently converted a lamp and $39.19 in U.S. currency, the property of Montgomery Ward Company. It is apparent from the record that the conversion of the lamp necessarily included the misapplication of $39.19, the difference between the sales price of the lamp ($47.99) and the amount shown on the register tape ($8.80).

III

[6] The remaining two assignments of error raise questions about the sentencing hearing. Defendant argues that the court erred when it did not apply the Fair Sentencing Act (N.C. Gen. Stat. § 15A-1340.1 *et seq.* (1981)), since this Act is to be applied to all felonies occurring on or after 1 July 1981. Once again, defendant is relying upon the date alleged in the bill of indictment. His conviction was based solely upon an incident occurring on 5 November 1980, and the Fair Sentencing Act is, by its own terms, inapplicable. G.S. § 15A-1340.1.

[7] Defendant was sentenced to two years, suspended on condition that he make restitution to Montgomery Ward of $618.87 and pay counsel fees of $800 and court costs. Defendant now questions the legality of the $618.87 in restitution. This amount consisted of witness Satterwhite's mileage, long distance calls, and parking fees during the trial. The amount further consisted of witness Glascock's air fare from Texas, taxi fare, parking fees and meals during the trial. The difference between the price of the lamp as marked, and as entered by defendant in the cash register, was also included in this restitution.

N.C. Gen. Stat. § 15A-1343(d) (1981) provides for restitution as a condition of probation "to an aggrieved party or parties who

shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant." G.S. § 15A-1343(e) provides, as a condition of probation, that a person placed upon probation "be required to pay all court costs and costs for appointed counsel or public defender in the case in which he [is] convicted." The difference in the marked price of the lamp and the price for which defendant sold the lamp consists of restitution pursuant to subsection (d) of this statute. The remaining expenses, however, for the prosecution witnesses' meals, mileage, travel and telephone calls should have been labeled as costs, and the trial court was without authority to assess all of these expenses against defendant.

The record on appeal shows that Montgomery Ward agreed to assume the witnesses' expenses, and the State later agreed to share in this burden. Only after defendant was found guilty of embezzlement did the State and Montgomery Ward suggest that defendant be charged with these expenses. A list of these expenses was submitted and accepted by the court over defendant's objection.

"The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action." *City of Charlotte v. McNeely*, 281 N.C. 684, 692, 190 S.E. 2d 179, 186 (1972). The controlling statute is N.C. Gen. Stat. § 7A-314 (1981). *Uniform fees for witnesses; experts; limit on number.* It is obvious from the record that the trial court did not follow this statute in ordering defendant to pay the witnesses' expenses as restitution. Pursuant to G.S. § 7A-314(a), witness Satterwhite would be entitled to reimbursement for travel expenses only if he were subpoenaed. The record does not show that Satterwhite testified at trial in obedience to a subpoena. The trial court therefore had no authority to tax defendant with any of Satterwhite's expenses. *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972). The record further shows that defendant was ordered to reimburse Montgomery Ward for Ms. Glascock's mileage in excess of that authorized by G.S. § 7A-314(c). On remand, should the trial court be inclined to again assess costs to defendant as a condition of probation, then this assessment must be made in accordance with the terms of G.S. § 7A-314.

Remanded for sentencing.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JOHN RICHARD MITCHELL

No. 8221SC965

(Filed 3 May 1983)

1. **Automobiles and Other Vehicles § 111— sufficiency of evidence that defendant's act proximate cause of victim's death**

Where two doctors testified that the head injury a victim sustained when defendant's car drove into a store and hit the victim contributed to and led to the victim's death, the State presented sufficient evidence to show that defendant's actions were a proximate cause of the girl's death even though another doctor testified that the sole cause of the victim's death was the negligence of the attending doctor.

2. **Automobiles and Other Vehicles § 111— sole cause of death rule—applicable in involuntary manslaughter cases**

The sole cause of death rule applies in involuntary manslaughter cases involving culpable negligence.

3. **Criminal Law § 91.2— pretrial publicity—denial of continuance proper**

In a prosecution for involuntary manslaughter resulting from an automobile accident, the trial court did not err in denying defendant's motion for a continuance due to the publication of two lengthy newspaper articles dealing with traffic deaths related to alcohol use in the major Sunday newspaper the day before the trial began.

4. **Jury § 7.14— re-examination of juror after acceptance by State—proper**

Where a prospective juror indicated during examination by defendant that she thought police officers would lie, the trial court did not err in allowing the State to re-examine and challenge the juror after the juror had been accepted by the State.

5. **Bills of Discovery § 6; Criminal Law § 87— providing State's witnesses—testimony by witness not named**

The trial court did not err in allowing a State's witness to testify whose name had not been disclosed as a prospective witness prior to jury voir dire where the court questioned the jurors as to whether they knew the prospective witness, where defendant made no allegation of surprise at trial, and where the witness was the first physician to examine the victim at the scene of the accident.

6. **Criminal Law § 87.4— allowing State to reopen examination of witness—no error**

It is within the trial court's discretion to allow a witness to be recalled and to offer additional testimony.

7. **Criminal Law § 138— Fair Sentencing Act—erroneously consolidating offenses for judgment**

The trial court erroneously consolidated for judgment the offenses of involuntary manslaughter and driving under the influence, second offense since the judge was required to make findings in aggravation and mitigation to support each sentence.

8. **Criminal Law § 138— wrongful consideration of victim's age as aggravating factor**

In a prosecution for involuntary manslaughter where defendant drove an automobile through a store window and hit a young girl, the trial court incorrectly considered the girl's age as an aggravating factor since the underlying policy of the statutory aggravating factor is to discourage wrongdoers from taking advantage of a victim because of the victim's young age.

9. **Criminal Law § 138— Fair Sentencing Act—prior convictions—aggravating factors**

In a prosecution for driving under the influence of intoxicating liquor, second offense and involuntary manslaughter, the trial court properly found as aggravating factors in imposing a sentence for involuntary manslaughter that the defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement and that defendant had a long history of habitual and persistent disregard of the motor vehicle laws and rules since one factor related to prior convictions and the other related to administrative revocations, and since defendant's prior conviction for driving under the influence could properly be considered as an aggravating factor in sentencing defendant for involuntary manslaughter although it could not have been considered for the charge of driving under the influence of intoxicating liquor, second offense. G.S. 15A-1340.4(a)(1).

10. **Criminal Law § 138— Fair Sentencing Act—aggravating factors within legislative realm only**

In a prosecution for involuntary manslaughter among other crimes, the trial court improperly considered as aggravating factors that defendant's sentence would deter others from committing the same offense and that a lesser sentence would unduly depreciate the seriousness of defendant's offense since those two factors fall within the exclusive realm of the Legislature.

APPEAL by defendant from *Albright, Judge.* Judgment entered 23 April 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 March 1983.

Defendant was tried and convicted on charges of possession of a duplicate operator's license knowing the same to be revoked;

operating a motor vehicle while his operator's license was revoked, third offense; operating a motor vehicle while under the influence of intoxicating liquor, second offense; and involuntary manslaughter. He was sentenced to consecutive active prison terms of six months for possession of a revoked driver's license; of two years for driving while license revoked, third offense; and of seven years for involuntary manslaughter and driving under the influence of intoxicating liquor, second offense.

State presented evidence tending to show that on 10 December 1981, James Cason, Jr., and his three year old daughter, Kimberly Cason, were shopping in a Hop-In convenience store in Winston-Salem when a car driven by defendant crashed through one of the walls of the store. The little girl was buried under a pile of debris. After pulling defendant from the car, the girl's father backed the car away and dug his daughter out of the debris. The child was examined at the scene by emergency medical personnel and found to be easily arousable and talkative, though drowsy.

Upon arrival at Forsyth Memorial Hospital at 10:35 p.m., Kimberly was examined by Dr. Richard Fireman. Dr. Fireman viewed x-rays taken of Kimberly's head, pelvis, and right leg and detected only a possible foot fracture. Dr. Fireman discharged Kimberly into her parents' care, giving them the usual instructions for the care of a patient who has been knocked out in an accident.

Meanwhile, defendant was arrested and taken to the police station, where he was administered a breathalyzer test. Defendant's blood alcohol level was determined to be 0.19 per cent. Witnesses who observed defendant at the scene testified that defendant had the odor of alcohol about him and was unsteady.

The girl returned home and her parents awakened her every hour (more often than the doctor had instructed) and checked her pupils as instructed by Dr. Freeman. When they tried to awaken Kimberly at 6:00 a.m., Kimberly would not wake up. They discovered that her right pupil was enlarged. They rushed Kimberly back to the hospital at Dr. Fireman's direction.

Dr. Fireman re-examined the x-rays taken earlier and discovered that there was a skull fracture that he had not seen on

his first view. A neurosurgeon, Dr. Ernesto de la Torre, was called in.

Dr. de la Torre determined that Kimberly had a blood clot, an epidural hematoma, on the right side of her head pressing against her brain. Surgery to remove the clot was immediately performed on Kimberly. While Kimberly was in intensive care after the operation, she had a cardiac arrest. Despite resuscitative efforts, she died later that afternoon.

Dr. de la Torre testified that Kimberly's death was caused by a combination of factors: the injury to her head which caused the blood clot which produced bleeding which caused a lack of oxygen in the blood which caused the cardiac arrest. Although Kimberly's parents were Jehovah's Witnesses and would not allow a blood transfusion, he could not say that a transfusion would have made a difference.

Dr. Francis Vogel, a neuropathologist and professor at Duke Medical School Center, testified for defendant that he reviewed the case history of the treatment of Kimberly Cason. The medical reports indicated that Dr. Fireman observed a swelling above the girl's right ear in the area of the fracture when she was first brought in. The x-rays clearly showed a fracture above the right ear which should have been diagnosed. In an injury of that type, there is a substantial risk of a subdural hematoma which, if left untreated, will lead to death within 24 hours. The first few hours after an injury of this sort are critical. The standard medical procedure is to keep the patient under observation in the hospital and monitor the blood pressure and pulse rate every half-hour. An elevation in blood pressure accompanied by a slowing of the pulse rate is an indication of an epidural hematoma requiring immediate surgical removal. Based on these factors, it was his opinion that the sole cause of Kimberly's death was the failure of Dr. Fireman to promptly diagnose the skull fracture and the release and discharge of Kimberly into her parents' care.

Attorney General Edmisten, by Associate Attorney David E. Broome, for the State.

Harper, Wood & Brown, by Gordon H. Brown, for defendant appellant.

ARNOLD, Judge.

Defendant presents 18 questions for review, which can be classified into four categories: causation, trial procedure, sentencing and evidentiary matters.

CAUSATION

Defendant first contends that there was insufficient evidence to support the submission of the case to the jury and to support the jury's verdict. Specifically, he argues that the overwhelming and uncontradicted evidence shows that Dr. Fireman's alleged negligence was the sole cause of Kimberly's death and that the State failed to prove that defendant's actions were a proximate cause of the girl's death. We disagree.

[1] To warrant a conviction in this case, the State must establish that the act of defendant was a proximate cause of the girl's death.

> [T]he act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act. [Citations omitted.] There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death. [Citations omitted.]

State v. Cummings, 301 N.C. 374, 377, 271 S.E. 2d 277, 279 (1980). (*Cummings* also involved a charge of involuntary manslaughter.) Negligent treatment by a physician will not excuse a wrongdoer unless the treatment is the sole cause of death. *State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976). When an injury inflicted by an accused is a contributing cause of death, the defendant is criminally responsible therefor. *Id.*

The State did present sufficient evidence to show that defendant's actions were a proximate cause of the girl's death. Both Dr. Lou Stringer and Dr. de la Torre testified that the head injury Kimberly sustained in the accident contributed to and led to her death. The evidence, when compared with Dr. Vogel's testimony, was therefore contradictory as to the cause of death. The contradictions in the evidence were to be weighed by the jury, and the jury decided in favor of the State.

[2] Defendant argues that the sole cause of death rule applies only to intentional homicides and is inapplicable to a charge of involuntary manslaughter involving culpable negligence. For this reason, the law of negligence should be consulted and the trial court erred in refusing to instruct the jury that if they found that the intervening negligence of Dr. Fireman was a proximate cause of the girl's death (rather than the sole cause), then defendant was to be found not guilty.

We disagree and hold that the sole cause of death rule applies also in involuntary manslaughter cases involving culpable negligence. *See, State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980). One who drives a car while intoxicated endangers the lives of everyone who has the misfortune of being in his path. A car in the hands of an intoxicated driver becomes a deadly weapon. The situation is similar to a drunken man who unintentionally wounds someone while firing random shots from a gun. Negligent medical treatment (or some other intervening cause) should not excuse one accused of culpable negligence for a homicide when the injuries inflicted result in death unless it can be shown that the intervening event was the sole cause of the victim's death.

TRIAL PROCEDURE

[3] Defendant next contends that the court erred in denying his motion for a continuance due to the publication of two lengthy newspaper articles dealing with traffic deaths related to alcohol use in the major Sunday newspaper of Forsyth County the day before the trial began.

We reject this contention. As defendant concedes, a ruling on a motion for a continuance is ordinarily within the sound discretion of the trial court and will not be reviewed absent an abuse of discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980). The articles did not mention defendant or the facts of this case but dealt with the general problem of drunken drivers. We therefore hold that there has been no showing of an abuse of discretion.

[4] Defendant next contends that the court erred in allowing the State to re-examine and challenge a juror after the juror had been accepted by the State.

We also reject this contention. G.S. 15A-1214(g) provides that the trial court may allow counsel to re-open consideration of a juror, even though counsel has once passed on the juror if "the juror has made an incorrect statement . . . or some other good reason exists . . . ." The trial court, in its discretion, may allow re-examination of a juror and excuse a juror upon challenge, either peremptory or for cause. *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977).

During the examination of a prospective juror by the defendant, the juror indicated that she could hold for the defendant, but that based on her experiences with police officers, she thought that they would lie. On re-examination, the juror admitted stating that she probably could not hold for the State in this case. The court therefore had good reason for exercising its discretion in reopening the examination.

[5] Defendant next contends that the court erred in allowing a State's witness, Dr. B. J. Fulton, to testify whose name had not been disclosed as a prospective witness prior to jury voir dire.

We cannot tell from the record whether a list of prospective State witnesses was furnished to defendant. Nonetheless, the State is not required to furnish such a list. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). If such a list is furnished, however, the court must look to see whether the district attorney acted in bad faith or whether the defendant will be prejudiced by allowing a witness to testify whose name did not appear on the list. *Id.* In *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980), involving a situation similar to the present case, the Supreme Court held that the trial court did not err in permitting two witnesses whose names had not been mentioned during jury voir dire to testify when the voir dire examination conducted by the court to determine bad faith showed that the jurors did not know either of the witnesses the State had failed to name, that the prosecutor did not act in bad faith and that defendant was not prejudiced thereby.

In the present case, the court questioned the jurors as to whether they knew the prospective witness. Upon receiving negative responses, the trial court, in its discretion, allowed the witness to testify. The court's discretion is not reviewable absent a showing of an abuse of discretion. *State v. Britt*, 291 N.C. 528,

231 S.E. 2d 644 (1977). Defendant made no allegation of surprise at trial. Moreover, the witness was the first physician to examine Kimberly at the scene of the accident. We conclude that there has been an insufficient showing of bad faith or prejudice.

[6] Defendant next contends that the court erred in allowing the State to reopen examination of James Cason, Jr., the girl's father. We reject this contention because it is within the trial court's discretion to allow a witness to be recalled and to offer additional testimony. *Hunter v. Sherron*, 176 N.C. 226, 97 S.E. 5 (1918); *State v. Adams*, 46 N.C. App. 57, 264 S.E. 2d 126, *disc. rev. denied*, 300 N.C. 559, 270 S.E. 2d 111 (1980). There has been no showing of an abuse of discretion.

SENTENCING

[7] At the outset we note the trial court erroneously consolidated for judgment the offenses of involuntary manslaughter and driving under the influence, second offense. As our Supreme Court recently held, "[I]n every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense." *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689 (1983).

As statutory aggravating factors, the court found:

10. The victim was very young, or very old, or mentally or physically infirm.

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

As additional aggravating factors, the court found:

16(a) The defendant has a long history of habitual and persistent disregard of the motor vehicle laws and rules of the road resulting in at least ten previous license suspensions or revocations.

16(b) A lesser sentence than that pronounced by the court will unduly depreciate the seriousness of the defendant's offense.

16(c) The sentence pronounced by the court is necessary to deter others from committing the same offense.

16(d) An additional charge for which separate punishment could have been imposed has been consolidated for judgment.

As mitigating factors, the court found that defendant has a good character and that defendant has a good employment record.

[8] First, defendant urges that aggravating factor No. 10 should not have been used to increase the sentence imposed since he did not intend to harm the girl. She happened to be in his path and happened to be three years old. He argues that the underlying policy of the statutory aggravating factor is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity. We agree that this was the policy of the statutory aggravating factor.

As this Court said in *State v. Gaynor*, 61 N.C. App. 128, 131, 300 S.E. 2d 260, 262 (1983): "Every aggravating factor, however, must be 'reasonably related to the purposes of sentencing' . . . . Under some circumstances the extreme old age or extreme youthfulness of the victim may increase the offender's culpability." For example, the age of a rape, kidnap, or mugging victim may increase the offender's culpability. In the present case, involving culpable negligence, defendant did not take advantage of the victim's tender age and it should not have been used as an aggravating factor to increase defendant's sentence.

Second, defendant contends that aggravating factors Nos. 15 and 16(a) were improperly considered because the same evidence was used to prove more than one factor in aggravation in violation of G.S. 15A-1340.4(a)(1). He also argues that evidence necessary to prove an element of the offense was used to prove an aggravating factor in violation of G.S. 15A-1340.4(a)(1) since he was charged with driving under the influence of intoxicating liquor, second offense and driving while license revoked, third offense. We disagree.

[9] Aggravating factors Nos. 15 and 16(a) did not relate to the same evidence: Factor No. 15 related to prior convictions; Factor No. 16(a) related to administrative revocations and suspensions. Although defendant's prior conviction for driving under the in-

fluence could not have been considered since it was an element of the second offense charge, it was properly considered as an aggravating factor in sentencing defendant for involuntary manslaughter.

[10] Third, defendant contends that the court erred in considering factors Nos. 16(b) and (c). We agree. In *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983), the Supreme Court held that factors identical to these were erroneously considered as aggravating factors. As the court stated in *Chatman*: "These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive . . . ." *State v. Chatman* at 308 N.C. 180, 301 S.E. 2d 78.

Finally, defendant contends that it was error for the trial court to consider Factor No. 16(d) and to use the additional charge, which carried a maximum term of six months, to increase the sentence imposed for involuntary manslaughter from the presumptive term of three years to seven years. Because the offenses should not have been consolidated for judgment, this factor was erroneously considered. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Since *Ahearn* compels us to find error in the trial court's findings in aggravation, the case must be remanded for a new sentencing hearing.

EVIDENTIARY MATTERS

We have examined all ten of defendant's exceptions to the court's evidentiary rulings and find no prejudicial error.

For the foregoing reasons, we find no error in defendant's trial; however, the case must be remanded for resentencing in accordance with this opinion.

Remanded for resentencing.

Judges HILL and BECTON concur.

MAS CORPORATION, T/A AND D/B/A HOLIDAY-WEST MOTEL, PLAINTIFF v. ERNEST A. THOMPSON, T/A AND D/B/A THOMPSON SIGN CO., DEFENDANT AND THIRD-PARTY PLAINTIFF v. MAHMOOD ALI SIDDIQUI AND SHAMSHAD ALI SIDDIQUI, THIRD-PARTY DEFENDANT

No. 8218SC344

(Filed 3 May 1983)

1. **Rules of Civil Procedure § 56.7— denial of summary judgment motion—no review on appeal from final judgment**

Denial of a motion for summary judgment should not be reviewable on appeal from a final judgment rendered in a trial on the merits.

2. **Trademarks and Tradenames § 1— liability for trademark infringement—construction of contract**

A provision in a contract for the construction and installation of a motel sign that "It is understood that sections of the above described sign will be from a former sign, used so as not to infringe on Holiday Inn trade-mark" was ambiguous, and the evidence was sufficient to support a verdict finding that defendant sign installer was not liable under the agreement for infringement of the Holiday Inns, Inc. trademark by two motel signs constructed for plaintiff motel corporation but that the parties intended that plaintiff would be liable for any infringement.

3. **Trademarks and Tradenames § 1; Uniform Commercial Code § 10— signs free from trademark infringement—agreement by the parties**

The provisions of G.S. 25-2-312(3) did not require defendant seller to deliver to plaintiff buyer motel signs free from any claim of trademark infringement where the parties had an agreement concerning trademark infringement, although such agreement was ambiguous.

4. **Principal and Agent § 7— undisclosed agency—liability of agent**

A sign contractor could recover from a motel owner individually for signs constructed for a motel corporation where the owner signed the contract for the signs with his own name and said nothing about the motel corporation, and the contractor had no actual notice of the corporate principal, the use of "Holiday-West" on documents and correspondence being insufficient to establish actual knowledge by the contractor that he was dealing with a corporation rather than with an individual.

5. **Unfair Competition § 2— motel signs infringing on trademark—no unfair trade practices by sign contractor**

Plaintiff's evidence was insufficient for the jury on the issue of unfair trade practices by defendant sign contractor in the construction and installation of two motel signs which infringed upon a motel chain's trademark where plaintiff presented no evidence that the contractor did anything which offended public policy or was immoral, unethical, oppressive, unscrupulous, or injurious.

APPEAL by plaintiff and third-party defendant from *Freeman, Judge.* Judgment entered 13 August 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 February 1983.

This action arose out of a contract for the construction and installation of two signs at the Holiday-West Motel. Plaintiff filed suit against defendant Thompson asserting, in essence, that Thompson was liable for the alleged trademark infringement of the signs against the Holiday Inns, Inc. trademarks. Thompson filed a third-party complaint to recover the balance due on the contract for the signs, $10,246.12, and to enforce his lien against M. A. Siddiqui and S. A. Siddiqui, the owners of the Holiday-West Motel. MAS and the Siddiqui brothers filed motions for partial summary judgment against Thompson based on their assertion that Thompson's contract was with the corporation, not the Siddiquis, and he had breached an express promise that the signs would not infringe on the Holiday Inns, Inc. trademark. The motions were denied.

MAS and M. A. Siddiqui introduced the following evidence. Siddiqui was a Holiday Inns franchisee until his franchise was denied in August 1979. Thompson's employee, Larry Barber, went to remove the Holiday Inns sign from the motel. Siddiqui told Barber that he needed two new signs immediately. When Thompson brought Siddiqui a proposal for one sign Siddiqui told Thompson he would only look at a proposal for two signs. On 13 September Thompson returned with a proposal for both signs. According to Siddiqui, Thompson prepared the contract and designed the signs. The contract contained the following sentence: "It is understood that sections of the above described sign will be from former sign, used so as not to infringe on Holiday Inn trademark." After the signs were installed Holiday Inns, Inc. contacted Siddiqui and told him the signs were substantially similar to the Holiday Inns' script and were an obvious copy of the Holiday Inns' design. Siddiqui told Thompson about the complaints, and Thompson changed the sign by putting the word "motel" in the corners, and making some other alterations. Siddiqui had already paid Thompson $10,000.00. He refused to pay the balance due because the signs were subsequently found to be infringing and had to be removed.

After plaintiff presented his evidence defendant moved for a directed verdict. The court dismissed plaintiff's counts two and four, which were based on implied warranty and unfair trade practices and denied the motion on the remaining counts.

Thompson's evidence tended to show the following. He testified that he was asked to remove the Holiday Inns sign from plaintiff's motel. When his employee, Larry Barber, went to remove it Siddiqui said he needed a new sign immediately. Siddiqui drew a diagram of the sign he wanted, and said he needed it in ten days. Thompson called Siddiqui and told him that it would be impossible to put up a new sign in such a short time, but he had an old sign that he could use. He showed Siddiqui a sketch. Siddiqui was not interested in using that sign in front of the motel because it was too small, but said it would be usable on a large pole beside Interstate 85. Siddiqui wanted Thompson to put the Holiday Inns sign back up in front of the motel with no changes except to put the word "west" on it. Thompson told him he could not use any of the Holiday Inns' markings on it. Siddiqui insisted on the Holiday Inns' style of script, green paint, and white letters. Thompson had some sketches prepared, following Siddiqui's instructions. Siddiqui liked the drawings. Thompson explained the sentence "It is understood that sections of the above described sign will be from former sign, used so as not to infringe on Holiday Inn trade-mark," was inserted for two reasons: to explain that used material was in the sign, and that he was not going to use the Holiday Inns' trademarks. Siddiqui signed the contract with his own name and said nothing about MAS Corporation. Thompson said that when he told Siddiqui that the sign resembles the Holiday Inns' trademark, Siddiqui told him not to worry because it was his problem, and he had a lawyer to advise him.

On 25 March 1981 a judgment was entered enjoining MAS from using the Holiday Inns' "Great sign" or any imitation, including the signs at Siddiqui's Holiday West Motel. Siddiqui failed to pay Thompson the balance due on the contract.

The jury answered the following issues:

1. Did the parties intend that the contract would mean the defendant, Thompson, would be responsible for any infringement?

Answer: No

2. Did the parties intend that the contract would mean the plaintiff, MAS Corporation, would be responsible for any infringement?

Answer: Yes

. . .

5. Was Mahmood Ali Siddiqui the agent for an undisclosed principal?

Answer: Yes

. . .

6. Did Mahmood Ali Siddiqui breach the contract?

Answer: Yes

7. What amount of damages has defendant, Thompson, sustained?

Answer: $10,041.12

Hugh C. Bennett, Jr., for plaintiff and third-party defendant appellants.

Stern, Rendleman and Klepfer, by John A. Swem, for defendant appellee.

VAUGHN, Chief Judge.

[1] Appellants' first four arguments are that the trial court erred in denying their motions for summary judgment and directed verdict, and in granting defendant's motion for directed verdict on two of appellants' claims. The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of trial when no material facts are at issue. *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457 (1972). That purpose cannot be served after there has been a trial. Denial of a motion for summary judgment, therefore, should not be reviewable on appeal from a final judgment rendered on a trial on the merits. *See Parker Oil Co. v. Smith,* 34 N.C. App. 324, 237 S.E. 2d 882 (1977); Annot., 15 A.L.R. 3d 899, 922 (1967). Appellants

present identical arguments for the trial court's allegedly erroneous denial of their motions for summary judgment and directed verdict. We shall consider their argument only with respect to the denial of their motion for a directed verdict. Upon motion for a directed verdict, all the evidence which tends to support the nonmovants' case against it must be taken as true and viewed in the light most favorable to the nonmovant, the nonmovant is entitled to the benefit of every reasonable inference which may be reasonably drawn from the evidence, and the motion may be granted only if, as a matter of law, the evidence is insufficient to grant a verdict for the nonmovant. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Any party may move for a directed verdict at the close of all the evidence. G.S. 1A-1, Rule 50(a). The court may direct a verdict for the party with the burden of proof when the credibility of the movant's evidence is manifest as a matter of law. *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). Appellants assign as error the trial court's denial of their motion for a directed verdict on three grounds. They contend that their motion for directed verdict should have been granted because the contract required Thompson to use sections of the former Holiday Inns sign so as not to infringe on the Holiday Inns trademark.

[2] The general rule is that when a written contract is unambiguous the interpretation is a question of law, but when the terms of the contract are ambiguous it is for the jury to ascertain the meaning. *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). The following language "It is understood that sections of the above described sign will be from former sign, used so as not to infringe on Holiday Inn trade-mark" is ambiguous for three reasons. First, there is no promise by either party. The sentence began "It is understood," which, when viewed in the light most favorable to Thompson, does not clearly indicate that Thompson was promising anything.

Second, there was conflicting evidence as to the parties' intentions. Obviously, a contract should be construed, whenever possible, to give effect to the intentions of the parties. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). Thompson said, in his deposition, that he included that sentence for two reasons: to let Siddiqui know that the sign would contain used materials, and to let him know that the Holiday Inns

trademark would not be used. According to Siddiqui, the sentence was included so as to hold Thompson responsible for furnishing signs satisfactory to Holiday Inns. Since there is conflicting evidence of the parties' intentions, the interpretation of the contract was a question of fact for the jury to decide.

Third, Siddiqui's subsequent conduct indicates he was engaged in a consistent pattern of misusing Holiday Inns trademarks. Subsequent conduct of the parties, after executing a contract, is admissible to show their intent. *Heater v. Heater*, 53 N.C. App. 101, 280 S.E. 2d 19, *review denied*, 304 N.C. 194, 285 S.E. 2d 99 (1981). Affidavits of two Holiday Inns employees show that in October 1980 and January 1981, more than a year after Siddiqui's franchise was terminated, Holiday Inns place mats, guest checks, towels, telephone facing strips, and commode cleanliness strips were found in Siddiqui's motel. These blatant infringements cast doubt on Siddiqui's assertion that Thompson promised not to infringe on the Holiday Inns trademark. Moreover, when Siddiqui asked Thompson to change the sign in December because of Holiday Inns' complaints he agreed to pay Thompson on a cost-plus basis, which indicates he did not consider Thompson liable for the infringements.

The above circumstances, which must be viewed in the light most favorable to Thompson, indicate there is ample evidence to grant a verdict in favor of the nonmovant, and the trial court did not err in denying the appellants' motions for a directed verdict.

[3] Appellants argue that, notwithstanding any issues of material fact in the interpretation of the contract, their motion for directed verdict should have been granted because G.S. 25-2-312(3) requires Thompson to deliver the signs free from any claim of infringement. G.S. 25-2-312(3) provides:

> *Unless otherwise agreed* a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. (Emphasis added.)

Again, viewing the evidence in the light most favorable to Thompson, it is clear that G.S. 25-2-312(3) does not apply in this

case. Thompson's evidence tends to show that the parties agreed Siddiqui would be liable for any infringement. Even if it is unclear what, precisely, was "otherwise agreed," the statute only applies if nothing was said as to liability, and the other conditions are fulfilled. In this situation, where the parties thought they had agreed to something, what their agreement actually was is a question of fact for the jury.

[4] Appellants further argue that the trial court should have granted Siddiqui's motion for directed verdict because Thompson is barred from enforcing his lien against Siddiqui individually since Siddiqui was merely an agent of Holiday-West Motel. The rule, however, is that "[a]n agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity. . . . The duty is on the agent to make this disclosure and not upon the third person with whom he is dealing to discover it." *Howell v. Smith*, 261 N.C. 256, 258-259, 134 S.E. 2d 381, 383 (1964). In *Howell*, plaintiff sued defendant for the balance due for petroleum products he sold defendant. Defendant alleged that he purchased the products as an officer of the corporation, so the corporation was solely liable for the debt. Defendant contended that five invoices and checks with the corporate name which he sent plaintiff gave plaintiff notice of the principal corporation. The Supreme Court disagreed, holding that the receipt of five statements, mailed in envelopes bearing the corporate name, and the individually signed checks with the corporate name printed on them were insufficient to establish actual knowledge that plaintiff was dealing with the corporation, not the individual defendant. Moreover, the court said "the use of a trade name is not as a matter of law a sufficient disclosure of the identity of the principal and the fact of agency." *Howell v. Smith*, 261 N.C. at 259, 134 S.E. 2d at 384. Here, Thompson said, in his deposition, that Siddiqui "acted to me totally as an individual. He never referred to any corporation, any partner, any anything other than just him as an individual, is how I dealt with him." We find that since Thompson had no actual notice of the corporate principal, the use of "Holiday-West" on documents and correspondence does not preclude Thompson's recovery from Siddiqui individually.

[5] Appellants also assign as error the trial court's granting Thompson's motion for a directed verdict on the claims of

statutory warranty under G.S. 25-2-312(3), and unfair trade practices. We have already discussed why the statutory warranty was inapplicable in this case, and a directed verdict on this claim was appropriate. As to the claim of unfair trade practices, the statute, G.S. 75-1.1(a), provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." A practice is unfair when it offends established public policy or when it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The appellants' evidence, taken as true and viewed in the light most favorable to the appellants, shows no evidence that Thompson did anything which offended public policy or was immoral, unethical, oppressive, unscrupulous, or injurious. Appellants contend that Thompson was deceptive when he filled his name in the blank on the contract which said "architect." Absent any indication that appellants read it or relied on it in any way the jury could not find this to be an unfair or deceptive act. Moreover, in their verdict, the jury found that Siddiqui had assumed responsibility for infringement, so any error of the trial court in not submitting the issue of unfair trade practices was harmless. *See Hendricks v. Hendricks*, 273 N.C. 733, 161 S.E. 2d 97 (1968).

We have carefully reviewed appellants' remaining assignments of error and find them to be without merit.

No error.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. GEORGE HARRIS THOMPSON

No. 8227SC963

(Filed 3 May 1983)

1. Criminal Law § 91.7 — absence of alibi witness — denial of continuance

The trial court did not err in the denial of defendant's motion for a continuance because of the unavailability of an out-of-state witness where no subpoena had been issued for the attendance of the witness, and defendant filed

no affidavits showing the testimony which the witness would have offered at trial.

2. Criminal Law § 163— failure to object to instructions—absence of jury instruction conference

Although the better practice would be for the trial judge to hold a jury instruction conference pursuant to Rule 21 of the General Rules of Practice for the Superior and District Courts, the lack of a conference, where one is not requested, will not excuse a defendant's failure to make a timely objection to the charge as required by App. Rule 10(b)(2).

3. Criminal Law § 138— erroneous finding in aggravation—new sentencing hearing

When a trial judge errs in making a finding in aggravation and imposes a prison term in excess of the presumptive sentence, the entire case must be remanded for a new sentencing hearing.

4. Criminal Law § 138— armed robbery—aggravating factors—pecuniary gain—use of deadly weapon by codefendant

In imposing a sentence for armed robbery, the trial court erred in finding as aggravating factors that the offense was committed for pecuniary gain and that a codefendant was armed with or used a deadly weapon at the time of the crime, since such factors constituted elements of the crime for which defendant was being sentenced. G.S. 15A-1340.4(a)(1).

5. Criminal Law § 138— aggravating factor—prior convictions—sufficiency of evidence

The trial court properly found as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement where defendant's record of prior convictions was read into the record by the district attorney at the sentencing hearing in the presence of defendant's attorney.

6. Criminal Law § 138— aggravating factor—untruthfulness by defendant

The trial court properly found as an aggravating circumstance that defendant lied on the stand during trial and in his statement to the police since a defendant's truthfulness under oath is probative of his attitudes toward society and his prospects for rehabilitation and is, therefore, relevant to sentencing. G.S. 15A-1340.3.

Judge BECTON concurring in the result.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 5 March 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 10 March 1983.

Defendant was charged with and convicted of armed robbery in violation of G.S. 14-87. From judgment and the imposition of a twenty-year prison term, he appeals.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, and James R. Glover, for defendant-appellant.

HILL, Judge.

[1] Defendant first argues that the trial judge erred in denying his motion for continuance because of the unavailability of an alibi witness. As a general rule, the grant or denial of a motion for continuance is in the sound discretion of the trial judge. Nevertheless, since defendant contends that the court's action prohibited the exercise of his right to confront his accusers and witnesses as guaranteed by the Federal and State Constitutions, the question presented is one of law and thus is reviewable on appeal. *See State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112 (1975).

The failure to grant a motion for continuance will result in a new trial only where defendant shows that the denial was erroneous and he was prejudiced thereby. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973). We find that the denial of defendant's motion for continuance was proper and did not prejudice his trial.

Defendant was arrested for armed robbery on 4 December 1981 and indicted for the same offense on 18 January 1982. Defense counsel first argued his motion to continue the trial just before jury selection on 3 March 1983, offering as grounds the absence of defendant's brother who lived in another state, as well as the absence of a sister who later appeared. No subpoena had been issued for the attendance of out-of-state witness, a circumstance that ordinarily will eradicate grounds for a continuance. *State v. Lee,* 293 N.C. 570, 238 S.E. 2d 299 (1977). No affidavits were filed to support the motion. Although testimony on the probable location of the absent witness was presented by defendant and his mother, we find that defendant has shown no prejudice since the record lacks specific evidence of the testimony this witness would have offered at trial. *See State v. Eatman,* 34 N.C. App. 665, 239 S.E. 2d 633 (1977). This assignment of error is overruled.

[2] Defendant contends the trial judge committed prejudicial error in his charge to the jury by possibly misleading the jury to believe that defendant carried the burden of proof in establishing his alibi. Defendant first argues that he should be allowed to raise this claimed error on appeal even though at trial he made no objection to the charge and failed to request additional instructions when provided the opportunity. He bases his argument on the trial judge's failure to hold a conference concerning instructions at the close of the evidence as directed by Rule 21 of the General Rules of Practice for the superior and district courts. We disagree.

Rule 10(b)(2) of the Rules of Appellate Procedure provides, in pertinent part, as follows:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury . . . .

The North Carolina Supreme Court has recently said, "Rule 10(b)(2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory." *State v. Fennell*, 307 N.C. 258, 263, 297 S.E. 2d 393, 396 (1982). Although the better practice would be for the trial judge to hold the instruction conference pursuant to Rule 21, the lack of a conference, where one is not requested, will not excuse a defendant's failure to make a timely objection to the charge as required by Rule 10(b)(2). Unless an error is shown to be so grievous that it is deemed necessary to suspend the rules as allowed under Rule 2, the appellate courts are bound by the Rules of Appellate Procedure and no review of improperly presented matters is permitted. *Id.* Our review of the whole record reveals no "plain error" in the court's instructions that would have had an impact on the jury's return of a guilty verdict. *See State v. Odom*, --- N.C. ---, 300 S.E. 2d 375 (1983). Moreover, the trial judge correctly recapitulated defendant's alibi to the jury and charged that the burden of proving an alibi did not rest upon the defendant. Reading the charge in its entirety, we see no reasonable possibili-

ty that the jury was in any way misinformed or misled on this aspect of the case.

[3] In his final assignment of error, defendant contends that the trial judge erred in imposing a twenty-year prison sentence which exceeds the presumptive sentence of fourteen years for robbery with a firearm. *See State v. Leeper*, 59 N.C. App. 199, 296 S.E. 2d 7, *disc. rev. denied*, 307 N.C. 272, 299 S.E. 2d 218 (1982). Under the Fair Sentencing Act, a trial judge may impose a prison term that exceeds the presumptive sentence only if he specifically lists in the record each matter in aggravation and mitigation and finds that the factors in aggravation outweigh the factors in mitigation. G.S. 15A-1340.4. These factors must be proved by the preponderance of the evidence and be reasonably related to the purposes of sentencing. *Id.* Balancing the factors is a matter within the trial court's discretion and will not be disturbed on appeal if there is support in the record for the court's decision. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982). When, however, a trial judge errs in making a finding in aggravation and also imposes a prison term in excess of the presumptive sentence, the entire case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

The trial judge found the following factors in aggravation: (1) the offense was committed for pecuniary gain; (2) a co-defendant was armed with or used a deadly weapon at the time of the crime; (3) the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement; and (4) "[t]he defendant deliberately presented, during the course of the trial, evidence which he knew to be false about his presence on the day in question and deliberately presented false evidence concerning the statement attributed to him and obviously found by the jury to be false."

[4] Since we find that the trial judge erred in finding the first two factors in aggravation, we are obliged to remand this case for resentencing. Defendant was tried and convicted of the armed robbery of a jewelry store. G.S. 15A-1340.4(a)(1) provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Under the facts of this case, the commission of the crime for pecuniary gain is inherent in the offense and may not be considered an aggravating

factor. Likewise, proof of the use of a deadly weapon at the time of the crime is necessary to establish an essential element of the crime for which defendant was tried and may not be used to prove a factor in aggravation.

[5] We find no error in the last two aggravating factors. Defendant's record of prior convictions for offenses carrying sentences of more than 60 days' confinement was read into the record by the district attorney at the sentencing hearing in the presence of defendant's attorney. Since defendant neither objected to this means of establishing his record nor questioned its correctness, he has waived any objection on appeal to the method used to prove his convictions. *State v. Massey,* 59 N.C. App. 704, 298 S.E. 2d 63 (1982).

[6] We hold, in addition, that the fourth finding by the trial court, *i.e.*, that defendant lied on the stand during trial and in his statement to the police, is acceptable as an aggravating factor because it is reasonably related to the purposes of the statute and the rehabilitation of the offender and provides a general deterrent to criminal behavior. A defendant's truthfulness under oath is probative of his attitudes toward society and his prospects for rehabilitation and is therefore relevant to sentencing. *See* G.S. 15A-1340.3; *Cf. United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed. 2d 582 (1978).

In pronouncing judgment under the Fair Sentencing Act, the court must look first to the trial at which the defendant is convicted. The aim of a trial is to seek and find the truth. To permit a defendant to commit perjury without fear of reprisal during a trial could lead to erroneous jury verdicts and destroy our system of jurisprudence; the sanctity of an oath would become meaningless. The fact that the defendant could be tried for perjury at another trial before another jury and judge pales in the face of the immediate need for truth at the initial trial.

We find no merit in the argument that the fear of incurring greater punishment may deter defendants from testifying. There is no protected right to commit perjury. *United States v. Grayson, supra.* To the extent that a sentencing judge's consideration of a defendant's truthfulness would deter that defendant from testifying falsely, the effect is entirely permissible.

We are aware of *State v. Setzer,* 61 N.C. App. 500, 301 S.E. 2d 107 (1983) in which this Court remanded for resentencing on grounds that the trial judge improperly found as an aggravating factor that the defendant lied on *voir dire.* That case involved contradicted testimony at a *voir dire* hearing which is a far cry from a finding of perjured testimony before a judge and jury.

We conclude that sentencing of a defendant must include consideration of facts that arose in the trial of the case. In so doing, we conclude that the sentencing judge's taking into account that defendant lied at trial is consistent with the purposes of *uniform sentencing* and with the rehabilitative and punitive *purposes of sentencing* in our system of jurisprudence. This assignment is overruled.

Because we find error in the first two aggravating factors listed by the trial judge, this case is remanded for resentencing in accordance with this opinion.

Remanded.

Judge ARNOLD concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

I concur in the decision to remand this case so that defendant can be resentenced. I write this concurring opinion, however, because I believe that an additional basis exists for a resentencing hearing—that is, the trial court erred in finding as an aggravating factor that Thompson lied on the stand during trial. The rationale and holding of *State v. Setzer,* 61 N.C. App. 500, 301 S.E. 2d 107 (1983) impels this conclusion. In *Setzer,* this Court said at p. 6 of the slip opinion:

> If, *in any case* in which the defendant testifies and is found guilty, the court may then find as an aggravating factor that the defendant did not testify truthfully, it would virtually repeal presumptive sentencing in a large percentage of cases. . . . In order to carry out presumptive sentencing . . . we hold that a judge cannot find as an aggravating factor that the defendant did not testify truthfully when the only evi-

dence of his untruthfulness is his contradicted testimony at a *voir dire* hearing *or during the trial.* (Emphasis added.)

Other legal and policy reasons, equally fundamental, equally sound, and equally persuasive, suggest that *Setzer* was decided correctly. First, it would be fundamentally unfair, in the context of our Fair Sentencing Act, to increase a defendant's sentence as a form of punishment for a new crime (perjury) without benefit of charge or trial. Second, fear of a greater punishment could deter even the defendant who would have given truthful testimony from testifying. Third, in adopting the Fair Sentencing Act, our legislature rejected the prevalent sentencing philosophy of fitting the punishment to the offender through long statutory maximum terms and broad judicial discretion and adopted a sentencing philosophy of fitting punishment to the crime by application of presumptive sentences. Therefore, as suggested by defendant, if the Fair Sentencing Act is to achieve its goal of eliminating disparate sentencing, it must be read to limit the myriad of factors that were considered appropriate when fitting the punishment to the offender was the watchword. *See Juneby v. State,* 641 P. 2d 823, 833 (Alaska App. 1982). Fourth, although perjury may be an indication of poor prospects for rehabilitation, it does not necessarily indicate that a longer sentence will improve the chances.

For these reasons, and on the basis of *State v. Setzer,* I believe the trial court erred in finding as an aggravating factor that defendant lied on the stand during trial.

IN THE MATTER OF: THE APPEAL OF SOUTHVIEW PRESBYTERIAN CHURCH FROM THE DENIAL OF ITS CLAIM FOR EXEMPTION BY THE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1981

No. 8210PTC547

(Filed 3 May 1983)

Taxation § 22.1— property used for recreation and Scout activities—use for religious purposes—exemption from ad valorem taxation

A 15.56 acre portion of petitioner's 20.56 acre tract of land is used for religious purposes, is reasonable necessary for the convenient use of petitioner's church buildings located on the remaining five acres, and is, therefore,

exempt from ad valorem taxes under G.S. 105-278.3 where the property is being used for neighborhood recreation activities and by Scout groups for camp-outs, athletics and other activities.

APPEAL by petitioner from a decision of the North Carolina Property Tax Commission rendered 8 February 1982. Heard in the Court of Appeals 14 April 1983.

Petitioner, Southview Presbyterian Church, sought a "religious purposes" exemption from *ad valorem* property taxation of a 20.56 acre tract of land on which petitioner's church buildings are located. The Cumberland County Tax Supervisor denied petitioner's claim for exemption except as to five acres of the tract. The Supervisor determined that the remaining 15.56 acres were taxable. Petitioner appealed to the Cumberland County Board of Equalization and Review which affirmed the decision of the Tax Supervisor. Petitioner then appealed to the North Carolina Property Tax Commission. The Commission heard evidence, made findings of fact and conclusions of law and entered a decision and order sustaining the decision of the county board. Petitioner appealed.

Williford, Person, Canady & Britt, by N. H. Person, for appellant.

Garris Neil Yarborough, for appellee.

WELLS, Judge.

The scope of appellate review of cases from the Property Tax Commission is pursuant to G.S. 105-345.2. *See In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115 (1981). Subsection (b) of that statute provides, in part, that the appellate court shall decide all relevant questions of law and interpret constitutional and statutory provisions. Subsection (b) further provides that the appellate court may grant relief if the taxpayer's substantial rights have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Subsection (c) provides that the appellate court must look to the whole record in reviewing the findings, inferences, conclusions and decisions of the Commission and further provides that the rule of prejudicial error applies in appellate review of cases from the Property Tax Commission. While the weighing and evaluation of the evidence is in the exclusive province of the Commission, *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975); *Clark Equipment Co. v. Johnson*, 261 N.C. 269, 134 S.E. 2d 327 (1964), where the evidence is conflicting, the appellate court must apply the "whole record" test to determine whether the administrative decision has a rational basis in the evidence. *In re McElwee, supra, quoting In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). The "whole record" test does not permit the appellate court to substitute its judgment for that of the agency when two reasonable conflicting results could be reached, but it does require the court, in determining the substantiality of evidence supporting the agency's decision, to take into account evidence contradictory to the evidence on which the agency decision relies. Although the court does not make a *de novo* decision, the evidence required to support an agency decision is greater than that required under the "any competent evidence" standard of review. *McElwee, citing Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

In the present case, the pertinent findings of fact of the Commission are not in dispute. The Commission's findings, and the supporting evidence and stipulations show, in pertinent part, the following. In 1978, in cooperation with the Fayetteville Presbytery, Southview Presbyterian Church acquired the subject tract of land in a rural area of Cumberland County, which tract had been selected based on the church's growth and development criteria. Prior to the beginning of construction on the property, petitioner contracted with a professional consulting firm to draw plans for the complete utilization of the property. The plan called for construction of a sanctuary, an education building, a home for the aged and handicapped (apparently to be financed with church

money and a HUD loan), playgrounds, recreational fields, a pond, picnic areas and an outdoor amphitheater. As of the time of the hearing before the Commission, petitioner had built a 3,000 square foot building which it used for worship services, paved a parking area, drained a pond to prepare it for refilling, cleared a field and seeded it with grass, done some grading for the amphitheater, cleared the undergrowth from the entire tract, and installed three mobile homes for Sunday school classes and storage purposes. The permanent building, the trailers and the parking lot are located on the portion of petitioner's property fronting on a public highway. The five acre area exempted by the County contains these facilities. The pond and the cleared land are located toward the rear of petitioner's tract, on the 15.56 acres not exempted. The church allows the 15.56 acre portion of the tract to be used by neighborhood children for volleyball, badminton, and softball games and by Scout groups for camp-outs, athletics and other activities. Petitioner has not been able to implement its development plans as rapidly as desired because the population growth in the surrounding part of the county has been slower than expected, and the church's membership has not increased as rapidly as had been hoped for. No part of the entire tract has been used for monetary gain.

Based on its findings, and citing G.S. 105-278.3, the Commission concluded that five acres of land was sufficient land to accommodate the church's use of its present buildings; that petitioner's property used for recreational purposes does not qualify for exemption; and that the 15.56 acre portion of petitioner's land was not exempt from property taxation. To these conclusions, petitioner has excepted. Thus, the question before us is a question of law, *i.e.*, whether these conclusions and the result reached by the Commission have a rational basis in the evidence. *In re McElwee, supra.*

Article V, Sec. 2(3) of the North Carolina Constitution provides that the General Assembly may exempt from taxation property "held for . . . religious purposes." Acting pursuant to this grant of authority, the General Assembly enacted G.S. 105-278.3, which provides, in pertinent part, as follows:

(a) Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient

use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for religious purposes as defined in subsection (d)(1), below . . . .

. . .

(c) The following agencies, when the other requirements of this section are met, may obtain exemption for their properties:

(1) A congregation, parish, mission, or similar local unit of a church or religious body . . . .

. . .

(d) Within the meaning of this section:

(1) A religious purpose is one that pertains to practicing, teaching, and setting forth a religion. Although worship is the most common religious purpose, the term encompasses other activities that demonstrate and further the beliefs and objectives of a given church or religious body. . . .

The County, while conceding that the property is held for religious purposes, maintains that petitioner is not entitled to have its land exempted because it is not "used" for religious purposes and is not reasonably necessary for the convenient use of petitioner's buildings.

While our courts have consistently stated that tax exemption statutes should be strictly construed—where there is room for construction—against exemption, they have also emphasized that such statutes should not be given narrow or stingy construction. *See In re Forestry Foundation,* 296 N.C. 330, 250 S.E. 2d 236 (1979); *Cemetery, Inc. v. Rockingham County,* 273 N.C. 467, 160 S.E. 2d 293 (1968); *In re Wake Forest University,* 51 N.C. App. 516, 277 S.E. 2d 91, *disc. rev. denied,* 303 N.C. 544, 281 S.E. 2d 391 (1981) and cases cited in those opinions. Words used in a statute must be given their natural or ordinary meaning. *Seminary, Inc. v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528 (1960).

Following the above rules of construction, our courts have looked to the present use of the property in applying statutes exempting property held for certain statutorily defined purposes. *See In re Forestry Foundation, supra; Wake County v. Ingle,* 273 N.C. 343, 160 S.E. 2d 62 (1968); *and In re Taxable Status of Property,* 45 N.C. App. 632, 263 S.E. 2d 838, *disc. rev. denied,* 300 N.C. 374, 267 S.E. 2d 684 (1980). Implicit in such an application is that property merely held for future use that might later entitle the holder to exemption is taxable. Our research has revealed but one case in which our Supreme Court has deemed property held for exempt purposes to be "used" as such. In *Seminary, Inc. v. Wake County, supra,* the plaintiff sought an educational purposes exemption for certain of its properties. The applicable statute exempted buildings, "wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for . . . seminaries . . . ." The superior court had held that the plaintiff was entitled to exemption for a building that, at the time of assessment, was being constructed for seminary use as a cafeteria and that, at the time of the hearing, was actually being used, primarily by the seminary but also by the public, as a cafeteria. Wake County appealed from that ruling of the superior court, and the Supreme Court, finding that the statute was clear and not in need of construction, held that the building was exempt under the statute.

Harrison v. Guilford County, 218 N.C. 718, 12 S.E. 2d 269 (1940), is more directly in point with the case now before us. There, the plaintiffs represented a church that sought a religious purposes exemption for a six acre vacant lot. The church had bought the tract, located four or five blocks from its existing building, in 1938 and planned to erect a new church on it by 1944 to accommodate its growing congregation. In 1939 the church cleared a portion of the lot, put electric lights under the trees, placed benches in the area and began using the lot as an outdoor meeting place for Sunday school classes and other church organizations. The Supreme Court held that the property was exempt because it was adjacent to the plaintiff's existing church, was reasonably necessary for the convenient use of the church and was wholly and exclusively used for religious worship.

With regard to the present case, we find that the requirement of G.S. 105-278.3(a)(1) that the property be used for religious

purposes is clear on its face and in no need of construction. The legislature has not exempted property merely held for planned future religious use from *ad valorem* taxation. While petitioner's original plans for the subject property may not have entitled it to exemption under the statute or under *Seminary, Inc. v. Wake County, supra,* nevertheless, we are persuaded that petitioner is presently using the 15.56 acre portion of its property wholly and exclusively for religious purposes and that such use is reasonably necessary for the convenient use of its existing structures. The record shows that the uses to which the subject property is being put are for neighborhood recreation activities and for Boy Scout and Girl Scout activities such as camp-outs and athletics. We are persuaded that such activities qualify as activities that demonstrate and further the beliefs and objectives of Southview Presbyterian Church, *see* G.S. 105-278.3(d)(1), and that the 15.56 acre tract is reasonably necessary for the convenient use of petitioner's church buildings. Unlike the subject property in *In re Forestry Foundation, supra,* and *Cemetery, Inc. v. Rockingham County, supra,* petitioner's 15.56 acres are being put to no commercial use.

Applying the rules stated by our Supreme Court in *In re McElwee* that we may not consider the evidence justifying the Commission's result without taking into account contradictory evidence and whatever in the record fairly detracts from the weight of the Board's evidence, we hold that the Commission's inferences, conclusions, and decision are not supported by competent, material, and substantial evidence in view of the whole record as submitted. G.S. 105-345.2(b)(5).

Accordingly, the Commission's order must be reversed and this cause remanded for entry of an order of exemption consistent with this opinion.

Reversed and remanded.

Judges BECTON and EAGLES concur.

CARL E. SIMS AND WIFE, SYBIL S. SIMS v. RITTER CONSTRUCTION, INC. AND WILLIAM A. RITTER AND WIFE, DONNA J. RITTER

No. 8224SC543

(Filed 3 May 1983)

1. **Appeal and Error § 6.9— order denying arbitration—appealable**

An appeal from a judge's order withdrawing the matter from arbitration and placing it on the trial calendar was not premature since defendant's right to have the matters in controversy settled by arbitration would be lost by delaying the appeal until after final judgment by the trial court. G.S. 1-277(a) and G.S. 7A-27(d)(1).

2. **Arbitration and Award § 2— agreement to arbitrate in contract—bar to court action**

Where a contract between the parties contained an agreement to submit any contract controversy to arbitration, the trial court had no jurisdiction to hear the action arising out of the contract and erred in withdrawing the matter from arbitration and placing it on the trial calendar. G.S. 1-544 and G.S. 1-567.2.

APPEAL by defendants from *Howell, Judge.* Order entered 4 January 1982 in Superior Court, WATAUGA County. Heard in the Court of Appeals 14 April 1983.

By complaint filed 15 July 1980, plaintiffs sought to recover damages for breach of a building contract entered into between plaintiffs and defendants on 12 February 1979. In their answer and counterclaim defendants moved to dismiss the complaint on the ground that the contract between the parties provided for submission to arbitration of any disagreement arising out of the contract.

On 4 June 1981 Superior Court Judge Kenneth Griffin found that the contract "required that all matters in controversy between the parties be submitted to arbitration," and so ordered.

The matter again came on for hearing on 4 January 1982 before Superior Court Judge Ronald W. Howell. In his order, Judge Howell stated that "neither party having taken any action whatsoever to initiate arbitration proceedings, and [Judge Griffin's 4 June 1981] Order not specifying which party shall pay the expense or initiate such action, the Court therefore concludes that the matter should be placed on the trial calendar for disposi-

tion." Defendants appealed from entry of the order withdrawing the matter from arbitration and placing it on the trial calendar.

Clement, McCauley, Miller & Whittle by Paul E. Miller, Jr., for defendant appellants.

No counsel contra.

BRASWELL, Judge.

[1] The initial question which we must consider, although not addressed by defendants in their brief, is whether an appeal lies from Judge Howell's order withdrawing the matter from arbitration and placing it on the trial calendar. If defendant appellants have no right of appeal, we must dismiss the appeal on our own motion. *Love v. Moore,* 305 N.C. 575, 291 S.E. 2d 141, *reh. denied,* 306 N.C. 393 (1982).

A party has a right to appeal an interlocutory order only if the order affects some substantial right claimed by appellant which will work an injury to him if not corrected before an appeal from final judgment. G.S. 1-277(a) and G.S. 7A-27(d)(1); *Atkins v. Beasley,* 53 N.C. App. 33, 279 S.E. 2d 866 (1981). We hold that this case falls within the "substantial right" exception since the defendants' right to have the matters in controversy settled by arbitration would be lost by delaying the appeal until after final judgment by the trial court. *See Bernick v. Jurden,* 306 N.C. 435, 293 S.E. 2d 405 (1982).

We next turn to the question of whether the court erred in withdrawing the matter from arbitration and ordering it placed on the trial calendar. We hold that it was error for the trial judge to withdraw the matter from arbitration.

[2] The contract entered into by the parties on 12 February 1979 provided in paragraph 9 that:

> "Any disagreement arising out of this contract or the application of any provision thereof shall be submitted to an Arbitrator or Arbitrators not interested in the finances of the contract."

Cases which interpreted former G.S. 1-544 concluded that agreements to arbitrate future disputes could not oust the courts of their jurisdiction. *See, e.g., Skinner v. Gaither Corp.,* 234 N.C.

385, 67 S.E. 2d 267 (1951). However, agreements to arbitrate future disputes are now by virtue of G.S. 1-567.2(a), which was effective 1 August 1973, binding and irrevocable:

> "(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy."

The record discloses that plaintiffs admitted in their complaint that a valid contract was entered into by the parties to this lawsuit. Plaintiffs did not deny the existence of an agreement to arbitrate. *Cf. Southern Spindle v. Milliken Co.*, 53 N.C. App. 785, 281 S.E. 2d 734 (1981), *disc. rev. denied*, 304 N.C. 729, 288 S.E. 2d 381 (1982), in which it was held that an unsolicited purchase order sent to plaintiff and containing an arbitration provision did not constitute an agreement by plaintiff to submit all contract disputes to arbitration.

The contract between the parties contained an agreement to submit any controversy to arbitration. This agreement, pursuant to G.S. 1-567.2, is valid, enforceable and irrevocable. Therefore, the Superior Court had no jurisdiction to hear the action arising out of the building contract and erred in withdrawing the matter from arbitration and placing it on the trial calendar.[1]

We note also that it was error for Judge Howell to overrule the order previously entered by Judge Griffin. As this Court stated in *Carr v. Carbon Corp.*, 49 N.C. App. 631, 632-33, 272 S.E. 2d 374, 376 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981):

1. There are, of course, some situations in arbitration disputes in which the court retains jurisdiction over the proceeding. Under G.S. 1-567.3, if one party refuses to arbitrate, the court can order arbitration; if there is a showing that no agreement to arbitrate exists, the court may stay the arbitration proceeding.

> "Ordinarily, one superior court judge may not overrule the judgment of another superior court judge previously made in the same case on the same legal issue. [Citations omitted.] This rule does not apply to interlocutory orders given in the progress of the cause. An order is merely interlocutory if it does not determine the issue but directs some further proceeding preliminary to a final decree. [Citation omitted.] The doctrine of *res judicata* does not apply to interlocutory orders if they do not involve a substantial right. [Citation omitted.]"

Since we have already determined that the order affected a substantial right, it was error for Judge Howell to overrule the previous order which required that the matters in controversy between the parties be submitted to arbitration.

For the foregoing reasons, the 4 January 1982 order of Judge Howell must be vacated.

Vacated and remanded.

Judges WEBB and WHICHARD concur.

DEPARTMENT OF TRANSPORTATION v. JOSEPH C. McDARRIS AND WIFE, ETHEL HAYES McDARRIS; HOMER BURGESS, LESSEE

No. 8230SC506

(Filed 3 May 1983)

1. **Evidence § 48.3— failure to object to qualification of expert—absence of specific finding by court**

Testimony in a condemnation case by respondent landowners' appraisal witness was not incompetent because the witness was never tendered as an expert nor explicitly found to be an expert where petitioner made no objection at trial to the witness's qualifications, and where the record indicates that the witness could properly have been ruled an expert and it will thus be assumed that the trial court found him to be an expert.

2. **Eminent Domain § 6.5— highway condemnation—value witness—fill material required to restore remaining property**

In a highway condemnation action, plaintiff's appraisal witness could properly base his before and after estimates on the amount and value of fill

material required to restore the landowners' remaining property to its original relationship to the roadway after the grade of the roadway was changed by the construction project.

3. **Eminent Domain § 6.8— highway condemnation—fill agreement between contractor and owners—inadmissibility**

The trial court in a highway condemnation action properly excluded evidence offered by the condemnor concerning an agreement between the landowners and the highway contractor under which the landowners received fill material for their remaining property from the contractor at no cost since the fill agreement did not constitute a special or general benefit within the meaning of G.S. 136-112(1).

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 30 September 1981 in Superior Court, JACKSON County. Heard in the Court of Appeals 17 March 1983.

Attorney General Edmisten, by Assistant Attorney General Frank P. Graham, for plaintiff appellant.

Brown, Ward, Haynes & Griffin, P.A., by Hallett S. Ward, Jr., and Coward, Coward & Dillard, P.A., by Kent Coward, for defendant appellees.

BECTON, Judge.

I

This is a condemnation action filed on 28 March 1978 by plaintiff, the North Carolina Department of Transportation (DOT) involving property owned by the defendants, the McDarrises. That the DOT had the authority to and did properly condemn the McDarrises' property is not questioned; rather, the DOT's appeal concerns the amount of compensation awarded and the method by which that sum was derived. The relevant facts follow.

II

The condemned property is part of two tracts owned by the McDarrises, totalling 15.03 acres, and located along U.S. highway 441 in Jackson County. Before the taking, one tract was 2.7 acres; the other, 12.33 acres. DOT needed the land for the right of way, construction, and drainage easements attendant to widening old U.S. 441 from a two-lane blacktop to a four-lane road with a center turning lane. At completion, the new thoroughfare was west of, and elevated above, the old grade. The elevation change

was nine (9) feet at its highest point and one (1) foot at its lowest point.

At the jury trial to determine the compensation issues, the McDarrises presented three witnesses, at least one of whom based his assessment on the amount of fill material necessary to restore the land to its original relationship to the roadway. DOT sought to establish, on cross-examination, that the McDarrises were not harmed by the change in elevation because the contractor, hired by DOT, gratuitously deposited fill material on the affected tracts. The McDarrises objected, and the court sustained the objection to that line of questioning. The jury awarded the McDarrises $60,000 and judgment was entered thereon.

III

DOT brings forth four (4) assignments of error and raises three (3) arguments on appeal. For the reasons that follow, we affirm the decision of the trial court.

A.

[1] DOT's first argument, based on its second assignment of error, poses two related questions: (i) whether the trial court erred when it allowed witnesses called by the McDarrises to give their opinions concerning the amount of damages owed the McDarrises; and (ii) what is the appropriate measure of damages. N.C. Gen. Stat. § 136-112 (1981) provides, in pertinent part:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

The McDarrises' first witness, W. B. Dillard, arrived at his damages estimate in a manner different from that set forth in G.S. § 136-112(1). Dillard based his before and after estimates on

the amount and value of fill material required to restore the McDarris property to its original relationship with the road grade. DOT concedes that that statutory formula, set forth in G.S. § 136-112(1), is mandated only for juries, commissioners and judges; and that expert real estate appraisers are not limited to any particular method of determining property values either before or after condemnation. Nevertheless, DOT argues that the admission of Dillard's testimony was error, not because he used a different measure of the injury, but because Dillard "was never tendered nor ruled as an expert." We disagree.

DOT correctly sets forth the rules concerning G.S. § 136-112 (1) in its brief. As our Supreme Court opined in *Board of Transportation v. Jones*:

> It is important to note that the statute [G.S. § 136-112(1)] speaks only to the exclusive measure of damages to be employed by the 'commissioner, jury or judge.' It in no way attempts to restrict *expert real estate appraisers* to any particular method of determining the fair market value of property. . . .

297 N.C. 436, 438, 255 S.E. 2d 185, 187 (1979).

Further, we have resolved the same issue in the negative: "[T]he real issue is whether expert real estate appraisers *must* use the before and after formula in determining damages. They do not." *Duke Power Co. v. Mom 'n' Pops Ham House, Inc., et al.*, 43 N.C. App. 308, 311, 258 S.E. 2d 815, 818 (1979). [Emphasis added.]

[2] The record also reveals, as DOT contends, that Dillard was never tendered as an expert nor explicitly found to be one by the trial court. However, the weak link in the DOT's chain of reasoning is its own failure to object, at trial, to those omissions. DOT allowed Dillard to render opinion after opinion, "expert" and otherwise, for a full twenty-nine pages of transcript before it proffered any objection to his testimony. Even when the first objection was made, it was made not to Dillard's objectionable status as an expert, but to the manner in which he arrived at the cost of restoring the properties' original relationship to grade. The applicable rule is familiar. An objection that a witness is not qualified to render the contested testimony is waived if not made

in apt time. In *Summerlin v. Railroad*, 133 N.C. 550, 45 S.E. 898 (1903), a personal injury suit involving injuries to a minor child, plaintiffs' doctor was allowed to testify at length concerning facts surrounding the child's injury. Subsequently, defendant objected, as in the case *sub judice*, to the competency of a question rather than to the witness's qualifications. The objection was overruled. Defendant then questioned the witness's competency for the first time on appeal. Justice Walker wrote:

> A party cannot be silent while a witness is testifying, as a qualified expert, to matters of opinion which are material to the controversy, and, after he has so testified, object generally to some question which may be afterwards asked him, and then make the point as to his competency for the first time in this Court. If the objection had been made in apt time, we have no doubt the judge below would have instituted the proper inquiry and found the facts as to the competency of the witness to testify as an expert, and those facts and his ruling thereon would have appeared in the case. This objection is untenable.

133 N.C. at 558, 45 S.E. at 901. *See*, 1 *Brandis on North Carolina Evidence* § 133 at 517 (2d rev. ed. 1982); *State v. Edwards and Nance*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980).

Also, when, as here, the record indicates that the witness could properly be ruled an expert, it is assumed that the trial court found him to be an expert, or that his competency was admitted, or that the witness's qualifications were unchallenged at trial. *Apex Tire and Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967); 1 *Brandis, supra*, § 133.

Accordingly, we hold that W. B. Dillard's testimony on the damages to the McDarrises' property was properly admitted. It follows, then, that the measure of damages used by that witness (valuation of the fill material needed to restore the land to grade) was an appropriate one. Since, as DOT asserts, the range of valuation methods available to experts is unlimited, no basis appears upon which to deem Dillard's valuation improper. We thus find DOT's argument unpersuasive.

DOT also contends that the damage to the McDarrises' property was non-compensable. We summarily reject that argument

as both parties agreed, and the judgment denominates by its terms, that this was a *taking by eminent domain. Cf., Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980) (taking incidental to enactment of valid traffic regulations, pursuant to exercise of State's *police power*, not compensable).

B.

[3] DOT, by its second and third arguments and remaining assignments of error, objects to the exclusion of testimony it sought to bring out on cross and direct examination concerning a fill agreement between the McDarrises and the road contractor. DOT sought to show that the McDarrises had obtained fill material, at no cost, from the State's contractor and that any compensable damage to the property should be offset by the special benefits attributable to the free fill material.

G.S. § 136-112(1) provides, in pertinent part, that: "[Consideration should be] given to any special or general benefits resulting from the utilization of the part taken for highway purposes." Special benefits have been defined as "those which arise from the peculiar relation of the land in question to the public improvement." [Citation omitted.] General benefits are those accruing to the public at large by reason of increased community property resulting from the project. *Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E. 2d 107, 112 (1962).

The fill agreement was a private pact between the McDarrises and the contractor. It was not incidental to the road project; nor did it arise from the peculiar relationship between the tracts and the improvement at issue. As we noted in *State Highway Commission v. Mode*, a case entirely apposite to this: "There is nothing in the record to support a conclusion, or inference, that the construction of the highway gave the [landowners] the right to receive [a benefit] from the grading contractor, and it cannot therefore be said that the construction of the highway bestowed this as a special benefit." 2 N.C. App. 464, 471, 163 S.E. 2d 429, 433 (1968).

Similarly, we find that no benefit capable of being considered as a set off against compensation owed the McDarrises is present in this case. Consequently, DOT's cause was not prejudiced by the exclusion of the evidence sought to be introduced since it was, in our view, irrelevant to the compensation issue.

We find the trial below to be free of error.

No error.

Judges ARNOLD and PHILLIPS concur.

TAR RIVER CABLE TV, INC. v. STANDARD THEATRE SUPPLY COMPANY

No. 827SC334

(Filed 3 May 1983)

Evidence § 32— agreement to purchase equipment—parol evidence improper

Where plaintiff entered into an agreement to purchase certain items of equipment from defendant and where the contract contained a sentence stating: "This instrument constitutes the entire agreement between the parties for the sale of the goods, and no oral agreements or representations of any kind or nature shall be binding," parol testimony was properly excluded by the trial court and summary judgment was properly entered for defendant.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 23 November 1981 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 14 February 1983.

This action arises out of an agreement entered into between Tar River Cable TV (Tar River) and Standard Theatre Supply Company (Standard). Tar River filed this action to recover $81,075.00 in damages due to Standard's alleged breach of their agreement. Standard counterclaimed for $19,845.29 due on the contract, and moved for summary judgment.

Tar River presented the following evidence at the summary judgment hearing through its verified complaint, affidavits, and depositions. Tar River sells cable TV packages to consumers. In August 1979, E. B. Chester, then President of Tar River, and David Smith, then Vice President of Tar River, met with Dave DeHart, Sales Representative of Standard, to discuss the installation of a studio. DeHart told Chester that they had extensive experience in the field of audio/video studio systems, and possessed the skill, expertise, and ability to design and install audio/video systems. Chester and Smith knew little about audio/video systems. They drew a diagram and explained to DeHart the requirements of the system they desired. According to Chester,

DeHart reviewed the diagram, listened to Chester and Smith, told them that he fully understood Tar River's system requirements, and that Standard could design and install the system. Chester told DeHart that he wanted an "engineering drawing" of the system prior to any ordering or installing. DeHart agreed to furnish such a drawing. In September DeHart showed Chester and Smith a purchase order which contained the following items:

1	Special Panel—SPECIAL AUDIO/VIDEO PANEL—(17) Seventeen outputs audio and video, 11 in-puts from receivers audio and video, (6) six inputs from studio console audio and video, (5) five in-puts, automated audio and video, one main audio video from desk top unit. One desk top unit bur [sic] position audio and video switch with one audio video output. Special audio/video panel shall mount in 19″ EIA rack. (17) seventeen video cables with end plugs 24″ long. (17) seventeen audio cables 24″ with connectors on each end.	2,800.00
1	Panasonic WV4600A Special Effects Generator	2,095.00
1	Sony VCR V02610	2,150.00
1	Panasonic portable NV9400 recorder	3,200.00
1	Panasonic WV3800 color camera	4,750.00
5	Panasonic 9″ monitors Model TR920MA 195.00	975.00
1	Panasonic VP-4 tripod	70.00
1	Panasonic AC adaptor NVB51	135.00
1	Shure Mixer Model M-67 rack mount with meter	276.00
3	Lavelier microphones Electro Voice 6493 102.00	306.00
1	Shure microphone Model 585SB	122.00
8	Colortran fresnel 6″ 213-205 750 watt 85.00	680.00
2	Colortran scoop #104-232 750 watt 120.00	240.00
2	Telex Director Headset CS-81 85.00	170.00
2	Telex Cameraman Headset CS-61 77.00	154.00
TOTAL PRICE DELIVERED AND INSTALLED		18,123.00

The back of the form contained the following terms and conditions:

> 1. The Company warrants that the goods are as described in this Quotation, but no other express warranty is

made in respect to the goods. If any model or sample was shown the Buyer, such model or sample was used merely to illustrate the general type and quality of goods and not to represent that the goods would necessarily conform to the model or sample. THE COMPANY DOES NOT WARRANT THAT THE GOODS ARE MERCHANTABLE OR THAT THEY CAN BE USED FOR ANY PARTICULAR PURPOSE. The sole remedy for any defect in the goods shall be the remedy available from the manufacturer of the goods under its warranty if any. In any event, the liability of the Company under any warranty or otherwise shall not exceed the Company's cost of the replacement parts, excluding installation and transportation charges. Notice of any failure to comply with specifications or any defect in the goods shall be given to the Company in writing within 90 days after delivery of the goods; and no action shall be brought by the Buyer on any matter arising out of this sale later than one year after delivery of the goods.

. . . .

5. The Buyer shall not assign this agreement or any rights hereunder without the prior written consent of the Company. *This instrument constitutes the entire agreement between the parties for the sale of the goods, and no oral agreements or representations of any nature or kind shall be binding.* Any amendments to this agreement must be in writing and be signed by the parties. (Emphasis added.)

DeHart quoted a price, which included the equipment, system design, and installation, of $18,123.00. According to Chester, none of the parties considered the purchase order to be a final written agreement. The purchase order listed only major items of equipment and did not specify many of the other components or explain the design of the system. According to Chester, he repeatedly questioned DeHart about the problem of synchronizing the various components. DeHart told Chester that he did not need to worry about it and the system Standard was designing would take care of the problem. In his deposition, Chester said he kept asking DeHart about the synchronization problem. He wanted an engineering drawing but never received one. He said he finally got coerced into letting the system be installed, without an engineering drawing, to see if it would work. There was no

discussion with DeHart about a frame synchronizer. A frame synchronizer, according to Chester, is necessary to obtain a satellite receiver signal. Chester said the system would not work after it was installed. Tar River returned Standard's invoice and told them the system did not perform. All they could do was switch between cameras, they could not switch between cable channels. Tar River had to buy a frame synchronizer, which cost $21,000.00. Chester said he did not know why Standard would not have wanted to sell them a frame synchronizer. Chester installed the frame synchronizer and redesigned the studio himself. He said "all the equipment [Standard had installed] was installed and functioning properly as per manufacturer's design. That's a fact. I don't dispute that at all. Unfortunately, it was the wrong equipment to perform the system functions that our diagram indicated we wanted it to perform." All the equipment was necessary, but a frame synchronizer was also needed for the system to work.

Defendant's affidavits tended to show the following. Roger Carter, Vice President of Audio-Video sales for Standard said Standard installed all the equipment listed in the contract with Tar River. Each item of equipment was functioning properly. DeHart said the contract was the entire written agreement between the parties. He said: "Specifically, I neither made nor does the written contract contain any warranty or promise that the studio equipment which we were selling included any equipment which would synchronize it with any satellite or cable sources. That is a transmission matter involving equipment which I did not even market."

Defendant's motion for summary judgment was granted.

Spruill, Lane, McCotter and Jolly, by William S. Cherry, Jr., and Charles T. Lane, for plaintiff appellant.

Stern, Rendleman and Klepfer, by John A. Swem, for defendant appellee.

VAUGHN, Chief Judge.

The sole issue presented is whether Tar River's evidence, which it contends presents a genuine issue of fact as to the nature of the contract, was admissible or barred by the parol evidence rule. The parol evidence rule excludes prior or contem-

poraneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties. This rule was explained by our Supreme Court as follows:

> A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953).

In this case, Tar River agreed to purchase certain items of equipment from Standard. By Tar River's own admission, the equipment was delivered, installed, and functioning properly. Subsequently, they realized that the system they purchased was not sophisticated enough to do what they wanted. They purchased a frame synchronizer, for $21,000.00, installed it, redesigned the system, and then brought this action against Standard for $81,075.00 damages, of which $21,000.00 was for the frame synchronizer. Chester admitted, in his deposition, that if Standard had included the frame synchronizer in the contract he would not have entered into the agreement because it would have been too expensive. The parol evidence rule was designed to apply in this sort of situation. The contract contained the following sentence: "This instrument constitutes the entire agreement between the parties for the sale of the goods, and no oral agreements or representations of any nature or kind shall be binding." Both parties agree that Standard fulfilled the written contract. Tar River's problem is simply that they wanted more than they contracted for. We find that the parol testimony was correctly excluded, and as there is no issue of fact, summary judgment was properly entered for Standard.

Affirmed.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL R. MASSEY

No. 8221SC938

(Filed 3 May 1983)

1. **Criminal Law § 138— aggravating factor—heinous, atrocious or cruel crime—insufficient evidence**

In imposing a sentence for attempted first degree burglary, the trial court erred in finding as an aggravating factor that the crime was especially heinous, atrocious or cruel on the basis of defendant's action in "going over there at that lady's house and knocking the door in at 11:30 at night."

2. **Criminal Law § 138— aggravating factor—prior conviction—representation by counsel**

The trial court erred in finding as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement where there was no evidence as to whether defendant was indigent at the time of the prior conviction and, if so, whether he was represented by counsel.

3. **Criminal Law § 138— aggravating factor—association with motorcycle gang which dealt in drugs**

In imposing a sentence for attempted first degree burglary, the trial court erred in finding as an aggravating factor that defendant associated with members of a motorcycle gang who had dealt in drugs.

4. **Criminal Law § 138— attempted first degree burglary—aggravating factor—use of shotgun for revenge**

In imposing a sentence for attempted first degree burglary pursuant to defendant's conviction upon an indictment alleging the nighttime breaking and entering of an occupied apartment with the intent to commit the felony of assaulting two males with a shotgun with intent to kill, the trial court erred in finding as an aggravating factor that defendant went to the apartment in question with a shotgun for the purpose of revenge since evidence of such factor was an essential part of the State's proof of the offense charged. G.S. 15A-1340.4(a)(1).

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Wood, Judge.* Judgment entered 6 May 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 March 1983.

Defendant was tried on charges of first degree burglary, second degree murder, and assault with a deadly weapon with intent to kill resulting in serious injury. The State presented evidence that on the night of 29 November 1981 defendant was present in an apartment with a group of friends when Regina Deadmon complained that she had been raped the previous evening by two black men who stole her money and drugs. Subsequently, five people, including the defendant, left the apartment in Miss Deadmon's car to find the alleged rapists and recover the money and drugs. Two of the members of the group were armed with a sawed-off shotgun and a baseball bat. At approximately 11:00 p.m. they arrived at the apartment of Alena Gibbs and unsuccessfully tried to gain entry through the back door by banging on the door with the baseball bat. Upon being assured by Mrs. Gibbs that the two men they sought were not in her apartment, they left to continue their search. After travelling a short while, the group happened upon Donald Burns, a black man, and Miss Deadmon wounded him with a gun shot. They subsequently saw another black man on the same street, and Miss Deadmon shot and killed this individual.

Defendant admitted his presence during the events of 29 November as presented by the State. He denied any active participation or any intent to commit a crime.

The trial judge submitted to the jury the offenses of attempted first degree burglary, second degree murder and assault with a deadly weapon with intent to kill resulting in serious injury. The jury returned verdicts of guilty of the attempted burglary and not guilty of all other offenses. Following a hearing pursuant to the Fair Sentencing Act and imposition of a prison sentence of ten years, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General John F. Maddrey, for the State.

Habegger and Johnson, by Daniel S. Johnson, for defendant appellant.

EAGLES, Judge.

Defendant argues that the trial court abused its discretion in finding that the factors in aggravation outweigh the factors in

mitigation and imposing the maximum sentence of ten years for the Class H felony, the presumptive sentence for which is three years.

Pursuant to G.S. 15A-1340.4(a)(1), the trial court found the following facts in aggravation:

6. The offense was especially heinous, atrocious, or cruel.

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

16. Additional written findings of factors in aggravation.

   a. The defendant on his own admission was associated with people who was (sic) members of a motorcycle gang, who had had records for dealing in drugs.

   b. The defendant conspired with others to commit the crime.

   c. That the defendant went there with a baseball bat, and shotgun, and went over to do revenge.

   d. That [although] the defendant was not charged with conspiracy, there was strong evidence of a conspiracy . . . with others, who were sentenced to life sentences for 1st Degree murder [and who] went there for the purpose of recovering drugs and money taken from Regina Deadmon.

The following factor was found in mitigation:

3. The defendant was a passive participant or played a minor role in the commission of the offense.

[1] Defendant first argues that the trial judge erred in finding that the crime was especially heinous, atrocious or cruel. At the sentencing hearing, the trial judge stated that he based his findings of this factor of aggravation upon the defendant's action of "going over there at that lady's house and knocking the door in at 11:30 at night . . . ." We agree with the defendant that this circumstance falls far short of the "excessive brutality" or "conscienceless, pitiless or unnecessarily tortuous" [sic] conduct necessary to categorize a crime as heinous, atrocious or cruel.

See, State v. Ahearn, 307 N.C. 584, 599, 300 S.E. 2d 689, 698 (1983), quoting *State v. Pinch,* 306 N.C. 1, 34, 292 S.E. 2d 203, 228 (1982).

[2] In the second finding of an aggravating factor, the record reveals that defense counsel stipulated that defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement, i.e., driving under the influence of an intoxicating beverage. However, there is no evidence as to whether the defendant was indigent at the time of this prior conviction and if so, whether he was represented by counsel. In the absence of this supporting evidence, the trial judge's finding of a prior conviction cannot be upheld. *See, State v. Thompson,* 60 N.C. App. 679, 300 S.E. 2d 29 (1983).

[3] We agree with the defendant that the trial judge erred in finding as an aggravating factor that the defendant associated with members of a motorcycle gang who had dealt in drugs. This finding of "culpability by association" bears no relation to the stated purposes of the Fair Sentencing Act. *See,* G.S. 15A-1340.3.

We also agree with defendant's argument that the trial judge violated the prohibition of G.S. 15A-1340.4(a)(1) against using the same item of evidence to prove more than one factor in aggravation. Two of the aggravating factors, set out at 16(b) and (d), are essentially restatements of each other, i.e., that defendant conspired with others in his participation in the events of the crime which took place on 29 November 1981.

[4] Error has also occurred in the trial judge's finding as an aggravating factor that "defendant went there with a . . . shotgun . . . to do revenge." G.S. 15A-1340.4(a)(1) mandates that "(e)vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Defendant was indicted for first degree burglary, *i.e.,* the nighttime breaking and entering of an occupied apartment with the intent to commit the felony of "assault(ing) two black males with a deadly weapon, a shotgun, with intent to kill." Defendant was convicted of an attempt to commit this crime. Evidence that defendant traveled to the apartment in question with a shotgun for the purpose of revenge was an essential part of the State's proof of the charged offense.

Because of the errors committed in the sentencing phase of defendant's trial, the case is remanded for resentencing in accordance with this opinion.

Remanded for resentencing.

Judge WEBB concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

I disagree with that portion of the opinion holding that the judge erred in finding the prior conviction as an aggravating factor. G.S. 15A-1340.4(e) provides that a prior conviction may be proved by stipulation or by the court record. Here, the prior conviction was proved by stipulation. Whether the defendant was afforded right to counsel is not an element of a "prior conviction." The statute merely provides that the prior conviction may not be used as an aggravating factor unless the defendant was afforded his right to counsel. It is just like any other evidence that is made inadmissible by statute or rule. If this defendant was not afforded right to counsel at his prior conviction, it was his duty to raise the issue in the trial court and not, for the first time, on appeal. The statute expressly so provides:

> A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing.

G.S. 15A-1340.4(e).

If defendant contends he was not afforded right to counsel, he raises a factual issue to be resolved in the trial court just as he does under Article 53 when he moves to suppress other evidence. The legislature very reasonably and expressly provided for the same procedures in Article 81A, the sentencing act we are now considering.

It may be that I could concur in some of the other matters discussed in the majority opinion. Instead, I elect to dissent to af-

ford the right of further review on the question raised in this dissent.

MATILDA BLOUNT RANSOM, MARY BLOUNT NIXON, HENRY BLOUNT, MARTHA BLOUNT JAMES, VANSIE BLOUNT, JOSEPHINE BLOUNT MATTHEWS, NOAH BLOUNT, PRISCILLA BLOUNT BALLARD, AND LILLIE BLOUNT LIGHTFOOT v. OSCAR BLAIR, INDIVIDUALLY, EMBALMER, AND OSCAR BLAIR, T/A BLAIR FUNERAL SERVICE; BATESVILLE CASKET COMPANY, INC.; AND DUPONT DAVIS, T/A DAVIS VAULT COMPANY

No. 821SC539

(Filed 3 May 1983)

1. **Dead Bodies § 2— negligence in embalming, interring and choosing vault supplier—insufficiency of evidence**

Plaintiffs' evidence was insufficient for the jury on the issue of negligence by defendant embalmer and funeral director in embalming or interring the body of plaintiffs' mother or in choosing a codefendant to supply and install the vault used for the burial.

2. **Dead Bodies § 2— alleged negligent reburial—punitive damages—insufficient evidence**

Plaintiffs' evidence was insufficient to support their claim for punitive damages against defendant funeral director and defendant vault supplier for failure to conduct a satisfactory reburial of their mother's body where the evidence showed that defendants made a reasonable and well-intentioned effort properly to rebury the body, and plaintiffs failed to prove intentional wrongdoing or wanton and reckless disregard of their feelings.

3. **Dead Bodies § 2— leak-proof casket—breach of warranty—insufficient evidence**

The evidence was insufficient to be submitted to the jury on the question of whether one defendant breached its warranty of a leak-proof casket where it tended to show that the casket was found floating in water in its vault, that some liquid was observed in the bottom of the casket when it was removed from the flooded vault, and that condensation, leakage of body fluids, and leakage of embalming fluids would normally cause some liquid to collect in the bottom of a casket, and where plaintiffs did not present any evidence that the liquid found in the casket was water or that the casket had leaked.

APPEAL by plaintiffs from *Small, Judge*. Judgment entered 23 October 1981 in Superior Court, CHOWAN County. Heard in the Court of Appeals 13 April 1983.

Plaintiffs, the nine children of Sophie Harris Blount, deceased, instituted this civil action against the defendants, Oscar Blair, Batesville Casket Company, and Dupont Davis, in contract and in tort for the faulty burial of their mother, Sophie Harris Blount. The plaintiffs alleged that they were entitled to recover both compensatory and punitive damages from the defendants for breach of contract, breach of warranty, negligence, and unfair or deceptive trade practices.

At trial, evidence was offered tending to show the following: Plaintiffs contracted with the defendant Blair to have him bury the body of their deceased mother. On 2 January 1977 Blair conducted the burial, using a casket purchased from defendant Batesville and a vault that was provided and installed by defendant Davis. On 9 May 1978 plaintiff Lightfoot was visiting the gravesite. She noticed the vault was tilted and filled with water, and the casket inside was visible. The top and bottom parts of the vault had been manufactured separately, and did not join in a perfect seal. Blair was summoned immediately and he removed the casket, which was floating in water, to the Blair Funeral Home where plaintiff Lightfoot asked to see the body. The body was badly decomposed and there was some liquid in the bottom of the casket. On 11 May 1978 defendant Blair reburied the body in a new Batesville casket and in a new vault supplied and installed by defendant Davis. Defendant Davis applied a sealing substance to the vault, but did not cover the grave with dirt since, in his opinion, the sealant and dirt needed time to dry before the dirt could be properly packed around the vault. Shortly thereafter a heavy rain came. Plaintiff Lightfoot again visited the grave and saw that the vault was tilted and surrounded by water. Defendant Blair opened the vault and found water inside. He removed the casket, provided a different type of vault, and buried the body again. No problems have arisen since. Representatives of Batesville testified that they found no evidence of leakage in their casket, which was warranted as leakproof. A medical expert testified that the decomposition of the body was not unusual, and that condensation, leakage of body fluids, and leakage of embalming fluids were normal. Plaintiffs did not pay defendants for the reburials.

Prior to trial, defendant Batesville's motion for summary judgment as to the plaintiffs' claim for punitive damages was

granted. At the close of the plaintiffs' evidence, the trial court granted the motions of defendants Blair and Davis for directed verdicts as to the plaintiffs' claims for punitive damages. Also at the close of plaintiffs' evidence the trial court allowed the motion of defendant Batesville for directed verdict as to the plaintiffs' claim for damages based on unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1. At the conclusion of all the evidence, the trial court granted the motion for directed verdict made by defendant Batesville. The Court also at that time allowed the motion of defendant Blair for directed verdict as to plaintiffs' claim against him based on negligence.

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

1. Did the defendant Blair breach his contract with the plaintiffs?

ANSWER: No

2. If not, were the plaintiffs injured by unfair or deceptive trade practices of the defendant Blair?

ANSWER: No

3. Were the plaintiffs damaged by the negligence of the defendant Davis?

ANSWER: No

4. If not, were the plaintiffs injured by unfair or deceptive trade practices of the defendant Davis?

ANSWER: No

5. Are the plaintiffs' claims against the defendant Blair barred by an accord and satisfaction?

ANSWER: ______

6. What amount, if any, are the following entitled to recover in damages?

A. Matilda Blount Ransom

ANSWER: __________

B. Mary Blount Nixon

ANSWER: __________

C. Henry Blount

ANSWER: ________

D. Martha Blount James

ANSWER: ________

E. Vansie Blount

ANSWER: ________

F. Josephine Blount Matthews

ANSWER: ________

G. Noah Blount

ANSWER: ________

H. Priscilla Blount Ballard

ANSWER: ________

I. Lillie Blount Lightfoot

ANSWER: ________

From summary judgment for defendant Batesville on punitive damages, from a judgment directing verdicts for Blair and Davis on punitive damages, directing a verdict for defendant Batesville on unfair or deceptive trade practices, directing a verdict for defendant Batesville on all claims against it, and directing a verdict for defendant Blair on negligence, and from a judgment entered on the verdict, plaintiffs appeal.

Bridgers, Horton & Simmons, by Edward B. Simmons, for the plaintiffs, appellants.

Leroy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr. for defendant-appellee, Oscar Blair.

Young, Moore, Henderson & Alvis, by George M. Teague and Joseph W. Williford for defendant-appellee, Batesville Casket Company.

Carter W. Jones, Charles A. Moore, and Kevin M. Leahy for defendant-appellee, Dupont Davis.

HEDRICK, Judge.

[1] Plaintiffs contend the trial court erred in granting defendant Blair's motion for a directed verdict as to the negligence claim against him. "The standard for entry of a directed verdict is that the evidence, when viewed in the light most favorable to the non-movant, is insufficient as a matter of law to support a verdict in favor of the non-movant." *Oakley v. Oakley*, 54 N.C. App. 161, 163, 282 S.E. 2d 589, 590 (1981) (citation omitted).

Plaintiffs' negligence claim against defendant Blair was predicated upon Blair's use of defendant Davis to supply and install the vault, and upon Blair's embalming and interment of the body. All the evidence tends to show that defendant Davis provided the vault, installed it in the grave, and sealed the casket inside. When the vault was discovered askew, full of water, and the casket visible, defendant Davis furnished another vault and purportedly again sealed the casket inside. There is no evidence in this record that defendant Blair did or failed to do anything which proximately caused any damage to the vault. The decision of Blair and Davis at the second burial to not pack dirt around the grave at that time was based on a reasonable belief that the gravesite needed to dry out. Plaintiffs failed to introduce any evidence that this decision constituted negligence.

Furthermore, plaintiffs did not show that Blair knew or should have known about any alleged incompetence on the part of Davis. To the extent plaintiffs base Blair's negligence on the performance of Davis, plaintiffs have not been prejudiced by the directed verdict for Blair on negligence.

Nor was there sufficient evidence to submit to the jury the question of whether defendant Blair negligently embalmed or interred the body. The uncontroverted testimony of a medical expert established that the decomposition of the body was within normal bounds. There is no evidence that the body had been negligently prepared or negligently placed in the casket and vault. The trial judge ruled correctly on defendant Blair's motion for directed verdict as to negligence.

[2] Plaintiffs further contend that the trial court erred in granting the motions of defendants Blair and Davis for directed verdicts on the plaintiffs' claims for punitive damages. Plaintiffs base

their claim on defendants' failure to conduct a satisfactory reburial on 11 May 1978, knowing the distraught condition of the plaintiffs. Blair and Davis made a reasonable and well-intentioned effort to properly rebury the body. Plaintiffs did not prove intentional wrongdoing or wanton and reckless disregard of plaintiffs' feelings, so no basis for punitive damages exists. In any event, plaintiffs have not been prejudiced because they were not awarded any actual damages. "Punitive damages may not be awarded where plaintiff is not entitled to recover any compensatory damages." *Phillips v. Insurance Co.*, 43 N.C. App. 56, 59, 257 S.E. 2d 671, 673 (1979) (citation omitted).

Plaintiffs contend the trial court erred in not instructing the jury as they requested concerning damages for mental anguish arising from breach of contract. No error occurred because the requested instruction was delivered in substance even though not in the plaintiffs' exact words. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967). In addition, the jury found no breach of contract, so there no longer exists an issue as to mental anguish damages arising from a breach of contract.

[3] Plaintiffs also maintain that the trial court erred in allowing defendant Batesville's motion for directed verdict at the close of all the evidence. Defendant Batesville warranted that its casket was leakproof; plaintiffs' claim against Batesville was that this warranty had been breached. The plaintiffs' evidence indicated that some liquid was observed in the bottom of the casket when it was removed from the flooded vault. Other evidence revealed that the casket was floating in the water. Defendants' medical expert testified that condensation, leakage of body fluids, and leakage of embalming fluids would normally cause some liquid to collect in the bottom of a casket. Plaintiffs did not present any evidence that the liquid was water or that the casket leaked, while defendants demonstrated that liquid in the casket came from the body. There was insufficient evidence to submit to the jury the question of whether Batesville breached its warranty of a leakproof casket.

Plaintiffs contend that the trial court erred by instructing the jury that photographs could be considered only as illustrative evidence. However, the plaintiffs failed to object to this instruction as required by Rule 10(b)(2) of the North Carolina Rules of

Appellate Procedure; so this Court will not review the instruction.

Finally, plaintiffs assert that the trial court should have granted their motion for a new trial based upon the errors discussed above. Because plaintiffs' contentions are without merit, the trial court properly refused to grant a new trial.

No error.

Chief Judge VAUGHN and Judge ARNOLD concur.

WENDY BETTS, ANGIE BETTS, BY AND THROUGH THEIR GUARDIAN AD LITEM, SANDRA BETTS PARKER AND KENNETH WAYNE O'NEIL v. MARGARET PARRISH, ADMINISTRATRIX CTA OF THE ESTATE OF RUSSELL W. SANDERFORD, RUBY WILSON ELLIS, AND MILDRED S. POLLARD

No. 8210SC525

(Filed 3 May 1983)

Wills § 66— will construction—contingency not happening

Where testator's will devised his real property to his mother for her lifetime and after her death to his wife in fee simple, the will provided that should his mother predecease testator, his real property should go to his wife in fee simple, the will further provided that should his mother and wife both predecease testator, his property should go to two nieces and a nephew, testator's wife predeceased him, and testator and his wife died without issue, the remainder interest in testator's real property did not pass to testator's nieces and nephew under the will but passed to testator's mother by intestate succession. G.S. 31-42(c)(1)b; G.S. 29-15(3).

Judge WHICHARD dissenting.

APPEAL by defendants from *Godwin, Judge.* Judgment entered 24 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 12 April 1983.

This is an action for a declaratory judgment construing the will of Russell W. Sanderford. Mr. Sanderford's will provided in part as follows:

ITEM TWO

I will and bequeath all of my personal property in equal shares to my wife, Mamie Prince Sanderford, and my mother, Ruby Wilson Ellis; provided that if either should predecease me then the survivor shall receive all of said personal property.

ITEM THREE

I will and devise my house at 134 Maywood Avenue, Raleigh, N.C., and all other real estate that I own to my mother for her lifetime and after her death to my wife, Mamie Prince Sanderford, in fee simple. Should my mother predecease me, then I will and devise said real estate to my wife, Mamie Prince Sanderford, in fee simple.

ITEM FOUR

If my mother and my wife should both predecease me, then I will, devise and bequeath all of my property, real, personal and mixed in equal shares to my nieces and nephew as follows:

One-third interest to Wendy Betts

One-third interest to Angie Betts

One-third interest to Kenneth Wayne O'Neil

The testator's wife predeceased him. He was survived by his mother, defendant Ruby Wilson Ellis, and by his nieces and nephew named in Item Four of his will.

The superior court concluded that the remainder interest in the house and lot at 134 Maywood Avenue lapsed upon the death of the testator's wife, and was devised by Item Four of the will to plaintiffs as tenants in common. It entered judgment declaring that the will devised a life estate to testator's mother and the remainder in fee to plaintiffs.

Defendants appealed.

Moore, Ragsdale, Liggett, Ray and Foley, by John N. Hutson, Jr., for plaintiff appellees.

Kimzey, Smith and McMillan, by Duncan A. McMillan, for defendant appellants.

WEBB, Judge.

We do not believe the will of Mr. Sanderford is ambiguous. Item Four provides that in the event his wife and mother should both predecease him, his estate would go to the plaintiffs. This contingency did not happen. It may be that the testator wanted the plaintiffs to have a remainder interest in his house and lot under the contingency that occurred, but he did not say so in his will. We are required to discern the intention of the testator from the plain language of the will. According to this language, the plaintiffs do not take any interest in the house and lot.

The canons of construction which the appellees suggest we should follow, such as a will should be construed as to avoid intestacy, a change in language from paragraph to paragraph should be given some significance, and the intention of the testator must be determined from reading the whole will, have no application. These canons of construction are used when a will is ambiguous. In this case, we hold the will is not ambiguous.

The testator and his wife died without issue. The remainder interest in the testator's real property passes to his mother, Ruby Wilson Ellis. *See* G.S. 31-42(c)(1)b and G.S. 29-15(3). We reverse and remand for a judgment consistent with this opinion.

Reversed and remanded.

Judge BRASWELL concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

"[T]he dominant purpose in construing a will is to ascertain and give effect to the testator's intent." *Bank v. Carpenter,* 280 N.C. 705, 707, 187 S.E. 2d 5, 7 (1972). That intent is determined by examining the entire will in light of all surrounding circumstances

known to the testator. *Wilson v. Church,* 284 N.C. 284, 295, 200 S.E. 2d 769, 776 (1973). It is presumed that one who makes a will does not intend to die intestate as to any of his property. *Ferguson v. Ferguson,* 225 N.C. 375, 377, 35 S.E. 2d 231, 232 (1945). "Having undertaken to make a will at all, it is not consistent with sound reasoning that the testator would have left his estate dangling." *Coddington v. Stone,* 217 N.C. 714, 720-21, 9 S.E. 2d 420, 424 (1940). When a will permits two interpretations, then, one resulting in complete testacy and the other only partial, the presumption favors complete testacy.

I believe the will does permit two interpretations, and that the interpretation which results in complete testacy should prevail. In Item Two the testator bequeathed his personal property to his wife and mother equally, and provided that in the event of the death of one the survivor would take such property in its entirety. He made no such provision with regard to his real property, thereby indicating a clear intent to limit his mother to the life estate therein which he expressly granted.

The testator provided for disposition of both real and personal property. Item Four stated that he devised and bequeathed "*all* of [his] property." It is thus evident that he intended to dispose of his entire estate, not that some of it should pass by intestacy.

It is apparent that the draftsman failed to take account of the possibility that the testator's wife would predecease his mother. It is equally evident, though, that the testator intended that the named nieces and nephew have the property after the death of both his wife and mother.

I vote to affirm.

STATE OF NORTH CAROLINA v. LEE CHURCHILL

No. 8210SC1132

(Filed 3 May 1983)

1. **Criminal Law § 26.5; Taxicabs § 1— acquittal of leaving cab unattended—conviction of trespassing**

Defendant could properly be convicted in the superior court of trespassing at a bus terminal after having been acquitted in the district court of leaving a cab unattended while soliciting fares in violation of a city ordinance, even though the same conduct gave rise to both charges, since each offense clearly had an element not found in the other offense. G.S. 14-134.

2. **Trespass § 13— joint ownership of sidewalk—instruction not required**

In a prosecution for trespassing at a bus terminal, the trial court did not err in failing to summarize evidence which defendant contended showed that the bus company shared the sidewalk leading to the terminal with a restaurant which leased space in the terminal and that she had a *bona fide* belief that she could use the sidewalk to go to the restaurant. G.S. 15A-1232.

3. **Criminal Law § 142.3— trespassing at bus terminal—probation—condition forbidding going on terminal premises except for traveling by bus**

A condition of defendant's probation for the crime of trespassing at a bus terminal that she not go upon the terminal premises except for the purpose of traveling by bus and with prior approval of her probation officer did not amount to banishment and was a reasonable condition of her probation.

APPEAL by defendant from *Lee, Judge.* Judgment entered 21 May 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 14 April 1983.

Defendant was convicted of trespassing on the property of Carolina Coach Company. She appeals from a sentence of six months imprisonment, suspended for three years with supervised probation under prescribed conditions.

Attorney General Edmisten, by Assistant Attorney General Michael Rivers Morgan, for the State.

Adam Stein, Appellate Defender, by Nora B. Henry, Assistant Appellate Defender, for defendant appellant.

HILL, Judge.

On several occasions a security guard at the Trailways Bus Station in Raleigh had instructed defendant, a cab operator, not

to solicit cab fares on, or trespass on, the bus company's property. The terminal manager had also warned defendant to stay off the property, and that if she returned she would be prosecuted for trespassing. The security guard later told her she could come on the property if she would conduct her business there and leave. Further problems developed, however, and the guard again told defendant "not to come on the property and solicit."

On 19 December 1981 the guard observed defendant drive her cab to the front of the bus station and park it some thirty-five or forty feet from the front door. She then walked up the sidewalk onto the terminal property walkway and stood in the front door speaking with several people as they left the terminal. The guard approached and heard defendant ask a man if he needed a cab. He arrested her for leaving her cab unattended, a violation of a Raleigh city ordinance, and for trespass.

[1] The District Court found defendant not guilty of the unattended cab charge, and guilty of trespass. She appealed to Superior Court, and was again found guilty of trespass.

Defendant contends "the State was collaterally estopped from relitigating in Superior Court whether [she] solicited a fare because [she] had been acquitted of that charge in District Court." Her theory, in essence, is that the trespass charge was grounded on her being on the premises for the purpose of solicitation of fares, and that the District Court finding of not guilty on the charge of "while in the operation for solicitation of cab fares did leave cab unattended" was a determination of the issue which precluded its relitigation.

The offenses with which defendant was charged were clearly discrete. The gravamen of the offense of which she was acquitted was *leaving an unattended cab* while soliciting fares, a violation of a city ordinance. *See* Raleigh City Code § 12-2042 (1982). The gravamen of the offense of which she was convicted was *being on the property of another* after being forbidden to do so, a violation of a state statute. *See* G.S. 14-134 (1981). Each offense clearly has an element which the other does not. The mere fact that the same conduct gave rise to both charges is not determinative.

Further, upon appeal from district court to superior court, the "trial *de novo* in the superior court is a new trial from begin-

ning to end, on both law *and facts*, disregarding *completely* the plea, trial, verdict and judgment below . . . ." *State v. Spencer*, 276 N.C. 535, 543, 173 S.E. 2d 765, 771 (1970) (emphasis supplied). Defendant's collateral estoppel contention is without merit.

[2] Defendant contends the court erred in failing, upon request, to summarize her evidence of joint ownership of the sidewalk leading to the bus terminal. She argues that the following evidence supported, and thus upon request required, such summarization:

> Q. [By defendant, *pro se*, to the security guard] Carolina Coach, the building itself is owned by Carolina Coach and the land, but there is [sic] two portions of the bus station; the right side, that is Trailways Bus Station itself, and the other is leased by Food Masters, which runs Travelers Junction Restaurant?
>
> A. They lease part of the building.
>
> Q. There is [sic] two buildings?
>
> A. Yes.
>
> Q. This main walkway up here and this is shared by both concerns, am I correct?
>
> A. Yes, that is correct.

The court must charge on all substantial and essential features of the case which arise upon the evidence. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977); *State v. Fearing*, 48 N.C. App. 329, 337, 269 S.E. 2d 245, 250, *cert. denied*, 301 N.C. 99, 273 S.E. 2d 303, *disc. rev. denied*, 301 N.C. 403, 273 S.E. 2d 448 (1980). It "is not required [, however,] to state the evidence except to the extent necessary to explain the application of the law to the evidence." G.S. 15A-1232 (1978). Defendant argues that the evidence recited above showed that she had a *bona fide* belief that she could be on the sidewalk, since "there was nothing to indicate she could not come into the restaurant." The record is silent, however, as to any such belief on the part of defendant. The evidence indicated that Carolina Coach Company owned all of the property in question, that its security guard had instructed defendant to stay away from "any portion" of the property, and that he had informed her that she would be arrested for

trespassing if she violated this instruction. In the context of such evidence, the evidence recited above, standing alone, did not suffice to make shared use of the sidewalk a material issue in, or a substantial and essential feature of, the case. The court thus did not err in refusing to include it in his summary of the evidence to the jury.

[3] A condition of defendant's probation was that she not go upon the premises of Carolina Coach Company or Travelers Junction Restaurant except for the purpose of traveling by bus and with prior approval of her probation officer. Defendant contends "this condition is invalid because it is a sentence of banishment and is an unreasonable condition of probation."

"In North Carolina a court has no power to pass a sentence of banishment; and if it does so, the sentence is void." *State v. Doughtie*, 237 N.C. 368, 369, 74 S.E. 2d 922, 923 (1953). "The concept of banishment has been broadly defined to include orders compelling individuals '. . . to quit a city, *place*, or country, for a specific period of time, or for life.'" *State v. Culp*, 30 N.C. App. 398, 399, 226 S.E. 2d 841, 842 (1976) (quoting 8 C.J.S., Banishment, p. 593 (emphasis supplied by the Court in *Culp*)).

This Court has held, however, that a condition of probation that defendant not loiter on the courthouse grounds, or in the courthouse, or in any other public building, unless he was there on business, did not constitute an order of banishment. *State v. Setzer*, 35 N.C. App. 734, 242 S.E. 2d 509, *disc. rev. denied*, 295 N.C. 263, 245 S.E. 2d 780 (1978). It stated that defendant was not compelled to "quit" the proscribed places entirely, but merely to limit his frequenting thereof to occasions on which he had business.

The condition of probation here likewise did not constitute a general order of banishment. The court allowed defendant access to the terminal premises for the legitimate business purpose of traveling by bus. The condition is not, as defendant contends, unreasonable as bearing no relationship to the offense. The conduct which precipitated defendant's difficulty in the first instance was her presence on the terminal property for a prohibited purpose. Limiting her access to these premises except for the legitimate, non-prohibited business purpose of traveling by bus is thus clearly related to preventing her use of the property for pro-

hibited purposes. It does tend to further defendant's reform, and it is thus a reasonable condition of her probation. *See State v. Setzer, supra,* 35 N.C. App. at 736, 242 S.E. 2d at 511.

We find *Setzer* controlling, and this assignment of error is therefore overruled.

No error.

Judges WEBB and BRASWELL concur.

GRACIE SCHMIDT WELCH, EXECUTRIX OF THE ESTATE OF WILLIAM H. SCHMIDT, DECEASED v. WILLIAM H. SCHMIDT, JR.

No. 8229SC540

(Filed 3 May 1983)

Wills § 32.1— wife predeceasing husband—construction of will

Where a testator stated that his wife's death in a common accident, or within 30 days after his death, would have the same effect as if she had predeceased him, and where his wife predeceased him, it was "consistent with sound reasoning" to assume that he intended to provide for the disposition of his estate in the event that his wife predeceased him as well as in the event that his wife's death occurred in a common accident or within 30 days after his death.

APPEAL by respondent from *Freeman, Judge.* Judgment entered 4 March 1982 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 14 April 1983.

William H. Schmidt executed a will with the following pertinent provisions:

ITEM THREE

If my wife, MABEL G. SCHMIDT, survives me, then I will, devise and bequeath all the rest and residue of my property, real, personal and mixed, of every nature whatsoever, which I now own or may hereafter acquire, including any automobiles I may own at my death, to my wife, MABEL G. SCHMIDT, and her heirs, in fee simple absolute.

ITEM FOUR

If my wife, MABEL G. SCHMIDT, and I shall die in a common accident, or under circumstances which make it impossible or improbable to determine which of us predeceased the other, or if my said wife, MABEL G. SCHMIDT, shall die within thirty days after my death, then it is my will that this, my Last Will and Testament, shall operate as if my said wife, MABEL G. SCHMIDT, had predeceased me and in that event, and in that event only MABEL G. SCHMIDT, and her heirs shall take nothing from or through the preceding paragraphs of this, my Last Will and Testament, in which property was devised and bequeathed to her and her heirs.

ITEM SIX

I will, devise and bequeath to my daughter, GRACIE SCHMIDT WELCH, and her husband, MARSHALL WELCH, the following tract of land lying in Eastatoe Township, Transylvania County, North Carolina:

[Description omitted.]

ITEM SEVEN

If the death of my wife, MABEL G. SCHMIDT, shall occur as set forth in Item Four above, then I will, devise and bequeath all the rest and residue of my property, real, personal and mixed, of every nature whatsoever, which I now own or may hereafter acquire, in equal shares to my two children, WILLIAM H. SCHMIDT, JR. and GRACIE SCHMIDT WELCH, share and share alike, in fee simple absolute.

He subsequently executed a codicil amending Item Seven to read as follows:

If the death of my wife, MABEL G. SCHMIDT, shall occur as set forth in Item Four of my Last Will and Testament, then I devise all of the remaining real estate which I own in what is known as the Rainbow Lake property in Eastatoe Township, Transylvania County, State of North Carolina, to my daughter, GRACIE SCHMIDT WELCH. All the rest and residue of my property, real, personal and mixed, of every nature whatsoever, which I now own or may hereafter acquire, I will devise and bequeath to my two children

WILLIAM H. SCHMIDT, JR. and GRACIE SCHMIDT WELCH, in equal shares, share and share alike, in fee simple absolute.

Schmidt died survived by his children, petitioner Gracie Schmidt Welch, and respondent William H. Schmidt, Jr. His wife predeceased him by more than two months.

Petitioner sought a declaration that under the will she took the Eastatoe Township property in fee simple. Respondent answered contending that he and petitioner owned the property as tenants in common.

After making findings of fact and conclusions of law, the court entered judgment declaring petitioner the fee simple owner of the property. Respondent appeals.

Averette & Barton, by Donald H. Barton, for petitioner appellee.

Ramsey, Smart, Ramsey & Hunt, P.A., by Michael K. Pratt, for respondent appellant.

WHICHARD, Judge.

Respondent assigns error to the finding that the intent of the testator, as disclosed by Items Four and Seven of the will and Item Seven of the codicil, was to provide for the distribution of his estate if (1) his wife predeceased him, (2) her death occurred within thirty days of his, or (3) he and his wife died in a common accident. He argues that Item Seven would apply only if the testator and his wife had died in a common accident, or if she had died within thirty days of his death; that the testator's intent was to allow the devise to lapse if neither of those conditions occurred; that neither of those conditions occurred, and the property in question thus passed by intestacy. He argues, alternatively, that the property passed under the residuary clause of Item Seven. We disagree, and accordingly affirm.

> Where one undertakes to make a will, the presumption is that the instrument disposes of all of testator's property, not leaving a residue to pass under laws governing intestacy. *Poindexter v. Trust Co., supra* [258 N.C. 371, 128 S.E. 2d 867]; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689. "Having undertaken to make a will at all, it is not consistent with

> sound reasoning that the testator would have left his estate dangling." *Coddington v. Stone*, 217 N.C. 714, 9 S.E. 2d 420.

In re Will of Wilson, 260 N.C. 482, 484, 133 S.E. 2d 189, 191 (1963). The testator here stated that his wife's death in a common accident, or within thirty days after his death, would have the same effect as if she had predeceased him. Having so provided, it would not be "consistent with sound reasoning" to assume that he intended to leave his estate "dangling" by making no provision for disposition in the event that his wife in fact predeceased him.

"To effectuate the intention of the testator the court may transpose or supply words, phrases and clauses when the sense of the devise in question 'as collected from the context manifestly requires it.'" *Jernigan v. Lee*, 279 N.C. 341, 344-45, 182 S.E. 2d 351, 354 (1971). It is evident from the four corners of the will that the testator intended to devise the property in question to the petitioner. In Item Six of his will he unconditionally devised to her a described portion of his Eastatoe Township property. In the codicil he devised to her his "remaining real estate" in that township "[i]f the death of [his] wife . . . occur[red] as set forth in Item Four" of the will. Item Four dealt with circumstances in which his wife was to be deemed to have predeceased him. The foregoing evidences an intent to devise to petitioner, in the event testator's wife predeceased him, all of his Eastatoe Township property.

Respondent contends the court erred in declaring petitioner "the owner in fee simple" of this property, because there was no evidence that the testator held fee simple title. A devise of real estate must be construed to be in fee simple unless the will plainly shows "that the testator intended to convey an estate of less dignity." G.S. 31-38 (1976). The will does not plainly show such an intent. On the contrary, it plainly indicates an intent to devise in fee simple.

Affirmed.

Judges WEBB and BRASWELL concur.

PAUL R. JENNEWEIN AND WIFE, VIRGINIA N. JENNEWEIN v. THE CITY COUNCIL OF THE CITY OF WILMINGTON, NORTH CAROLINA, BEN B. HALTERMAN, MAYOR, JOSEPH DUNN, MARGARET FONVIELLE, RALPH W. ROPER, WILLIAM SCHWARTZ, LUTHER JORDAN AND TONY PATE

No. 825SC236

(Filed 3 May 1983)

1. **Municipal Corporations § 31.2— special use permit—city council decision—standard of appellate review**

Although the North Carolina Administrative Procedure Act provides judicial review only for agency decisions, G.S. 150A-50, and exempts cities and other local municipalities, G.S. 150A-2(1), a similar standard of review is appropriate to review city council special use permit decisions.

2. **Municipal Corporations § 31.2— special use permit—appeal from decision—whole record test**

While the whole record test does not allow the appellate court to replace a city council's judgment as between two reasonably conflicting views in determining whether to issue a special use permit, the appellate court must take into account both the evidence which justified the city council's result and the contradictory evidence in determining whether the city council's decision was supported by competent, material and substantial evidence.

3. **Municipal Corporations § 30.6— denial of special use permit for antique shop—supporting evidence**

A city council's denial of a special use permit for an antique shop in a historic district on the ground that such use of the property would materially endanger the public health and safety was supported by competent, material, and substantial evidence tending to show that petitioner uses flammable solvents in refinishing furniture on the premises; the surrounding houses are old, very close together, and of wood frame construction; and petitioner has only one fire extinguisher and no fire alarms.

APPEAL by petitioners from *Strickland, Judge.* Judgment entered 18 December 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 January 1983.

This case arises from the Wilmington City Council's denial of petitioner's application for a special use permit. In July 1977, petitioners filed with the Planning Department of the City of Wilmington an application for a special use permit to use 318 South Front Street, in the Historic District of Wilmington, as an antique shop. The application was approved by the Historic District Commission and the Planning Commission. In November 1977, the

Wilmington City Council, pursuant to its authority under G.S. 160A-381, voted to deny petitioners' application. Petitioners filed a *petition for certiorari* in Superior Court. The Court remanded the action for a hearing de novo before the city council. On 26 September 1978, the city council again denied petitioners' application. The Superior Court remanded the action for a third hearing before the city council. At the hearing, on 28 April 1981, petitioners' application for a special use permit was again denied.

As required by the Wilmington zoning ordinance, in order to grant a special use permit the council must find:

(1) That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;

(2) That the use meets all required conditions and specifications;

(3) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,

(4) That the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of the City of Wilmington.

The first finding of fact and conclusion made by the city council is as follows, in pertinent part:

1. It is the City Council's CONCLUSION that the proposed use (does not) satisfy the first general requirement listed in the Ordinance; namely, that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved. In support of this conclusion, the Council makes the following FINDINGS OF FACT:

. . . .

Margaret Groover, a property owner in the subject block, owning property at 300 South Front Street on the northwest corner of Front and Ann Street, [testified] that she had lived

at that address since 1942 and in the neighborhood in general all her life and that the 300 block had always been residential. She testified that danger to the public health and safety was present due to fire danger with the type of use being considered since all the houses in the block are frame houses very close together and with furniture refinishing going on in the antique shop the danger to the public health and safety would be increased. She further testified that danger from fire was increased anywhere where no one lived on the premises at night as subject property presently existed. She further testifed on cross examination that a fire had occurred between her house and the subject property and that that property was unoccupied at the time of the fire. Opponents offered further competent, sworn testimony through Mr. Jackson Spark of 308 South Front Street (3 doors from the subject property on the same side of the street) that use as an antique shop would disturb the peace, quiet and calm of the neighborhood and that he had been disturbed on numerous occasions by the people looking for the antique shop which had been operating illegally and without a permit.

He further testified that increased traffic from the shop would create danger to pedestrians and other people walking in the neighborhood.

. . . .

[Several other witnesses testified as to the danger of the increased traffic.]

. . . .

Opponents offered further competent, sworn testimony through Don Britt of 401 South Front Street on the southeast corner of Front/Nun Street approximately fifty (50) yards from the subject property. . . . [H]e pointed out the danger to public health and safety with respect to fire hazards on the property noting that the petitioner had no fire alarms on her property, only one fire extinguisher with more than 5,000 square feet, no one living in the building in question, and smoking is allowed on the premises and petitioner by her own testimony smokes. In addition, he noted the use

of flammable refinishing material and the presence of cars in the backyard.

The city council concluded that the proposed use satisfied the second requirement, that the use meets all required conditions and specifications. They concluded that the proposed use did not meet the third requirement, that the use will not substantially injure the value of adjoining property, or the fourth requirement, that the location and character of the proposed use would be in harmony with the area. Since three conditions precedent to the issuance of the special use permit were not satisfied the application was denied. The Superior Court affirmed the city council's action on the basis of their findings of fact and conclusions made at the 28 April 1981 meeting.

Stephen E. Culbreth, for petitioner appellants.

City Attorney R. Michael Jones and Assistant City Attorney Laura E. Crumpler, for respondent appellees.

VAUGHN, Chief Judge.

[1, 2] Petitioners' only exception is to the entry of judgment. The court made no findings of fact. It is, however, our duty to review the sufficiency of the evidence presented to the council. The appropriate standard of review before this Court is in the nature of the standard of review required by the North Carolina Administrative Procedure Act. *Coastal Ready-Mix Concrete Co. v. Board of Commissioners of the Town of Nags Head,* 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied,* 300 N.C. 562, 270 S.E. 2d 106 (1980). According to *Concrete Co.,* although the North Carolina Administrative Procedure Act provides judicial review only for agency decisions, G.S. 150A-50, and exempting cities and other local municipalities, G.S. 150A-2(1), a similar standard of review is appropriate to review city council special zoning request decisions. The Supreme Court set out the following guidelines for review:

(1) Reviewing the record for errors in law,

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

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

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

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

299 N.C. at 626, 265 S.E. 2d at 383. In this case, there is no question that the above guidelines numbers one, two, three, and five were met. The only issue before us is whether the decision of the city council was supported by "competent, material and substantial evidence in the whole record." This whole record test does not allow us to replace the city council's judgment as between two reasonably conflicting views, but we must take into account both the evidence which justifies the city council's result and the contradictory evidence in determining whether the city council's decision was supported by competent, material and substantial evidence. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

[3] Petitioners contend that they have introduced competent, material, and substantial evidence supporting all the conditions required for a special use permit. Since all four conditions must be met, to affirm the trial court's decision we need only find that the city council's conclusion that one condition was not met was supported by competent, material, and substantial evidence. The first condition was "That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved." Petitioners contend they offered evidence that the shop averaged only four to seven customers per day which refutes the council's finding that there would be increased traffic. Petitioner, however, did not have a sign in front of her shop and was operating her shop illegally without the special use permit. It is more likely that if she was granted the special use permit she would put up a sign, advertise, and thus acquire more customers. The traffic problem, however, may not be as serious as the potential fire hazard caused by her use of inflammable solvents used in refinishing the antiques. In her brief, petitioner denied that she would be

refinishing furniture. The record, however, reveals that petitioner admitted she was refinishing furniture with inflammable solvents:

> Attorney Culbreth asked Mrs. Jennewein if she refinished furniture and she stated she has done some but does not do it now. Antiques need a lot of washing and scrubbing and steel wooling and things of that sort. She does not use many flammable solvents, no more that most kitchen things would be.

Although petitioner denied refinishing furniture, the last two sentences indicate that she does refinish furniture on the premises. There was uncontradicted evidence that the surrounding houses were old, very close together, and of wood frame construction. Petitioner had only one fire extinguisher and no fire alarms. There was other evidence tending to show that the proposed use would endanger the public health and safety. The finding that the use of the property as an antique shop would materially endanger the public health and safety was, therefore, supported by competent, material, and substantial evidence as required by *Concrete Co., supra.*

We do not hesitate to say that the record also supports the council's negative findings on conditions (3) and (4). It is, however, not necessary to discuss the evidence as to those conditions since all four must be met before the council may grant the special use permit.

Affirmed.

Judges WELLS and BRASWELL concur.

NORTH CAROLINA EX REL. CHARLES E. HORNE, INDIVIDUALLY, AND UPON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FOR THE BENEFIT OF THE CITY OF CHARLOTTE AND THE COUNTY OF MECKLENBURG, NORTH CAROLINA v. BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., INDIVIDUALLY, AND AS MEMBERS OF THE CHARLOTTE CITY COUNCIL, KENNETH R. HARRIS, INDIVIDUALLY, AND AS MAYOR OF THE CITY OF CHARLOTTE, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MECKLENBURG, THE CHARLOTTE CHAMBER OF COMMERCE, A CORPORATION

No. 8226SC463

(Filed 3 May 1983)

1. **Taxation § 7.2— municipal reception for legislators—public purpose**

   Several municipal and county boards and entities did not violate Article V, §§ 2(1) and 2(5) of the North Carolina Constitution by using public funds to pay for a reception honoring the North Carolina General Assembly and the State Senate President Pro Tem.

2. **Constitutional Law § 18; Taxation § 7— legislative reception to promote legislation—no denial of First Amendment rights**

   Plaintiff's First Amendment right against being compelled to speak was not violated by municipal and county organizations having a legislative reception to promote legislation.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 5 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1983.

Plaintiff brought this action against the City Council of Charlotte, the Mayor of Charlotte, the Board of County Commissioners of Mecklenburg County, the Charlotte Chamber of Commerce, and the individual members thereof, alleging they illegally used a total of $7,809.44 of public funds to pay for a reception honoring the North Carolina General Assembly and State Senate President Pro Tem W. Craig Lawing. The uncontradicted facts are as follows. The reception was held on 24 April 1979. The following people, and their spouses, were invited: all the members of the General Assembly, the Council of State, Senate officials, County officials, Judges of the North Carolina Court of Appeals, Justices of the North Carolina Supreme Court, Senate and House Sergeants-at-Arms' staff, legislative staff members, the Lieu-

tenant Governor's staff, the Speaker's office staff, the House and Senate Principal Clerks' office staff, the General Assembly Librarian, and several special invitations for Lawing's friends and relatives. The cost of the reception was split evenly by the City, the County, and the Chamber of Commerce.

The total cost, $7,809.44, included rental of a hall in the Raleigh Civic Center, food and refreshments, entertainment, a chartered bus, miscellaneous expenses, and travel expenses.

According to defendants, the purpose of the reception was to promote legislative goals of the City of Charlotte and Mecklenburg County. These goals included increasing state aid for Medicaid sponsorship, state funding for the Mecklenburg Mental Health Inpatient program, increasing the daily wage for substitute teachers, increasing the interest rate on delinquent taxes, and increasing the state funding for foster care. Almost all the goals involved increasing state participation in existing social programs.

The City Council and Chamber of Commerce defendants filed Rule 12(b) (6) motions to dismiss for failure to state a claim for relief. Plaintiff and the County Commissioner defendants filed motions for summary judgment. The trial judge, considering all the materials filed in discovery and the arguments by counsel for all the parties, treated the Rule 12(b) (6) motions as motions for summary judgment and granted all the defendants' motions for summary judgment.

Hugh Joseph Beard, Jr., for plaintiff appellant.

City Attorney Henry W. Underhill, Jr., for defendant appellee, Charlotte City Council.

Frank B. Aycock III, for defendant appellees, City Council members, Chafin, Short, Locke, Carroll, Danelly, Leeper, Frech, Trosch, Selden, Cox and Harris.

Ruff, Bond, Cobb, Wade and McNair, by James O. Cobb, for defendant appellees, County Commissioners Hair, Peacock, Ray and Thomas.

Helms, Mulliss and Johnston, by Robert B. Cordle, for defendant appellee, Charlotte Chamber of Commerce.

VAUGHN, Chief Judge.

The sole question is whether the trial court erred in granting defendants' motions for summary judgment. Summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). Since the facts are not at issue, the only question is whether defendants are entitled to a judgment as a matter of law.

[1] Plaintiff argues that the expenditure of public funds for the reception violates Article V, Sections 2(1) and 2(5) of the North Carolina Constitution. Section 2(1) provides: "Power of taxation. The power of taxation shall be excercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." Although this section refers only to the power of taxation, the power to appropriate money from the treasury is no greater than the power to levy the tax. *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968). Plaintiff contends that the expenditure for the reception was not for a public purpose and thus violated Article V, Section 2(1) of the North Carolina Constitution. "[F]or a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity." *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 43, 175 S.E. 2d 665, 673 (1970). The purpose of the reception was to influence the General Assembly to pass legislation which, as seen by defendants, was favorable to Charlotte and Mecklenburg County residents. We have found no North Carolina cases on this issue, however, a recent Georgia Supreme Court opinion addresses this point. In the Georgia case, *Peacock v. Georgia Municipal Association, Inc.*, 247 Ga. 740, 279 S.E. 2d 434 (1981), the plaintiffs alleged that defendant, whose members were 400 towns and cities in Georgia, was illegally using public funds in various lobbying activities to influence the state legislators. The Supreme Court of Georgia held that the activities carried out by defendant were necessary activities for the administration of local governments, and representing the views of the constituents to the legislators

on pending issues was one of the functions of officers of municipalities and counties. We agree with the Georgia Supreme Court. Local government officials have a duty to represent their constituents, and presenting local interests to the state legislators in hope of getting favorable bills passed in the General Assembly is obviously a public and not a private purpose. The alleged extravagance of the reception does not convert the public purpose to a private one. Plaintiff's remedy is to air his opinion at the ballot box.

Plaintiff argues that defendants' expenditures also violated *Article V, Section 2(5) of the North Carolina Constitution.* That section provides:

> Purposes of property tax. The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

Plaintiff contends this was violated because the expenditure was not a "purpose authorized by general law." Defendants contend, and we agree, that lobbying is authorized by general law, by implication, in G.S. 120-47.8(3), which exempts from the registration requirements imposed on lobbyists. "A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties." Since lobbying by city and county officials is permitted, Article V, Section 2(5) was not violated. Urging policies which benefit their constituents is one of the ways local officials promote their constituents' interests.

[2] Plaintiff's third argument is that defendants' expenditures violated his First Amendment rights through the Fourteenth Amendment of the Federal Constitution. He argues that the First Amendment protects a person's right against being compelled to speak, and these expenditures were made to promote ideological positions contrary to his viewpoint. Without addressing the question of whether plaintiff, as a taxpayer, has standing to raise this issue, it is clear that his argument is without merit because de-

fendants were not lobbying to promote an ideological position. They were promoting legislation, mainly consisting of requests for increased state funding for existing programs, to benefit their constituents who presumably are the majority of the voters in Charlotte and Mecklenburg County. Obviously, this is not in violation of plaintiff's First Amendment rights.

Since we agree with the trial court that there is no issue of fact, and defendants are entitled to judgment as a matter of law, there is no need to address the issue of defendants' immunity.

Affirmed.

Judges WEBB and EAGLES concur.

COITE P. BRADY, D/B/A BRADY BUILDING COMPANY v. EDWIN M. FULGHUM, JR. AND WIFE, PATRICIA M. FULGHUM

No. 8222SC434

(Filed 3 May 1983)

Contracts § 6.1— construction contract—unlicensed contractor—no substantial compliance with licensing statute

Plaintiff contractor did not substantially comply with the requirements of the general contractor's licensing statute, G.S. 87-1, and was barred from recovering either on the basic contract or for "extras" in construction requested by defendants where plaintiff was not licensed at the time he entered a contract to construct a residence for defendants for $106,850 or when he began construction on 13 March 1980, and the residence was two-thirds completed at the time he acquired his license on 22 October 1980.

Chief Judge VAUGHN dissenting.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 25 February 1982 in Superior Court, IREDELL County. Heard in the Court of Appeals 9 March 1983.

Plaintiff contractor instituted this action for monies due him under a contract for the construction of a residence for defendants. In their answer defendants alleged, among other things, that plaintiff was prohibited from recovering further on the contract since he was not a licensed contractor within the meaning of G.S.

87-1, *et seq.* From entry of summary judgment dismissing his complaint with prejudice, plaintiff appeals.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for plaintiff-appellant.

Aimee A. Toth, for defendant-appellees.

EAGLES, Judge.

Plaintiff's sole assignment of error on appeal is that the trial judge erred in entering summary judgment for the defendants. Summary judgment is properly entered in cases "where a claim or defense is utterly baseless in fact," and those "where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971).

The following facts, taken in the light most favorable to the plaintiff, are not disputed by the parties: During February 1980 the plaintiff and defendants entered into negotiations which culminated in a written contract for the construction of a residence for defendants at a total contract price of approximately $106,850.00. On or about 13 March 1980 plaintiff began construction of the residence. Plaintiff was not a licensed builder, as required by G.S. 87-1, *et seq.*, at the time of the negotiations or at the time construction was commenced on the residence. Plaintiff was awarded his builder's license on 22 October 1980. Plaintiff acknowledges that defendants' house was approximately two-thirds (2/3) completed at the time plaintiff obtained his license. Defendants have paid to the plaintiff the sum of $104,000. Plaintiff contends that an additional sum of $2,850 is due under the original contract and the sum of $28,926.41 is due for additional changes in construction requested by defendants.

Since there is no controversy as to the material facts in this action, the question before us is whether the trial judge properly granted summary judgment for defendants as a matter of law based upon plaintiff's non-compliance with G.S. 87-1, *et seq.* Plaintiff presents two arguments on appeal. First, he contends that the trial judge erred in granting the defendants' motion for summary judgment because plaintiff did in fact acquire his contractor's license before completion of construction. Second, he argues that

even if he is barred from recovering on the basic contract by virtue of his non-compliance with G.S. 87-1, *et seq.*, he is still entitled to recover the sum of $28,926.41 which represents the cost of "extras" in construction requested by defendants. We find no merit in either of plaintiff's arguments.

Plaintiff concedes that at the time he entered into negotiations with defendants and began construction on their residence he was not a licensed contractor. The statutory language of G.S. 87-1, in effect at that time, defined a general contractor as:

> [O]ne who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing thirty thousand dollars ($30,000) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

A general contractor *must* be licensed pursuant to G.S. 87-10 which provided, in pertinent part, at the time of this action as follows:

> Anyone hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board . . . a written application . . . the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of one hundred twenty-five thousand dollars ($125,000) . . . .

Our courts' decisions consistently follow the rule that one who violates the licensing requirements for general contractors may not recover on the contract nor may he recover under theories of *quantum meruit* or unjust enrichment. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Sand and Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E. 2d 580 (1980); *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977). This policy, although a stringent one, has been considered imperative in light of the statutory purpose of G.S. 87-1 to "protect the public from incompetent builders" by "deterring unlicensed per-

sons from engaging in the construction business." *Builders Supply v. Midyette,* 274 N.C. 264, 270-73, 162 S.E. 2d 507, 511-13 (1968).

While plaintiff admits that he had no contractor's license upon entering the contract with defendants, he argues that he substantially complied with the statutory licensing requirements when he obtained his license during the course of the construction and therefore avoided any statutory sanctions, citing *Holland v. Walden,* 11 N.C. App. 281, 181 S.E. 2d 197, *cert. denied,* 279 N.C. 349, 182 S.E. 2d 581 (1971). We find defendants' reliance upon *Holland* to be misplaced. In that case the court found the contractor had substantially complied with the licensing requirements when she obtained her license to engage in general contracting only two months after she commenced construction of a twenty-one month work project. There the contractor had held a valid license for eighteen and one-half months out of a total of approximately twenty-one months of on-site work. The court found that under these circumstances, there was no contravention of the purposes of Article 1 of Chapter 87, *i.e.*, protecting the public from incompetent builders. In the case *sub judice* by the time the plaintiff acquired his contractor's license, the defendants' residence was substantially completed. As opposed to the situation in *Holland* where the contractor was licensed for 88 percent of the construction and during the major work on the building, plaintiff here was not licensed during at least 66 percent of the construction, which comprised the major portion of work. We find that under the facts of this case plaintiff has not substantially complied with the licensing requirements of G.S. 87-1, *et seq.*

We find no merit in plaintiff's argument that he should be paid for the "extras" requested by defendants as separate contracts. As categorized by plaintiff in his own complaint, these "extras" represented merely "additions to or changes in the contract not contemplated by its original terms." If plaintiff is barred from recovering on the basic contract because of his non-compliance with the licensing statute, then he is also prohibited from recovering any payment for the additional expenditures. *See, Sand and Stone, Inc. v. King,* 49 N.C. App. 168, 270 S.E. 2d 580 (1980).

For the reasons stated above, we affirm the entry of summary judgment for the defendants.

Affirmed.

Judge WEBB concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

I would hold, as we did in *Barrett, Robert & Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E. 2d 10, *review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982), that the protective policy of the statute was realized by plaintiff's substantial compliance with the licensing provision.

IN THE MATTER OF DANA RENEE JONES

No. 8221DC476

(Filed 3 May 1983)

1. Infants § 6.7— award of visitation rights to grandparents—proper

Petitioner failed to carry her burden of showing that circumstances had changed since an order was made which set visitation rights of the maternal grandparents, and the trial court properly upheld the grandparents' visitation rights. G.S. 50-13.5(j).

2. Infants § 6.2— court's jurisdiction in custody case continuous

A finding or conclusion that the trial court retained jurisdiction in a child custody case was unnecessary since that fact is inherent in an order denying a change in visitation rights.

APPEAL by petitioner from *Alexander, Judge*. Judgment entered 19 April 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 15 March 1983.

This appeal results from the dismissal of the petitioner's motion to have actual and legal custody of her daughter returned to her, to quash prior orders giving the child's grandparents certain visitation rights, and to have the child declared not to be a dependent juvenile.

Denise J. Williams, the petitioner here, is the mother of Dana Renee Jones, who was born on 12 February 1973. With Williams' consent, Jones was placed in the legal custody of her maternal grandparents, Mr. and Mrs. Matthew Vance Cummings, on 15 Jan-

uary 1975. Jones had been declared a dependent child in a 9 December 1974 order.

On 1 October 1976, an order was entered granting Williams certain visitation privileges even though custody would remain with the grandparents. The Cummings voluntarily returned Jones to the actual custody of Williams in February, 1978. The child has resided with her mother since that time.

The petitioner married her present husband in April, 1981. On 24 July 1981, an order was entered awarding actual custody of the child to the petitioner, with legal custody to be effective on 16 December 1981. That order also gave the grandparents "liberal rights of visitation." An order dated 1 October 1981 defined the times for visitation by the grandparents.

A hearing was held on 16 December 1982 on the motion by the petitioner that is the subject of this case. An order was entered on 19 April 1982 that upheld the visitation rights of the grandparents. From that order, the petitioner appealed.

Davis & Harwell, by Fred R. Harwell, Jr., for the petitioner-appellant.

White & Crumpler, by David R. Crawford, for the respondent-appellees.

ARNOLD, Judge.

[1] The primary issue on this appeal is the visitation rights of the maternal grandparents. Its resolution depends on an application of the provisions of G.S. 50, not G.S. 7A as the petitioner contends. The provisions of G.S. 7A that are cited by the petitioner are part of subchapter XI, which is the North Carolina Juvenile Code. Those statutes do not govern the facts before us.

G.S. 50-13.5(j), which was added by 1981 N.C. Sess. Laws C. 735 s. 3, states:

> In any action in which the custody of a minor child has been determined, upon a motion in the cause and a show of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate.

G.S. 50-13.7(a) provides: "[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." The Supreme Court in *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E. 2d 129, 142 (1978), held that the word "custody" as used in G.S. 50-13.7 "was intended to encompass visitation rights as well as general custody."

Thus, before an order providing visitation for grandparents of a minor child may be modified, the party seeking modification must show changed circumstances and an abuse of discretion by the trial judge. The petitioner here has not shown either one.

The guiding principle in a custody dispute and therefore, in a visitation order, is the child's best interest. 3 R. Lee, N.C. Family Law § 224 (4th ed. 1981) and cases cited therein. This is in accord with recent cases nationwide. Annot., 90 A.L.R. 3d 222, 225-26 (1979).

"[I]t is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare." *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E. 2d 324, 327 (1967). To support an award of visitation rights, the trial court judgment "should contain findings of fact which sustain the conclusions of law that a party is a fit person to visit the child and that such visitation rights are in the best interest of the child." *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E. 2d 26, 29 (1977).

Applying these principles and the statutes cited to these facts, we can find no error in what the trial judge did. The petitioner did not carry her burden of showing that circumstances have changed since the 1 October 1981 order, which set the visitation rights of the grandparents.

The child continues to live with her mother and her present husband. The mother has legal and actual custody of the child. The petitioner has not shown that the grandparents have become unfit to care for the child during the time that they will have her.

Although there is a communication problem between the petitioner and her parents, who are the child's grandparents, there has not been a sufficient showing that this constitutes changed circumstances or is detrimental to the child. Before a

custody and thus, a visitation, order will be modified, there must be "a substantial change of condition affecting the child's welfare. . . ." *Tucker v. Tucker,* 288 N.C. 81, 87, 216 S.E. 2d 1, 5 (1975); *Blackley v. Blackley,* 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974). A sufficient showing has not been made here by the petitioner.

[2] The petitioner's other argument attacks the failure of the trial judge to rule on the child's juvenile dependent status and termination of the court's jurisdiction.

Under G.S. 1A-1, Rule 52(a)(1), the trial judge is required to "find the facts specially and state separately . . . [his] conclusions of law thereon and direct the entry of the appropriate judgment." *See Coggins v. City of Asheville,* 278 N.C. 428, 434, 180 S.E. 2d 149, 153 (1971). The purpose of this requirement "is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble,* 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980).

Our examination of the order here reveals that the trial judge acted properly under the rule. First, it was unnecessary to rule on the child's status as a dependent juvenile under G.S. 7A-517(13) because the petitioner has custody and the child has resided with her since 1978.

Second, the jurisdiction of courts in custody and thus, visitation, cases is continuous. A decree "determines only the present rights with respect to such custody and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the child." 3 R. Lee, *supra,* at § 226 and cases cited therein. A finding or conclusion that the court retained jurisdiction was unnecessary since that fact is inherent in an order like the one before us.

Because we find that the trial judge properly granted the respondents' motion to dismiss, we affirm his order.

Affirmed.

Judges BECTON and PHILLIPS concur.

LLOYD O. HUGHES AND WIFE, MARY C. HUGHES v. CITY OF HIGH POINT

No. 8218SC42

(Filed 3 May 1983)

1. **Municipal Corporations § 21; Nuisance § 7— city's operation of sewer system as nuisance**

Plaintiffs' evidence on motion for summary judgment was sufficient to support a finding that defendant city's operation of its sewer system in its existing condition after notifying plaintiffs that it would no longer attempt to correct a sewage overflow problem constituted a nuisance entitling plaintiffs to compensation for permanent damages to their property where it tended to show that the sewer line maintained by defendant to which plaintiffs' sewage disposal system connected was at least 50 years of age; in 1971 defendant's sewer system began to malfunction, causing an intermittent overflow of raw sewage into plaintiffs' basement during periods of rainfall; defendant attempted to correct the problem until 2 November 1979, at which time it notified plaintiffs it would not take any other steps to rectify the condition; and the overflow was caused by the deterioration of defendant's sewer lines.

2. **Evidence § 48— qualification of experts—opinion based on facts in report in evidence**

A licensed professional engineer and a mechanical engineer engaged in the plumbing and heating business could properly testify as experts as to the cause of sewer line failures and could properly state opinions based on facts contained in a report which was in evidence.

APPEAL by plaintiffs from *Wood, Judge.* Judgment entered 9 December 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 November 1982.

This is an action in which the plaintiffs contend that they have suffered permanent damage to their home as the result of the maintenance of a sanitary sewer system by the defendant City. The plaintiffs contend that the operation of the sewer system by the defendant constitutes a nuisance and they are entitled to compensation for permanent damage to their property.

The defendant moved for summary judgment. The papers filed in support and in opposition to the motion for summary judgment showed that the defendant is a municipal corporation which maintains a sanitary sewer system for those owning property within the city limits. In 1957 the plaintiffs purchased a house and lot within the city limits which was served by the sanitary sewer system maintained by the City. The sewer line maintained by the

defendant to which the plaintiffs' sewage disposal system connects is at least 50 years of age. The plaintiffs began experiencing trouble with their sewage disposal in 1971. The plaintiffs have plumbing facilities in the basement of their home and these facilities began to overflow with raw sewage during periods of rainfall.

The defendant made several efforts through the years to correct the plaintiffs' problems. In 1979 the City tested the sewer lines serving the plaintiffs' house and concluded on 2 November 1979 that the problem was caused by: (1) the plaintiffs' plumbing facilities in their basement being lower than could properly be served by the City's gravity-flow sewage system; (2) the plaintiffs' failure to install a check valve in their service main; and (3) the plaintiffs' maintenance of drains and downspouts which run into the City's sewer lines. The defendant notified the plaintiffs at that time that they would take no more action to solve the problem.

The plaintiffs filed an affidavit by William Daniel, a licensed professional engineer. Mr. Daniel stated in this affidavit that in his opinion, the sewage overflow in the plaintiffs' basement was caused by the deterioration of the defendant's sewage line. This deterioration had reduced the capacity of the sewage line to carry what it was designed to carry and allowed storm water into the line which caused further back-up of sewage. Mr. Daniel stated that in his opinion the only way the problem could be solved was by replacing the defendant's sewage line. The plaintiffs filed an affidavit by Gerald R. Buchanan, who has a B.S. degree in mechanical engineering from North Carolina State University and is engaged in the plumbing and heating business in High Point. He stated in his opinion "that the overflow of sewage into the HUGHES' residence during periods of heavy rain is caused by infiltration of storm water into the CITY'S sanitary sewer outfall during periods of heavy rainfall through cracks and eroded joints that have developed over the years from normal wear and tear, action of the elements and intrusion of tree roots . . . ." The court granted the defendant's motion for summary judgment. The plaintiffs appealed.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth, for plaintiff appellants.

Wyatt, Early, Harris, Wheeler and Hauser, by William E. Wheeler, for defendant appellee.

WEBB, Judge.

[1] If a governmental entity builds and maintains a structure which is permanent in nature and the maintenance of the structure causes a diminution in value to a person's real estate, the structure is considered a nuisance and the landowner is entitled to compensation. *See Midgett v. Highway Commission,* 265 N.C. 373, 144 S.E. 2d 121 (1965); *Glace v. Pilot Mountain,* 265 N.C. 181, 143 S.E. 2d 78 (1965); *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599 (1963); and *Clinard v. Kernersville,* 215 N.C. 745, 3 S.E. 2d 267 (1939). In this case the evidence when considered most favorably for the plaintiffs is that the defendant's sewage system as originally constructed did not cause any damage to the plaintiff's property. In 1971 the defendant's sewage system began to malfunction, causing an intermittent overflow of raw sewage in the plaintiffs' basement. The defendant attempted to remedy the condition until 2 November 1979, at which time it notified the plaintiffs it would not take any other steps to rectify the condition.

As we understand the law, it is the maintenance of a structure or condition permanent in nature which constitutes a nuisance. The defendant would not be liable for a nuisance if it had negligently maintained or performed some work on a structure which caused some temporary inconvenience to the plaintiffs. We do not believe the defendant was maintaining a nuisance so long as it was attempting to repair or change the sewage system so that it would not overflow on the plaintiffs' property. When the defendant notified the plaintiffs that it would no longer attempt to correct the problem but would maintain the system in its then existing condition, we believe defendant started to maintain a nuisance.

[2] Defendant argues that there is not sufficient evidence that the deterioration of its sewage lines caused the overflow for the jury to find this fact. It contends that the affidavits of Mr. Buchanan, the plumber, and Mr. Daniel, the engineer, should not

be considered because their opinions as to the cause of the overflow were based in part on the information given to them by the plaintiffs and were thus based on "hearsay, speculation and conjecture." Mr. Buchanan and Mr. Daniel, because of their education and experience, are better qualified than would be a jury to form opinions as to the causes of failures in sewer lines. They qualify as expert witnesses. *See* 1 Brandis on N.C. Evidence Sec. 133 (1982). The report by the defendant as to its experiments to determine the cause of the problem was in evidence. The expert witnesses may give their opinions as to causation based on the facts obtained in the report. The two cases cited by the defendant, *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E. 2d 71 (1966) and *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1965), do not apply. In each of them, an expert witness gave an opinion based on a hypothetical question which assumed facts not in evidence. Our Supreme Court held this was error. In this case, the facts on which the expert witnesses based their opinions were in evidence.

The defendant also argues that the expert witnesses could not testify that the overflow was caused by breaks in the sewer line because there was no evidence of broken or damaged lines. The witnesses' opinions based on the facts before them were that there were breaks in the line which caused the overflow. The formation of this opinion was within the parameters of the witnesses' expertise.

The defendant contends further that the overflow could be as well caused by breaks in the plaintiffs' line or the lines of a neighbor. These are questions for the jury. The defendant argues further that the plaintiffs' plumbing facilities which overflow are located below the street level; and the North Carolina State Building Code requires a backwater valve for such facilities, which the plaintiffs have not installed. We reiterate that we are passing on a motion for summary judgment. We believe the plaintiffs have presented sufficient evidence of the cause of the overflow to make it a question for the jury. If the jury believes that the overflow was caused by the basement facilities being too low, they may decide the case for the defendant. We cannot make this decision.

The defendant also contends the plaintiffs have not shown they have suffered damage. There is evidence that raw sewage

was overflowing intermittently in the plaintiffs' basement. Mr. Hughes testified that the house was not marketable. We believe he was competent to give this testimony. *See* 1 Brandis on N.C. Evidence Sec. 128 (1982). This establishes damage to the plaintiffs.

The defendant contends that the claim arose in 1971 and it was not filed within the required time. In light of our holding that the plaintiffs did not have a claim based on a nuisance until 2 November 1979, we reject this argument.

We hold that there should be a trial as to whether the defendant is maintaining a nuisance and whether the plaintiffs have been damaged thereby.

Reversed and remanded.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. LENWOOD RIGGS

No. 823SC1103

(Filed 3 May 1983)

1. Arson § 4.1— first degree arson—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for first degree arson where it tended to show that defendant was in the dwelling house which was burned approximately one hour before the fires were discovered; an occupant of the house asked him to leave to prevent an altercation concerning a woman; shortly thereafter, defendant returned to ask the occupant about the woman; when she told defendant the woman had gone, defendant replied, "I know she's in that house, bitch," and left; some 30 minutes later, the occupants of the house discovered a fire at the front door; an occupant saw defendant running from the back porch and then realized that a second fire had been started in the wood stacked on the back porch earlier that evening, defendant had purchased gasoline in a plastic container from a nearby store; the fires were determined by a State's expert to have been incendiary in origin; and soil samples taken from the immediate area had the odor of gasoline.

2. Criminal Law § 66.17— pretrial show-up—independent origin of in-court identification

The evidence supported the trial court's finding that an arson victim's in-court identification of defendant was of independent origin and not tainted by

a pretrial show-up identification where the victim testified prior to voir dire that she had known defendant before the night of the fire, that he had previously been to her home, and that he was at her home and in her presence on the night in question, and where the victim testified on voir dire that she recognized defendant as he ran from her house after she became aware of the fire, that she was standing about seven feet from him at the time, that illumination was provided by a 75-watt light bulb in the kitchen and the glare from the fire itself, and that less than one hour after the incident she made a positive identification of defendant as the man she saw running from her house.

3. Criminal Law § 96— withdrawal of evidence—failure to give requested instruction—instruction at close of all evidence

Defendant was not prejudiced by failure of the trial court to instruct the jury at the time of defendant's request that it should disregard certain soil samples which were shown to the jury but not offered into evidence because a proper foundation was lacking where the court gave the proper instruction after the close of all the evidence, and where the presence of gasoline in the soil was established by other competent evidence.

APPEAL by defendant from *Peel, Judge.* Judgment entered 11 June 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 13 April 1983.

Defendant was charged in a proper bill of indictment with first degree arson in violation of G.S. 14-58. The jury returned a verdict of guilty. From judgment imposing a prison term of fifteen years, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Assistant Public Defender William F. Ward, III, for defendant-appellant.

HILL, Judge.

Defendant initially argues that the trial judge erred in denying his motion to dismiss at the close of all the evidence. He contends that the State presented insufficient circumstantial evidence to take the case to the jury, particularly when considered with defendant's uncontradictory evidence submitted to explain the State's case. We disagree.

When ruling on defendant's motion for nonsuit, the trial judge must consider all the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn

therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). The rule for determining if the evidence is sufficient to warrant submission of the case to the jury is the same whether the evidence is circumstantial, direct, or both. *State v. Wright*, 302 N.C. 122, 273 S.E. 2d 699 (1981). Evidence is sufficient to uphold a guilty verdict if substantial evidence, defined as "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion," was presented on every element of the offense charged. *Id.* at 126, 273 S.E. 2d at 703. When ruling on a motion for nonsuit, the court may consider evidence that tends to rebut any inference of guilt but does not conflict with the State's evidence. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971). If there is more than a scintilla of evidence to support the indictment, however, the case must be submitted to the jury. *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955).

[1] In this case, defendant was charged with first degree arson; *i.e.*, the willful and malicious burning of a dwelling house inhabited by Emma Hussey and occupied by her at the time of the burning. Considered in the light most favorable to the State, the evidence shows that defendant was in the Hussey house approximately one hour before the fires were discovered. Ms. Hussey asked him to leave the house to prevent an altercation concerning a woman. Shortly thereafter, he returned to ask Ms. Hussey about the woman. When she told him the woman had gone, defendant replied, "I know she's in that house, bitch" and left. Some thirty minutes later, the occupants of the house discovered a fire at the front door. When Ms. Hussey went to call the fire department, she heard a "bloosh-like" sound through her kitchen window. She saw defendant running from the back porch. She then realized that a second fire had been started in the wood stacked on her back porch. Earlier that evening, defendant had purchased gasoline in a plastic container from a nearby store. The fires at the Hussey house were determined by a State's expert to have been incendiary in origin; soil samples taken from the immediate area had the odor of gasoline.

We find the above evidence was more than sufficient to support the indictment and consequently to submit the case to the jury. Defendant's argument that he bought the gasoline because he just discovered his car had run out of gas is insufficient to rebut the inference of guilt raised by the State's evidence, par-

ticularly eyewitness testimony that defendant ran from the house moments after the fire started.

[2] Defendant assigns error to the trial court's denial of his motion to suppress Emma Hussey's in-court identification of him. The court suppressed evidence of Ms. Hussey's show-up identification of defendant. Nevertheless, after an extensive *voir dire*, the court allowed Ms. Hussey's in-court identification, finding it was based on her observation of the defendant at the time of the offense and not on the subsequent show-up.

Even if a pre-trial identification procedure is found to be impermissibly suggestive, a trial judge may allow identification testimony where the totality of the circumstances reveals the identification itself to be inherently reliable. Determination of the reliability of the identification involves consideration of:

> ". . . [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

State v. Yancey, 291 N.C. 656, 661, 231 S.E. 2d 637, 641 (1977), *quoting Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972).

Here, the witness testified prior to *voir dire* that she had known defendant before the night of the fire, that he had previously been to her home, and that he was at her home and in her presence on the night in question. On *voir dire* she said that defendant had worn dark clothes and a red cap that evening. She said that when she became aware of the fire she recognized defendant as he ran from her house. She was standing about seven feet from him at the time. Illumination was provided by a bare 75-watt light bulb in the kitchen and the glare from the fire itself. Less than one hour after the incident, Ms. Hussey made a positive identification of the defendant as the man she saw running from her house. We find that the above evidence amply supports the trial judge's finding that Ms. Hussey's in-court identification was reliable and independent of the pre-trial show-up identification. The defendant's motion to suppress was properly denied.

Defendant also contends the trial judge committed prejudicial error in failing to make specific findings of fact to support his denial of defendant's motion to suppress the in-court identifications by Ms. Hussey and by Ronnie Hollowell who sold defendant gasoline on the night of the fires. Defendant does not contend that conflicting evidence was heard in the *voir dire*. We have previously determined that the in-court identification by Ms. Hussey was independent of the show-up identification. No argument is made by defendant that Mr. Hollowell's identification of him was tainted. Under these circumstances, we hold the trial judge's failure to make findings of fact to be harmless error. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

[3] By his next assignment of error, defendant contends he was prejudiced when at the close of the State's evidence the trial judge failed to instruct the jury to disregard certain State's exhibits that were shown to the jury, but not offered into evidence because a proper foundation was lacking. Defendant acknowledges the court gave the proper instruction after the close of all the evidence, As a general rule, the withdrawal of incompetent evidence by appropriate instructions from the court will cure any error in its admission. *State v. Covington, supra.* Here, the evidence, consisting of canisters of soil samples taken from the burned area, was removed promptly from the jury's view upon defendant's request. The evidence never was admitted for the obvious reason that the State's witness did not recognize the soil samples. the presence of gasoline in the soil was established by other competent evidence. Thus, we find the defendant suffered no prejudicial error from the court's failure to give the limiting instruction when he requested it. This assignment of error is overruled.

Defendant finally assigns error to two evidentiary rulings. In the first instance, we find no prejudicial error in the court's allowance of testimony contended by the defendant to be hearsay, since evidence of the same import was later elicited by defense counsel during cross-examination. *State v. Henley*, 296 N.C. 547, 251 S.E. 2d 463 (1979). We hold the court's second ruling to be a proper exclusion of hearsay testimony.

We find that the defendant received a fair trial free of prejudicial error.

No error.

Judges JOHNSON and PHILLIPS concur.

JOAN BARLOW HUGHES, ADMINISTRATRIX OF THE ESTATE OF ALLEN RUFUS BARLOW v. SHEILA GOFORTH GRAGG AND ALFRED LEE GRAGG

No. 8225SC623

(Filed 3 May 1983)

1. **Automobiles and Other Vehicles § 62.3— striking of pedestrian—insufficient evidence of negligence**

The evidence in a wrongful death action showed that defendant driver was confronted with a sudden emergency and was insufficient to establish actionable negligence by defendant where it tended to show that defendant was driving late at night when she saw decedent and another man walking, one on each side of the road; when decedent began to wander into her lane of travel, defendant drove over into the middle of the road; and decedent suddenly walked or jumped into the path of defendant's car and was struck by the front of the car.

2. **Automobiles and Other Vehicles § 83.2— contributory negligence by pedestrian**

The evidence in a wrongful death action established decedent's contributory negligence as a matter of law where it showed that while decedent was walking on the highway late at night in a state of extreme intoxication, he walked or jumped directly into the path of defendant's moving vehicle.

3. **Automobiles and Other Vehicles § 86— striking of pedestrian—insufficient evidence of last clear chance**

The evidence in a wrongful death action did not require the trial court to submit an issue of last clear chance where it showed that as soon as defendant saw decedent wander into her lane of travel, she swerved toward the center of the road, but that decedent suddenly walked or jumped into the path of defendant's car.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 31 March 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 21 April 1983.

Plaintiff appeals from a directed verdict for defendants in a wrongful death action.

Todd, Vanderbloemen and Respess, by James R. Todd, Jr., for plaintiff appellant.

Roberts, Cogburn, McClure & Williams, by Robert G. McClure, Jr., and Isaac N. Northup, Jr., for defendant appellees.

WHICHARD, Judge.

I.

The complaint alleged that defendant-wife, while driving negligently, struck and killed plaintiff's decedent, who was walking along the side of the road facing the traffic.

Defendants' answer denied negligence on the part of defendant-wife. It pled contributory negligence on the part of plaintiff's decedent, in that he suddenly and without warning stepped in front of defendants' car, creating a sudden emergency in which defendant-wife "acted as any reasonable and prudent person would have done under the same or similar circumstances . . . ."

Plaintiff replied, pleading that if her decedent was contributorily negligent, defendant-wife knew or should have known of his situation in time to avoid injuring and killing him. She further pled that defendant-wife was negligent in failing to use reasonable care to avoid striking and killing decedent; that rather than using such care, she "intentionally speeded up her vehicle," striking decedent in the process; that she had the last clear chance to avoid striking and killing decedent; and that even if decedent was contributorily negligent, plaintiff is still entitled to recover under the doctrine of last clear chance.

II.

Plaintiff's evidence, in pertinent part, showed the following:

Donna Phillips testified that she had gone to the store around 11:00 p.m. on the evening in question. As she returned to her home she observed an automobile emerging from an intersection. After the automobile turned onto another road, she proceeded until she saw a person lying in the road about a quarter of a mile from the intersection where the automobile had emerged.

She had, without difficulty, seen two men walking on the same side of the road as she drove to the store. She found the

body of a man approximately 300 feet from where she had seen the men on the road. To the best of her knowledge it was the body of one of the men she earlier had seen walking.

Clyde Pope testified that the incident occurred "at the edge of [his] land." While he and his wife were watching television, they "heard the bump," which sounded like two cars had run together. He then "heard tires or something going out through there." He went to the road and "saw the body laying down there."

Plaintiff, decedent's mother, testified on direct examination that defendant-wife had told her the following:

As she drove down the road she saw two men walking on it, one on each side. The one on the right did not walk straight. She was frightened seeing men on the road late at night, so she speeded up and pulled toward the center of the road to try to avoid hitting one of them. The next thing she knew decedent was in front of her and threw up his hands and looked like he smiled when she hit him.

Plaintiff asked her why she speeded up. She replied: "When I see men on the road late at night it frightens me."

On cross examination plaintiff testified that defendant-wife had told her "that she saw [two] men in the road, one on one side, one on the other." She had said that "she noticed that the one on the right, or one side at least, started into the road." She did not tell her "that she turned her car toward the center of the road and slowed her car down." Rather "[s]he said she speeded up and got in the center of the road."

The investigating patrolman testified that he asked for a chemical test because he "smelled liquor" on decedent. Defendant-wife told him the following:

She saw two men walking, one on each side of the road. The man on the right shoulder began to wander into her lane of travel. She slowed down and drove over into the middle of the road "when all of a sudden the man that had wandered into the road jumped in front of her car and was waving his hands at her when she struck him with the right front of her car." The other man came toward her car, which frightened her even more, and

she fled the scene to go to the nearest phone to call the "authorities."

A physician, stipulated to be a medical expert specializing in pathology, testified that multiple blunt injuries "from the front" proximately caused decedent's death. In his opinion the injuries were the result of some severe blunt force to decedent's body. Decedent, at the time of his death, had a blood ethanol level of 220 milligrams percent. This indicated that decedent was "very, very drunk," and that his physical and mental faculties were appreciably impaired.

III.

The trial court granted defendants' motion for directed verdict at the close of plaintiff's evidence on the grounds that the evidence failed to show actionable negligence on the part of defendants and showed contributory negligence as a matter of law. We agree, and accordingly affirm.

IV.

[1] The evidence was insufficient to establish actionable negligence on the part of defendants. It indicated only that defendant-wife was confronted with a sudden emergency, and it did not show any choice of action on her part which "was not such choice as a person of ordinary care and prudence would have made under similar circumstances." *Schloss v. Hallman*, 255 N.C. 686, 690, 122 S.E. 2d 513, 516 (1961).

V.

[2] The only evidence as to decedent's conduct indicated that while walking on the highway late at night in a state of extreme intoxication, he walked or jumped directly into the path of a moving vehicle. This evidence "establishes [decedent's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom," thus rendering him contributorily negligent as a matter of law. *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979).

VI.

[3] The court properly declined to submit the issue of last clear chance. The burden was on plaintiff to establish that the doctrine applied. *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E. 2d 591, 596

(1977); *Stephens v. Mann*, 50 N.C. App. 133, 135, 272 S.E. 2d 771, 772 (1980), *disc. rev. denied*, 302 N.C. 221, 276 S.E. 2d 919 (1981).

> It is well established that in order to submit the issue of last clear chance to the jury, the evidence must tend to show the following elements: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.

Wray v. Hughes, 44 N.C. App. 678, 681-82, 262 S.E. 2d 307, 309-10, *disc. rev. denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980). "The doctrine contemplates that if liability is to be imposed the defendant must have a last 'clear' chance, not a last 'possible' chance to avoid injury." *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E. 2d 770, 772 (1971). *Accord*, *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E. 2d 387, 390 (1966); *Artis v. Wolfe*, 31 N.C. App. 227, 229, 228 S.E. 2d 781, 782, *disc. rev. denied*, 291 N.C. 448, 230 S.E. 2d 765 (1976).

The evidence does not permit a reasonable inference that defendant-wife should have seen decedent's perilous condition in time to have avoided injuring him, or that she failed or refused to use every means at her command to avoid the injury. All the evidence is to the effect that as soon as she saw decedent she swerved toward the center of the road, a movement away from decedent, in an attempt to avert the collision. She conceivably had the last "possible" chance to avert the collision, but she clearly did not have the last "clear" chance which the law requires to merit submission of the issue to the jury.

Affirmed.

Judges WEBB and BRASWELL concur.

WILLIAM L. CHURCH, EMPLOYEE, PLAINTIFF v. G. G. PARSONS TRUCKING CO., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC1035

(Filed 3 May 1983)

1. Appeal and Error § 24— denial of motion for rehearing—no exception

Where defendants failed to except to the denial of their motion for a rehearing before the Industrial Commission, the assignments of error presented no question for review.

2. Master and Servant § 55.4— injuries in truck accident arising in course of employment

Where plaintiff truck driver had not completed his trip because of failing brakes on both the tractor and trailer, and where it was reasonably necessary for the plaintiff to interrupt his trip to have repairs made to the brakes on the trailer and tractor, the accidental injuries sustained by the plaintiff while he was traveling from one town to another for the purpose of having repairs made to the brakes on the tractor to enable him to continue the trip to his original destination, arose out of and in the course of his employment.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission dated 27 August 1980. Heard in the Court of Appeals 18 April 1983.

This is a proceeding brought by the plaintiff under the North Carolina Worker's Compensation Act to recover compensation allegedly resulting from an injury by accident on 22 May 1978.

The Industrial Commission made the following pertinent findings of fact:

> 1. Plaintiff is a 54 year old [man] who has been a truck driver for approximately 30 years. On February 2, 1978, plaintiff leased his tractor to the defendant-employer, a common carrier licensed to transport goods by truck in interstate commerce, under an "Agreement, Contract, and Lease," or term lease. Under this agreement plaintiff was required to maintain the vehicle at his own expense in the state of repair required by "the rules and regulations of the Interstate Commerce Commission, Department of Transportation, and all other regulatory authorities." He was also responsible for operating expenses. In consideration of the leased equipment and his services as a driver, the defendant-employer paid plaintiff a percentage of the revenue on flatbeds and reefers.

2. On May 20, 1978, plaintiff was returning from a trip to Ohio where he had unloaded one shipment and loaded a second one of lumber for the defendant-employer to be taken to Thomasville. As he came across the West Virginia Turnpike, the trailer brakes began to fail which eventually increased to such a degree that the tractor brakes were almost destroyed.

3. Plaintiff came to the terminal outside of Wilkesboro in order to have the defendant-employer repair the trailer brakes. Since it was Saturday, he had to call a dispatcher to obtain permission to leave the trailer for repair.

4. Plaintiff then drove two miles to his home where he left the tractor unmoved until Monday morning at 5:30 a.m. when he started his trip to Hickory in order to have the tractor brakes repaired. It was his intention after this repair and the trailer brake repair to pick up the load of lumber in Wilkesboro and continue to Thomasville in order to complete the trip, which could not have been made without the repairs.

5. On May 22, 1978, after having gone about 18 miles from Wilkesboro toward Hickory, plaintiff met a second tractor trailer coming around a curve in his side of the road. A head-on collision was avoided, but the front left portion of the tractor was struck by the rear of the second vehicle. As a result of this collision, plaintiff's neck, shoulder, and leg were injured. He was hospitalized and in fact paralyzed to a degree for approximately three months.

6. When plaintiff sustained an injury by accident on May 22, 1978, the injury arose out of and in the course of his employment at which time he was an employee of the defendant-employer.

Based on these findings the Commission concluded:

1. Plaintiff was an employee of the defendant-employer within the meaning of the Workmen's Compensation Act and sustained an injury by accident on May 22, 1978 which arose out of and in the course of his employment. At the time of his injury plaintiff was furthering the employer's business in that he was taking care of repairs of damage to his tractor's brakes caused by the failure of the defendant-employer's trailer's brakes and seeing that repair to the trailer's brakes

was accomplished. The repairs were necessary at this time in order to complete the trip to Thomasville which was to the defendant-employer's advantage and benefit.

Defendants appealed.

McElwee, Hall, McElwee & Cannon, by John E. Hall, William H. McElwee, III, and William F. Brooks for the plaintiff, appellee.

W. G. Mitchell for the defendants, appellants.

HEDRICK, Judge.

[1] Defendants' first assignment of error is set out in the record as follows: "That the Commission erred in failing to remand the case to the Hearing Commissioner with instructions to change the Findings of Fact with respect to the brakes on the plaintiff's tractor and defendant's trailer." In their brief, defendants argue the Industrial Commission erred in "failing to remand the case . . . for reconsideration of testimony." The defendants did file a motion before the full commission for rehearing but this motion was denied. The defendants failed to except to the denial of this motion; therefore, this assignment of error presents no question for review.

[2] Next, defendants contend the Commission erred in finding and concluding that plaintiff's injuries arose out of and in the course of his employment with the defendant, G. G. Parsons Trucking Co. In our opinion, this case is controlled by our decision in *Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E. 2d 312 (1977) in which we held that an operator-lessor of a tractor-trailer is an employee of the lessee within the meaning of the Worker's Compensation Act. In *Thompson* we said:

> 'Preliminary preparations by an employee, reasonably essential to the proper performance of some required task or service, is generally regarded as being within the scope of employment and any injury suffered while in the act of preparing to do a job is compensable.' In the last cited case the New York court held compensable an injury suffered by an employee, who had leased his truck-tractor to the defendant employer, while performing repairs or maintenance work on the vehicle at his home in preparation for operating it in his employment as scheduled for later the same day.

32 N.C. App. at 697, 236 S.E. 2d at 314 (citations omitted).

In the present case, the plaintiff had not completed the trip from Ohio to Thomasville, North Carolina because of the failing brakes on both the tractor and trailer. It was reasonably necessary for the plaintiff to interrupt his trip at Wilkesboro to have repairs made to the brakes on the trailer and tractor. The accidental injuries sustained by the plaintiff while he was traveling from Wilkesboro to Hickory, for the purpose of having repairs made to the brakes on the tractor to enable him to continue the trip to Thomasville, arose out of and in the course of his employment. See *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807 (1982), where the Supreme Court in affirming an award of the Industrial Commission to the plaintiff in a similar case expressly approved the reasoning of this court in *Thompson*. The opinion and award of the Industrial Commission in the present case is

Affirmed.

Chief Judge VAUGHN and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. RONALD RUTLEDGE

No. 822SC1058

(Filed 3 May 1983)

Searches and Seizures § 24— search warrant—information from confidential informant—sufficiency of affidavit

An officer's affidavit based on information received from a confidential informant was sufficient to establish probable cause for issuance of a warrant to search defendant's residence for narcotics where it asserted sufficient underlying circumstances to show the informant's reliability by stating that the informant had furnished reliable information in the past to the affiant and to another officer, and where it asserted sufficient underlying circumstances to show the basis of the conclusion that defendant had narcotics at his residence by stating that the informant had seen heroin, cocaine and marijuana at defendant's residence and that defendant was "stocked up" for the weekend.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 1 June 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 11 April 1983.

The defendant was charged in proper bills of indictment with felonious possession with intent to manufacture, sell and deliver marijuana, cocaine and heroin. The defendant made a timely motion to suppress evidence, which allegedly was obtained pursuant to an invalid search warrant. Judge Freeman denied the defendant's motion after conducting a hearing on the defendant's motion. The defendant pleaded guilty as charged but preserved his right to appeal the denial of his motion to suppress under N.C. Gen. Stat. § 15A-979.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Jo Anne Sanford for the State.

Charles M. Vincent for the defendant, appellant.

HEDRICK, Judge.

The defendant purports to bring forward three questions for review: (1) whether the trial court erred in not summarily allowing defendant's motion to suppress, (2) whether the trial court's conclusion, after hearing evidence on the motion, was against the weight of the evidence and (3) whether the court erred in failing to make findings of fact. Simply stated, the sole question raised by the defendant's motion to suppress is whether the officer's affidavit was sufficient to support a finding of probable cause for the issuance of a search warrant. Thus, it is unnecessary to discuss separately the questions raised by the defendant. Since the defendant's only challenge is to the sufficiency of the affidavit supporting the search warrant, the trial judge could have summarily denied the motion without a hearing. *See* N.C. Gen. Stat. § 15A-977. Even though Judge Freeman conducted a hearing it was not necessary under these circumstances that he do so; therefore, he committed no error in failing to make findings of fact.

All of the defendant's assignments of error raise the single question as to whether the court erred in denying the motion to suppress. Since the officer's affidavit, upon which the search warrant was based, relies on information obtained from an unidentified informant, the well-recognized Aguilar-Spinelli test applies for determining the sufficience of the affidavit. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972).

When probable cause for issuing a search warrant is based on an informant's information, this two-pronged test requires that the supporting affidavit reveal (1) sufficient underlying circumstances to show the informant's credibility and reliability and (2) the underlying circumstances showing the basis of the conclusion reached by the informant.

In the case before us, the application for a search warrant made by Officer Manning states the following:

> That on the night of March 5th, 1982, a confidential informant advised me that Ronald Rutledge had at his residence, Heroin, Cocaine and Marihuana [sic] and was selling same. The informant advised that they had seen some of the above susbstances [sic] at the Rutledge residence. In formant [sic] also advised that Rutledge was "stocked up" for the weekend. This confidential source has proven to be reliable in that they have furnished me information in the past. This same informant has also furnished Officer Lloyd with information that has proven reliable.

This application does more than baldly assert the informant's reliability. It also gives the underlying reason for such a conclusion in that the informant had furnished information in the past to Officer Manning and Officer Lloyd. We hold this meets the first test of the Aguilar standard. Officer Manning also sets forth with adequate detail the basis of the informant's conclusion that the defendant had drugs at his residence. The informant had actually seen heroin, cocaine and marijuana at the defendant's residence and stated that the defendant was "stocked up" for the weekend. This satisfies the second prong of the Aguillar-Spinelli test.

We hold that the minimum standards for finding probable cause, where the basis for that finding is reliance on an unidentified informant, have been met in this case. We find the trial judge committed no error in denying the defendant's motion to suppress the evidence.

No error.

Chief Judge VAUGHN and Judge ARNOLD concur.

JAMES E. WALL, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. DELBERT RAY ADAMS, JERRY MICHAEL MEACHUM, AND FIRST OF GEORGIA INSURANCE COMPANY, THIRD PARTY DEFENDANTS

No. 8220SC566

(Filed 3 May 1983)

Insurance § 90— discharge of weapon from automobile—not within use provision of liability policy

An injury caused by the discharge of a weapon from inside an automobile by an occupant thereof does not arise out of such ownership, maintenance or use so as to afford coverage under the "ownership, maintenance or use" provision of a standard automobile liability insurance policy.

APPEALS by plaintiff and original defendant from *Mills, Judge.* Plaintiff appeals from a judgment entered 8 January 1982 in Superior Court, ANSON County. Original defendant appeals from an order entered 18 January 1982 in Superior Court, ANSON County. Heard in the Court of Appeals 19 April 1983.

Henry T. Drake for plaintiff.

Griffin, Caldwell, Helder & Steelman, P.A., by C. Frank Griffin and Sanford L. Steelman, Jr., for original defendant-third party plaintiff.

No brief filed for third party defendants.

WHICHARD, Judge.

I.

The pleadings and discovery documents establish the following pertinent facts:

Plaintiff and third party defendant Meachum scuffled and exchanged some words while exiting a food store. When this occurred third party defendant Adams was pumping gas into his sister's car, which he was operating with her permission.

Meachum, who was riding with Adams, got into the car after exiting the store. Plaintiff had to pass this vehicle en route to his own. As he did so, Meachum took a gun and shot him, causing injury.

Meachum was inside the car when he fired the gun. The gun belonged to Adams, and prior to the shooting it had been located on the dashboard of the car Adams was operating.

Original defendant Nationwide was the liability insurance carrier on the car owned by Adams' sister and operated by Adams. Its policy undertook to pay all sums which the owner-insured became legally obligated to pay because of bodily injury "arising out of the ownership, maintenance or use of the owned automobile." *See* G.S. 20-279.21(b) (Cum. Supp. 1981).

II.

Plaintiff obtained a consent judgment against Adams and Meachum, jointly and severally, in the sum of $15,000.00 for the injury sustained in the shooting. He seeks in this action to recover that sum with interest from original defendant on the ground that original defendant is liable under its policy of insurance for the negligent acts of Adams as operator of the insured vehicle.

The trial court granted original defendant's motion for summary judgment, and denied plaintiff's motion therefor. We affirm.

III.

It has been held in this jurisdiction that there is no causal relationship between the discharge of a weapon from inside an automobile by an occupant thereof and the "ownership, maintenance or use" of that automobile. An injury so caused thus does not arise out of such ownership, maintenance or use so as to afford coverage under the "ownership, maintenance or use" provision of the standard liability policy. *Insurance Co. v. Knight,* 34 N.C. App. 96, 99-100, 237 S.E. 2d 341, 344-45, *disc. rev. denied,* 293 N.C. 589, 239 S.E. 2d 263 (1977); *Raines v. Insurance Co.,* 9 N.C. App. 27, 175 S.E. 2d 299 (1970).

In *Insurance Co. v. Walker,* 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied,* 293 N.C. 159, 236 S.E. 2d 704 (1977), which plaintiff cites in his brief, the injury in suit was caused by a discharge from a rifle located on a permanently mounted gun rack inside the truck cab. This Court upheld a finding of coverage on the ground that transportation of guns was one of the regular uses to which the truck had been put, and that the injury thus arose out of its use within the meaning of the policy.

Here by contrast, the injury resulted from "something 'wholly disassociated from, independent of, and remote from' the [vehicle's] normal use." *Insurance Co. v. Walker, supra,* 33 N.C. App. at 22, 234 S.E. 2d at 211. The cases are thus distinguishable.

IV.

Original defendant's answer contained a third party complaint against Adams, Meachum, and First of Georgia Insurance Company, in which original defendant claimed entitlement to indemnity from Adams and Meachum in the event it was found liable under its policy. The complaint alleged that First of Georgia had insured Adams and Meachum, and that it had defended in plaintiff's suit against them without reservation of rights. Original defendant sought contribution from First of Georgia in the event plaintiff should recover from it. The trial court granted summary judgment for First of Georgia, from which original defendant appeals.

Because we have held that the trial court properly found no liability on the part of original defendant, the question presented by its appeal is moot. "An appellate court will not hear and decide a moot question, or one which has become moot." 1 *Strong's North Carolina Index 3d,* Appeal and Error, § 9, p. 215. This appeal must therefore be dismissed.

V.

PLAINTIFF'S APPEAL

Affirmed.

ORIGINAL DEFENDANT'S APPEAL

Dismissed.

Judges WEBB and BRASWELL concur.

MRS. O. A. ABBOTT, GUY AUSTIN, JOHN T. BENDER, JR., DR. WILLIAM H. BENNETT, WILLIAM BOND, DR. L. R. BOWEN, R. F. BROWNLEE, LOVIC A. BROOKS, E. F. BAILEY, ARTHUR D. CANNON, MRS. W. C. CAYE, M. R. CHAMBERS, LOUIS CLAY, JR., W. T. COLLINS, JAMES A. COLQUITT, R. W. CRENSHAW, JR., COL. JOSEPH R. CURTIS, SAM F. DAVIS, JOE L. DAVIS, WILLIAM G. FAGER, CARD G. ELLIOTT, CHESTER H. FERGUSON, EDGAR F. FINCHER, FOY B. FLEMING, RAWSON FOREMAN, ROBERT FOREMAN, JAMES G. GARNER, J. RALPH HAMILTON, A. S. HAPPOLDT, JOHN M. HARBERT, III, J. CALHOUN HARRIS, JOHN HARTLEY, L. W. HILL, DR. JOHN M. HODGES, MRS. IRENE T. JAGELS, W. H. JEWELL, MRS. LOIS A. JOHNSON, MCGRATH KEEN, YEOMAN KEEN, THORNTON KENNEDY, LEON R. KLEINPETER, JR., BEN F. LACY, MARY LECHICH, W. E. LOVETT, L. REEVES LUKE, MRS. JAMES F. MACK, HARVEY MATHIS, MRS. F. J. MAXTED, C. PARKHILL MAYS, MRS. C. P. MCGEHEE, EARL MCMILLAN, GENERAL EDWARD P. MECHLING, SAMUEL T. MESSNER, JR., MRS. RODNEY MILLER, ROBERT C. MILTON, MRS. C. W. MIZELL, BOB MULLIS, RUDI OUDSHOFF, C. D. OXFORD, ROBERT B. PAUL, MRS. EDMONDSON PERKINS, NELL PHELPS, DAVID POPPER, RALPH POWERS, FRANK PRATHER, MRS. PAUL REITH, MRS. S. K. RUSSELL, MARY A. S. SANGER, I. M. SHEFFIELD, GEORGE SHERRILL, JR., MRS. C. E. SHEPPARD, TOM C. SMITH, IVY SMITH, THOMAS N. STILWELL, MRS. P. M. STURGES, WILLIAM H. TERRY, SR., RICHARD TIFT, MRS. G. C. TRISMEN, WILLIAM D. TYNES, III, MRS. H. J. ULRICH, OLEN VERNON, REBECCA WARREN, BRUCE WALTERS, MRS. MARTHA WEISE, JOHN WESTMORELAND, JR., WILLIAM J. WILLKOMM, JR., JOHN D. WOLFE, GEORGE W. WOODRUFF, CHARLES L. WOODSIDE, AND WILLIAM D. YOUNG v. THE TOWN OF HIGHLANDS AND HARRY R. WRIGHT, MAYOR, AND RONALD SANDERS, CHARLES ZACHARY, V. STEPHEN PIERSON, AND BOBBY TALLEY, MEMBERS OF THE GOVERNING BOARD OF THE TOWN OF HIGHLANDS, N. C., AND RUFUS EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 8230SC166

(Filed 3 May 1983)

Municipal Corporations § 2.5; Taxation § 25— judgment upholding annexation—stay order pending appeal—affirmation by appellate court—liability for ad valorem taxes pending appeal

Where a judgment upholding the validity of a local act annexing plaintiffs' land to a town was stayed pending appeal and a final disposition of the case, affirmation of the judgment by the appellate court dissolved the stay order and left the judgment in effect from the date of its rendition, and the town could collect ad valorem taxes from plaintiffs for the period during which the appeal was pending.

APPEAL by plaintiffs from *Thornburg, Judge.* Order entered 2 December 1981 in Superior Court, MACON County. Heard in the Court of Appeals 8 December 1982.

The plaintiffs brought this action challenging a local act (S.L. 1979, C. 756) annexing their land to the Town of Highlands. The superior court ruled against the plaintiffs on 5 June 1980 but stayed its judgment pending appeal and a final disposition of the case. This Court in *Abbott v. Town of Highlands,* 52 N.C. App. 69, 277 S.E. 2d 820, *cert. denied,* 303 N.C. 710, 283 S.E. 2d 136 (1981) affirmed the judgment of the superior court but found it was not error to stay the judgment pending appeal.

The Town sought to collect from the plaintiffs *ad valorem* property taxes for the years 1980 and 1981, the period during which the appeal had been pending. Plaintiffs then filed a motion in the cause in Macon County Superior Court asking for an interpretation of the stay order. Plaintiffs sought a determination to the effect that, prior to this Court's certification on 14 September 1981 of the final judgment, they were not liable for *ad valorem* taxes. The superior court held that plaintiffs were liable for the taxes. Plaintiffs appealed.

Herbert L. Hyde for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice, by E. Lawrence Davis and Anthony H. Brett, for defendant appellees.

WEBB, Judge.

The only issue on this appeal concerns the effect of the 5 June 1980 stay order. Plaintiffs contend that the Town was without power to collect taxes on their property during the period the stay order was in effect because their land was not within the Town's corporate boundaries until certification of the judgment on 14 September 1981. We disagree. G.S. 1-296 governs the effect of a stay order pending appeal. It provides as follows:

> "Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or

making the deposit required in this chapter, until such judgment is reversed or modified by the appellate division."

The judgment in the instant case was neither reversed nor modified on appeal, there having been found no prejudicial error. Affirmation of the judgment by the appellate court dissolved the stay order and left the judgment in effect *from its rendition* on 5 June 1980. *See In Re Griffin*, 98 N.C. 225, 3 S.E. 515 (1887). Since the judgment was in force from the time it was entered, the plaintiffs were liable for taxes during that period.

Affirmed.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. CLARENCE H. HOUSAND

No. 825SC717

(Filed 3 May 1983)

1. Criminal Law § 89.3— State's witness—corroborating statement properly admitted

In a prosecution for involuntary manslaughter, the court properly admitted into evidence a prior written statement of a State's witness for the purpose of corroborating her testimony since defendant entered only a general objection to questions regarding the identification of the statement and since portions of these statements were corroborative of her testimony at trial.

2. Criminal Law § 163— failure to object to charge before jury retired

Defendant failed to properly preserve a challenge to the jury instructions where he failed to make an objection to the charge before the jury retired. App. Rule 10(b)(2).

APPEAL by defendant from *Davis, Judge.* Judgment entered 4 March 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 January 1983.

Defendant, Clarence H. Housand, was convicted of involuntary manslaughter on the theory that the defendant acted in a criminally negligent way. The State's evidence tended to show that the victim, Scott Huffman, was leaning over a counter in the kitchen of defendant's apartment, facing the living room couch on

which defendant and Mary Hewett were sitting. Defendant picked up a pistol that he and Huffman had been firing earlier and pointed it toward the kitchen. According to Hewett's testimony on direct examination, defendant held the pistol "like he was aiming at a picture" behind where Huffman was standing. Defendant had his finger on the trigger, but was not pressing it. Huffman said something about pulling the trigger and told defendant "all you can do is shoot me." Defendant said, "No, I would not do that." The gun then discharged and the defendant jumped up and said, "Is he shot?" Huffman died of a gunshot wound to the head. On cross-examination, Hewett testified that it looked like the defendant pointed the gun at Huffman, but that he could have been pointing it at the picture which was to the right of Huffman and well above his head. Hewett further testified that she was not looking at the gun when it discharged and did not know whether the gun hit the floor and fired or whether it went off in the defendant's hand.

Defendant presented no evidence. From the imposition of an eight to ten year sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Harold P. Laing, for defendant appellant.

JOHNSON, Judge.

[1] The court admitted into evidence a prior written statement of State's witness Hewett for the purpose of corroborating Hewett's trial testimony. Defendant assigns error, contending that the prior written statement was inconsistent with Hewett's trial testimony, and by its admission the State was allowed to impeach its own witness.

In a handwritten statement given to law enforcement officers, Hewett said, among other things, that defendant pointed the gun at Huffman; that she watched him put his finger on the trigger and "squeeze it slow"; and that she looked at Huffman and the gun went off. The trial judge instructed the jury, in his charge, that this evidence was received as corroboration tending to show that Hewett had made a statement consistent with her testimony at trial; that the jury must not consider Hewett's state-

ment as evidence of the truth of what was said because it was not made under oath; and that if the jury believed Hewett's statement was consistent with her trial testimony it could be considered in determining her credibility.

Hewett's statement is competent and admissible if it corroborates her testimony at trial. The admissibility of a prior consistent statement of a witness to corroborate his testimony is a long established rule of evidence in this jurisdiction. *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978). We have reviewed Hewett's entire statement and find that portions of it were corroborative of her testimony at trial. Defendant entered only a general objection to questions regarding the identification of the statement, without moving to strike or exclude any portion alleged to be incompetent. Where part of a statement does not corroborate the witness' testimony, the defendant has a duty to call to the trial judge's attention the objectionable part. A broadside objection will not suffice. *Id.; State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Harris*, 46 N.C. App. 284, 264 S.E. 2d 790 (1980). This assignment of error is, therefore, overruled.

Defendant also assigns error to that part of the court's charge concerning corroborative evidence and to the court's instructions on the defense of accident. We must initially determine whether defendant has properly preserved these assignments of error for appellate review.

[2] This case was tried following the 31 October 1981 amendment to Rule 10(b)(2) of the Rules of Appellate Procedure, which requires, as a prerequisite to assigning error to any portion of the charge, that an objection be made before the jury retires. Defendant did not raise any objection at trial to the instructions he now challenges and there is no indication that he was denied the opportunity, in violation of Rule 10(b)(2), to make an objection out of the hearing or the presence of the jury. We therefore hold that defendant has not properly preserved this assignment of error for our review. *State v. Hargrove*, 60 N.C. App. 174, 298 S.E. 2d 402 (1982); *State v. Thompson*, 59 N.C. App. 425, 297 S.E. 2d 177 (1982). We have, nevertheless, carefully reviewed the charge as a whole, and find no prejudicial error.

No error.

Judges HEDRICK and EAGLES concur.

JAMES J. RIPPY v. OSCAR BLACKWELL

No. 8222SC517

(Filed 3 May 1983)

Negligence § 29.1— sufficient evidence of negligence

In an action to recover for injuries received by plaintiff when defendant's dump truck fell while he was repairing it and cut off his finger, the evidence on motion for summary judgment presented an issue of fact as to defendant's negligence and did not establish contributory negligence as a matter of law where it would permit the jury to find that the truck was safely resting on blocks and plaintiff was working underneath the front of the truck; defendant jacked the truck up off the blocks and caused it to fall; plaintiff had warned defendant not to jack it up off the blocks again; defendant jacked the truck up at a time when he knew plaintiff's finger was in a position of danger; and while he was jacking the truck off the safety blocks, defendant tried to move the spring with a crowbar.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 21 January 1982 in Superior Court, DAVIE County. Heard in the Court of Appeals 11 April 1983.

Plaintiff brought this personal injury action against defendant alleging that his injury resulted from defendant's negligence. In his answer, defendant denied negligence and alleged that if he was negligent plaintiff was contributorily negligent. Defendant moved for summary judgment. The following evidence was introduced at the summary judgment hearing. On Saturday, 20 October 1979, defendant asked plaintiff, a diesel mechanic, to help him work on his dump truck. According to defendant's version of the accident, the repair required the replacement of pins through the left front of the truck. The truck was jacked up and was on blocks. It had been jacked up for two days. Defendant's deposition includes the following:

Q. In order to try to put this pin in what did you have to do with regard to jacking the truck?

A. Let's see—all I was doing—I was jacking it up—I had a crowbar pulled the spring down you know because it won't come exactly up and I was going to pull the spring down and when I was under there jacking it and getting it where I thought it ought to be, I told him to stick the pin in it and I guess he was up there taking his finger and running it around in that hole and that jack—see we didn't know the jack was not shut up. If I hadn't had more blocks underneath of it it would have fell on me.

Plaintiff's version of what happened is that they jacked the truck up on the day of the accident, and he put a prop under the truck and told defendant not to jack it up anymore. This had to be done several times because defendant would ignore plaintiff's request and would continue jacking the truck causing the prop to fall out. Eventually, the truck was jacked up with the prop in a satisfactory position. At the time of the accident, most of the bolts were already in place and everything was lined up, plaintiff only had to stick in a few more bolts and tighten them up. He turned around to pick up the remaining bolts, turned back, and he was putting in a bolt when the prop fell out from under the truck, the truck fell, and his finger was cut off. At that time, defendant was squatting in front of the truck, but plaintiff could not see what he was doing. Plaintiff said that defendant must have been doing something to the jack to cause the prop to fall out.

The trial judge granted defendant's motion for summary judgment.

Martin and Van Hoy, by Henry P. Van Hoy II, for plaintiff appellant.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Richard R. Reamer, for defendant appellee.

VAUGHN, Chief Judge.

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment. Summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

G.S. 1A-1, Rule 56(c). The purpose of summary judgment is to bring the case to a decision on the merits without the expense of a trial when there are no material facts in issue. *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In a negligence case, summary judgment should not be rendered for the movant unless the evidence shows lack of negligence by the movant, there is no contradictory evidence, and there is no question as to the credibility of the witnesses. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

There are clearly conflicts in the evidence. The case is, therefore, not one for summary judgment. There is evidence that would permit, but not compel, the jury to find that defendant, while the truck was safely resting on the blocks, jacked it up off the blocks and caused it to fall. Plaintiff had warned him not to jack it up off the blocks again. Defendant's own evidence tends to show that he jacked it up at a time when he knew plaintiff's finger was in a position of danger. There is also evidence that while he was jacking the truck off the safety blocks, he tried to move the spring with a crowbar. This evidence leaves issues of material fact as to defendant's negligence and does not show plaintiff's alleged contributory negligence as a matter of law. Summary judgment must, therefore, be

Reversed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RALPH PATE

No. 8220SC888

(Filed 3 May 1983)

1. Criminal Law § 158.1— failure to put excluded evidence in record

Where defendant failed to include in the record what a witness would have testified concerning prior confrontations between defendant's family and the family of the victim, the Court was unable to review on appeal the propriety of the trial judge's excluding the evidence at trial.

2. Criminal Law § 167.1— objected testimony—evidence of same import later admitted without objection

The benefit of an objection to an officer's testimony as to statements made by defendant while in custody was lost when evidence of the same import was thereafter elicited by defense counsel on cross-examination.

3. Homicide § 28.1— failure to instruct on self-defense proper

In a prosecution for second degree murder, the trial court did not err in failing to instruct the jury on self-defense where the undisputed evidence was that defendant shot an unarmed man in his own yard from a moving car.

Judge WEBB dissenting.

APPEAL by defendant from *Mills, Judge.* Judgment entered 30 April 1982 in Superior Court, UNION County. Heard in the Court of Appeals 7 March 1983.

Defendant was indicted for the second degree murder of Bradley Flowe. Evidence presented at trial showed that on 20 February 1982 the defendant was informed by his son Jeffrey that another son Darrell, who was crippled, was in the hospital as the result of an assault upon him by Bradley and Ted Flowe. Defendant went to meet his son Dale who had witnessed the fight. Dale described the assault to his father and was persuaded to drive his car so that his father could find the Flowes. Defendant took a .22 rifle from his car and put it in his son's car. Locating the Flowes leaving a local Arcade, the defendant, his son Dale and two friends followed the Flowe vehicle to their house where defendant threw a bottle at the car from the road. Defendant and his companions then left the scene but returned at defendant's direction so he could talk with the Flowes. When they approached the Flowe residence, Bradley Flowe was seen in the driveway running toward them shouting with his hands up in the air. At the same time another occupant of the Pate vehicle yelled, "He's got a gun." Dale quickly accelerated the car to leave, and defendant fired his rifle. Bradley Flowe was struck and killed by the defendant's gunshot.

The jury returned a verdict of guilty as charged. From imposition of a fifteen year prison term, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Haynes, Baucom, Chandler, Clayton and Benton, by W. J. Chandler, for defendant-appellant.

EAGLES, Judge.

[1] Defendant has assigned error to several evidentiary rulings. He argues that the trial judge erred in excluding evidence pertaining to prior confrontations between the Pates and the Flowes. Since defendant has failed to include in the record what the witnesses would have testified to in this regard, we are precluded from any review on appeal. *State v. Misenheimer,* 304 N.C. 108, 282 S.E. 2d 791 (1981). For the same reason we also do not reach defendant's argument concerning prejudice in the exclusion of certain testimony by the witness Dale Pate. *Id.*

Defendant next objects to the form of certain questions propounded by the State which he contends assumed facts not in evidence and called for conclusions. He does not argue that any answers elicited by these questions were prejudicial nor do we find them to be prejudicial. Upon examining the challenged questions, we find no basis to believe that there is a reasonable possibility that a different result would have been reached at trial had the alleged error in question not been committed. G.S. 15A-1443(a); *State v. Corbett and State v. Rhone,* 307 N.C. 169, 297 S.E. 2d 553 (1982). The question propounded to Officer Rollins concerning his previous experience in arresting suspects, while irrelevant, did not amount to prejudicial error. *Id.*

[2] We find no merit in defendant's contention that there was error in allowing the arresting officer to testify as to a statement made by defendant while in custody concerning the whereabouts of the murder weapon. Evidence of the same import was thereafter elicited by defense counsel on cross-examination of this same witness. "When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *Id.* at p. 179, 297 S.E. 2d at 560. Similarly, there is no error in the overruling of defendant's objections to statements by police officers regarding the demeanor of defendant's daughter on the night of the arrest since this evidence was brought out during other testimony without objection. *Id.*

[3] In his final assignment of error defendant contends the trial judge erred in failing to instruct the jury on self-defense. A defendant is entitled to an instruction on self-defense if there is evidence in the record to establish that it was necessary or that it

reasonably appeared to the defendant to be necessary to kill the victim in order to protect himself from death or great bodily harm. *State v. Spaulding,* 298 N.C. 149, 257 S.E. 2d 391 (1979). However, if the court determines as a matter of law that there is insufficient evidence in the record from which a jury could determine that the defendant reasonably could have formed such a belief, then the issue should not be submitted for consideration. *State v. Bush,* 307 N.C. 152, 297 S.E. 2d 563 (1982). The evidence in the record before us does not necessitate the submission of a self-defense instruction to the jury. Although defendant stated that he had a reasonable apprehension of harm to himself when he heard the shouted words "got a gun," the undisputed evidence is that he shot an unarmed man in his own yard from a moving car. There is no evidence in the record that defendant thought he saw a weapon in the possession of the deceased or that the deceased was close enough to him to do him great bodily harm. This assignment of error is overruled.

We find that the defendant received a fair trial free of prejudicial error.

No error.

Chief Judge VAUGHN concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe there was sufficient evidence of self-defense that it should have been submitted to the jury.

JOHN BEN PETTUS v. MARIE GERRY PETTUS

No. 8221DC559

(Filed 3 May 1983)

Divorce and Alimony § 2.4— absolute divorce action—jury trial demanded—necessity for jury trial

The trial court erred in entering a judgment of absolute divorce without affording defendant a trial by jury where defendant demanded a jury trial in her answer and did not at any time waive her right to a trial by jury. G.S. 50-10.

APPEAL by defendant from *Harrill, Judge.* Order entered 12 March 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 18 April 1983.

No counsel for plaintiff, appellee.

Billings, Burns & Wells, by R. Michael Wells for the defendant, appellant.

HEDRICK, Judge.

The only question presented by this appeal is whether the trial court erred in denying the defendant's motion, under N.C. Gen. Stat. § 1A-1, Rule 60(b), to set aside the judgment of absolute divorce entered on 15 February 1982. The defendant argues the Court was without authority to enter a judgment of absolute divorce because she at all times demanded a trial by jury, pursuant to N.C. Gen. Stat. § 1A-1, Rules 38 and 39, and that she had not waived at any time her right to trial by jury. We agree.

In her answer to plaintiff's complaint seeking a divorce based on one year's separation, the defendant demanded a trial by jury. On 15 February 1982 Judge Keiger entered a judgment of absolute divorce without affording defendant a trial by jury. On 17 February 1982 the defendant moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), to have the judgment of absolute divorce set aside. Judge Harrill denied this motion on 12 March 1982, and the defendant appealed.

Our decision is controlled by N.C. Gen. Stat. § 50-10 and *Edwards v. Edwards,* 42 N.C. App. 301, 256 S.E. 2d 728 (1979). The

judgment must be vacated and the cause will be remanded to the District Court for a trial by jury.

Vacated and remanded.

Chief Judge VAUGHN and Judge ARNOLD concur.

DAVIE COUNTY DEPARTMENT OF SOCIAL SERVICES ON BEHALF OF ELAINE C. BROWN v. HENRY LEE JONES AND LINWOOD GRAY BROWN

No. 8222DC561

(Filed 3 May 1983)

Appeal and Error § 6.2— order directing blood grouping test—no immediate appeal

Defendant had no right of immediate appeal from an order directing him to submit to a blood grouping and comparison test pursuant to G.S. 8-50.1.

APPEAL by defendant Jones from *Johnson, Judge.* Order entered 6 April 1982 in District Court, DAVIE County. Heard in the Court of Appeals 18 April 1983.

Brock and McClamrock, by Grady L. McClamrock, Jr., for plaintiff appellee.

Davis and Corriher, by Thomas M. King, for defendant appellant.

VAUGHN, Chief Judge.

This is an action seeking support of a minor child. Paternity is at issue. The court entered an order directing defendant to submit to a blood grouping and comparison test pursuant to G.S. 8-50.1, and defendant gave notice of appeal from that order.

An order to submit to a blood grouping test pursuant to G.S. 8-50.1 is interlocutory. No appeal lies from an interlocutory order that does not affect a substantial right. An order to submit to a blood grouping test does not, in this case, affect a substantial right. We are, therefore, required to dismiss the appeal. *Love v.*

Moore, 305 N.C. 575, 291 S.E. 2d 141 (1982); *Bailey v. Gooding,* 301 N.C. 205, 270 S.E. 2d 431 (1980).

Appeal dismissed.

Judges HEDRICK and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MAY 1983

BRANCH BANKING & TRUST CO. v. WORONOFF No. 827DC613	Wilson (80CVD658)	Affirmed
CAMKEN CORP. v. A&H CLEANERS, INC. No. 8212DC552	Cumberland (81CVD4314)	Reversed & Remanded
DOLPHIN CO. OF ORIENTAL, INC. v. THOMPSON No. 823SC339	Pamlico (79CVS136)	No Error
IN RE KIRBY No. 828DC1009	Wayne (81J110)	Affirmed
LAZENBY v. GODWIN No. 8214SC114	Durham (74CVS1986)	Prior Opinion Affirmed Except As Amended In Second Opinion
SHEPHERD v. MOZINGO No. 828SC533	Wayne (81CVS595)	Affirmed
STATE v. CHAVIS No. 8216SC1094	Robeson (81CRS4036)	No Error
STATE v. CLONTZ No. 8219SC984	Cabarrus (82CRS1110) (82CRS1111) (82CRS1112) (82CRS1620) (82CRS1580)	Affirmed
STATE v. CRUMP No. 824SC1227	Sampson (82CRS1099)	Reversed & Remanded
STATE v. DAMERON No. 8227SC1205	Gaston (82CRS11503)	No Error
STATE v. DORTCH No. 828SC1047	Wayne (82CRS1587)	No Error
STATE v. FREEMAN No. 8212SC1054	Cumberland (82CRS4041) (82CRS4042)	No Error
STATE v. PELT No. 828SC1210	Wayne (81CRS3848) (81CRS3849)	No Error

STATE v. SMITH No. 822SC1072	Beaufort (81CRS7967)	No Error
STATE v. SMITH No. 8212SC1199	Cumberland (82CRS1892)	No Error
STATE v. STEELE No. 8222SC1095	Davidson (81CRS9498)	No Error
STATE v. WALKER No. 8215SC641	Alamance (80CRS16823) (80CRS16824)	No Error

STATE OF NORTH CAROLINA v. OSCAR GARCIA GONZALEZ AND RALPH WOODS, JR.

No. 8219SC1043

(Filed 17 May 1983)

1. **Criminal Law § 92— joinder of defendants for trial proper**

The trial court properly granted the State's motion to consolidate for trial the charges against three defendants where the offenses fit within the guidelines set by G.S. 15A-926(b) and where the joint trial did not deprive defendants of a fair trial.

2. **Criminal Law § 76.6— admissibility of defendant's statement—failure of court to make sufficient findings after voir dire**

In a prosecution for armed robbery, the trial court's findings of fact were insufficient to support the admission into evidence of defendant's statement since the trial court failed to resolve evidentiary conflicts by making findings of fact which enabled the Court to say whether the trial judge committed error in admitting the confession.

3. **Criminal Law §§ 77.3, 162— codefendant's statement implicating other defendants—waiver of objection**

Where three defendants were tried in a joint trial for armed robbery and larceny of an automobile, and where the court gave counsel for all defendants "sanitized" versions of each defendant's statement, and where no objection was made to the statement of one defendant which tended to implicate the other two defendants, the inadmissibility of the evidence was waived by the defendants' failure to make timely objection when they had an opportunity to learn that the evidence was objectionable. G.S. 15A-927(c)(1).

4. **Criminal Law § 42.6— admission of gun into evidence—chain of custody sufficient**

The trial court did not abuse its discretion in admitting a pistol into evidence where the evidence showed that the pistol seized from a defendant was given to a deputy who submitted the pistol to the SBI laboratory in a sealed and labeled package; that the pistol was returned to the deputy after having been opened and resealed; that the officer who gave the gun to the deputy testified that the gun "appeared to be" the same gun he seized; that the deputy identified the gun as the one "turned over" to him and where another deputy testified the pistol was the one "recovered by the Sheriff's Department and presented to (its owner) and he identified it as being his gun."

5. **Criminal Law § 77— confession of codefendant—not implicating defendant**

The paraphrasing of a codefendant's statement sufficiently excluded all references to defendant in a manner that would not prejudice defendant, meeting the requirements of G.S. 15A-927(c)(1).

6. **Robbery § 4.3— armed robbery—sufficiency of evidence**

The evidence in an armed robbery case was sufficient where it showed the gunman had crouched behind the counter when he saw a customer pull up

in front of the station; that the operator of the station noticed his gun was missing immediately after two masked men ran away; that two witnesses testified the same gun kept behind the counter was found in defendant's possession several hours later; and where defendant appeared quite nervous, wore a jacket matching the description of one worn by the robber, and initially gave the officer an alias name until he was told warrants were outstanding on a person of that name.

7. **Criminal Law § 138— sentence in excess of presumptive sentence—aggravating factor supported by evidence**

In a prosecution for armed robbery, the evidence was sufficient for the trial court to find as the single aggravating factor that "the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." G.S. 15A-1340.4(f) and G.S. 14-87(d).

APPEAL by defendants from *Beaty, Judge.* Judgments entered 25 June 1982 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 17 March 1983.

This is a criminal action in which defendant Gonzalez was charged in proper bills of indictment with armed robbery and larceny of an automobile. Codefendant Woods was charged with armed robbery and carrying a concealed weapon. These cases were consolidated for trial along with the charges against a third defendant, Ervin Calvin Crawford, whom the jury found not guilty.

The State's evidence tended to show the following: On 22 November 1981, about 9:00 p.m., a man wearing a toboggan pulled down over his face, carrying a pistol, entered a service station in Candor and demanded money from Steven Dunn, the store employee on duty. Dunn gave the gunman the cash register drawer, which contained approximately $1,030.00. Dunn later discovered his own pistol missing from behind the counter. As the gunman ran out of the store, he was met at the door by a second man, also wearing a toboggan over his face. This second man wore a light blue leisure jacket. The two men fled together.

Shortly afterwards, a green Buick station wagon with a rack on top was seen leaving from a street adjacent to the station. About 45 minutes after the robbery, a Biscoe police officer saw the Buick and attempted to follow it. The Buick went behind a private residence on a dead end street. As the officer approached the Buick, he found it unoccupied and with the motor running. In-

side the car was the cash register drawer taken from the service station robbery and a certificate of title and sales receipt showing the car was owned by defendant Gonzalez.

About 3:30 a.m. on 23 November 1981, defendant Gonzalez was stopped in Biscoe while driving a stolen automobile. A roll of bills totaling $1,039.00 was found in Gonzalez's pocket when he was arrested.

Defendant Woods was arrested the same morning in Star after a local citizen reported to police having dropped off a nervous man at a convenience store. Star Police Chief W. L. Batten found the man to be Woods, who was wearing a light blue leisure jacket, and who was concealing in his possession the victim Dunn's pistol.

After *voir dire* testimony, the court ruled admissible a statement made by defendant Gonzalez in which he admitted to investigating officers his involvement in the robbery of the Candor service station. In the statement, Gonzalez said he drove his car, a green Buick station wagon, to the service station and entered the store. On leaving the scene, he took all the money from the store's cash drawer and abandoned the car after discovering he was being pursued by police. Gonzalez hid in the woods until police left. He was arrested later driving a car he had stolen.

The court also admitted a statement made by the third defendant, Ervin Calvin Crawford, in which Crawford said, "I told him [Officer Ramseur] I was with some guys, but that I didn't rob anyone, they did."

Both defendants Gonzalez and Woods were found guilty as charged. Defendant Gonzalez was sentenced to serve 20 years in prison on the armed robbery charge and to a consecutive sentence of 18 months on the larceny conviction. Defendant Woods received a 20-year sentence on the armed robbery conviction and a consecutive six-month sentence for carrying a concealed weapon. From these judgments, defendants appealed.

Defendant Crawford was acquitted.

Attorney General Rufus L. Edmisten, by Associate Attorney William H. Borden, for the State.

Russell J. Hollers for defendant appellant Oscar Garcia Gonzalez.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant Ralph Woods, Jr.

BRASWELL, Judge.

I. Defendant Gonzalez's Appeal.

[1] Defendant Gonzalez first contends that the trial court erred in allowing the State's motion to consolidate for trial the charges against the three defendants and in denying Gonzalez's motion to sever. He argues separate trials for each defendant were necessary because the statement made by codefendant Crawford implicated the others.

G.S. 15A-926(b) provides for joinder of defendants for trial when the several offenses were part of a common scheme or plan, or part of the same act or transaction, or were so closely connected in time, place and occasion that it would be difficult to separate proof of one charge from proof of the others. Whether defendants jointly indicted should be tried jointly or separately is in the trial court's discretion. *State v. Lake,* 305 N.C. 143, 286 S.E. 2d 541 (1982); *State v. Nelson,* 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied,* 446 U.S. 929, 100 S.Ct. 1867, 64 L.Ed. 2d 282 (1980); *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972). The exercise of the court's discretion will not be disturbed upon appeal, absent a showing that the joint trial deprived the movant of a fair trial. *State v. Slade,* 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968).

While Crawford's statement that "I didn't rob anyone, they did" might implicate defendant Gonzalez by inference at the joint trial, Gonzalez was not prejudiced. We find no abuse of discretion in the trial judge's decision to consolidate the trials or to deny the motion to sever, and this assignment of error is overruled.

[2] The second assignment of error questions the sufficiency of the trial court's findings of fact to support the admission into evi-

dence of Gonzalez's statement of 2 December 1981. Gonzalez maintains the court failed to make proper findings, after a *voir dire* hearing, about his refusal to talk with officers until he was represented by an attorney. He also objects to the absence of a finding that when he signed a form waiving his *Miranda* rights on 2 December 1981, he believed he was to be questioned only about an unrelated incident in High Point and that he had waived none of his rights concerning the Candor charges.

According to *voir dire* testimony of defendant Gonzalez, Deputy A. D. Green, and Deputy W. A. Walser, Jr., Gonzalez told the deputies several times between the time of his arrest on 23 November 1981 and the day he made the statement on 2 December 1981 that he wished to be represented by counsel and would not talk with them unless an attorney was present. Gonzalez testified he agreed on 2 December to talk with High Point Police Officer Joe Sink about charges related to an incident in High Point. Gonzalez stated that when he signed a *Miranda* rights waiver form, he believed the form pertained only to the High Point incident; the police said Gonzalez did not indicate he wished to limit the questioning to the High Point incident. Gonzalez testified that Deputy Walser informed him on 2 December 1981 that his codefendants had given statements implicating him in the Candor robbery, so Gonzalez made up a "story" to tell the officer. He said he refused to sign the statement after the officer reduced it to writing because the statement was false. Deputy Walser also indicated "there were plenty of things" that would help him if he would make a statement, according to Gonzalez's testimony, although Walser denied making any promises of leniency in exchange for the confession.

Although at the conclusion of the *voir dire* the trial judge did make many appropriate findings of fact, he did not go far enough. Both sides had offered evidence. The findings of fact in the present case do not resolve many of the conflicts in the *voir dire* evidence concerning the events occurring during the time defendant Gonzalez was in custody, prior to his statement made on 2 December 1981. No findings were made about Gonzalez's telling law enforcement officers on previous occasions when they attempted to question him that he did not wish to talk to them until he was represented by counsel. There were no findings made resolving Gonzalez's testimony that he agreed to talk with Officer

Sink only about the High Point charges and that he did not realize he was also agreeing to discuss the Candor robbery when he signed the waiver of rights form. The findings also fail to resolve the problem raised by Gonzalez's testimony that the officers told him he had been implicated by his codefendants. Without resolution of such matters, an appellate court is unable to determine if error occurred when the confession was admitted into evidence as being voluntary.

The proscribed function of the trial court on *voir dire* is to resolve evidentiary conflicts by findings of fact in such manner that this Court is able to say whether the trial judge committed error in admitting the confession. *State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569 (1966); *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344 (1965). Our Supreme Court, in a decision filed after the date of the trial in the present case, held that a court's failure to find facts resolving the conflicting *voir dire* testimony is prejudicial error "requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made." *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E. 2d 78, 84 (1982).

Thus, under the *Booker* rule, we hold this cause must be remanded to the Superior Court of Montgomery County for a hearing to determine whether defendant Gonzalez's statement was made voluntarily and understandingly. If the presiding judge finds the statement was not voluntary, he shall enter an order vacating the judgment appealed from, setting aside the verdict, and granting a new trial. However, if the judge finds the statement was voluntarily and understandingly made, he will make supporting findings and conclusions and order commitment to issue on the original judgment.

Defendant Gonzalez's third assignment of error is whether the trial court erred in concluding that Gonzalez's statement was admissible. This issue will be moot if, on remand, the presiding judge finds Gonzalez's confession was not made voluntarily and understandingly and thus orders a new trial barring that confession from evidence. However, should the presiding judge at the *voir dire* hearing on remand find the confession was voluntary, then we find that the court properly admitted the statement.

[3] Defendant Gonzalez's fourth and fifth assignments of error relate to the trial court's admission of codefendant Crawford's statement. Gonzalez contends the court should have instructed the jury that the statement was admissible against Crawford only and was not probative of Gonzalez's guilt. Gonzalez further argues that the court erred in denying his motion to strike the portion of Crawford's statement in which he said, "I told him I was with some guys, but that I didn't rob anyone, they did." Only two persons were seen in the service station during the robbery, and two persons, Gonzalez and Woods, were on trial with Crawford at the time his statement came before the jury. Thus, the confession, by inference, implicated both Gonzalez and Woods.

Prior to 1968, the rule in this State was that the admission of the confession of one codefendant, even though it implicated another against whom it was inadmissible, was not error provided the trial judge instructed the jury to consider the confession as evidence only against the confessor and not against other codefendants. *State v. Lynch*, 266 N.C. 584, 146 S.E. 2d 677 (1966). However, in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), the Supreme Court of the United States held that in a joint trial the admission of a non-testifying defendant's extrajudicial confession which implicates his codefendants violates the codefendants' Sixth Amendment right of cross-examination, a violation which is not cured by the court's instructions to the jury that the confession is admissible only against the declarant. As a result of *Bruton*, the North Carolina Supreme Court held that in joint trials extrajudicial confessions must be excluded unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). This requirement was then codified in the General Statutes at G.S. 15A-927(c)(1), which provides:

"(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant."

The record in the present case shows that unaltered copies of the statements of Gonzalez and Crawford were given to each defendants' counsel before any testimony was presented about the statements. Both Gonzalez and Crawford then moved to suppress Crawford's statement. The trial court ruled that "sanitized" versions of both Crawford's and Gonzalez's statements—a paraphrasing of the statements omitting references to the other defendants—would be admitted into evidence. This was the court's effort to comply with G.S. 15A-927(c)(1)(b), as reflected in its comment made before the "sanitized" statements were prepared by the State: "Since all three defendants will be on trial at this procedure I will allow the use of the statements to the extent that they detail the involvement of that individual, as to that individual and not as to the other two."

After Deputy Green had testified before the jury about Crawford's statement to him, both Gonzalez and Woods moved to strike. The following colloquy occurred:

"[DEFENDANT WOODS' ATTORNEY]: I move to strike that portion of the statement as follows; I was with some guys but I didn't rob anyone, they did. I think that ties and puts all meaning back into the statement as was originally there. And I'm sorry I overlooked this when I read the statement, but apparently—I don't think it's being sanitized enough, to use the D.A.'s termonology [*sic*].

THE COURT: All right. Motion denied. Let the record show that the Court prior to statements being presented in open court instructed the District Attorney to make all statements available to counsel for the defendants, that the Clerk made copies of the statements and a copy of each statement from Gonzalez and Crawford were presented to the defendants and their counsel, that no objections were made to the statements in the form presented at that time. Let the record further show that at the time the officer read the

statement no objections were made to anything that was stated at that time. The objection came after the statement had been completed. Motion denied.

MR. HOLLERS: Your Honor, I will make the same motion on behalf of Gonzalez.

THE COURT: On the same grounds, the motion is denied as to Gonzalez. Bring the jury back in."

The court's remarks indicate that the "sanitized" versions of the statements had been given to counsel before being presented to the jury, yet no objections were made before the statement was read to the jury. Defendants Gonzalez and Woods may be correct that they, as the only two people on trial with Crawford, might have been implicated by Crawford's statement that he was with "some guys" who robbed the station. However, their attorneys had access to the version of the statement prepared for presentation to the jury and still failed to make timely objection. Thus, we hold that they waived their opportunity to object and in essence invited the error. The inadmissibility of evidence is waived by a defendant's failure to make timely objection when he had an opportunity to learn that the evidence was objectionable. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Jeeter*, 32 N.C. App. 131, 230 S.E. 2d 783, *disc. rev. denied*, 292 N.C. 268, 233 S.E. 2d 394 (1977). "Invited error is not ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E. 2d 101, 102 (1971).

Defendant Gonzalez also complains that no instruction was given limiting the jury to consideration of Crawford's statement only against Crawford. In light of our holding that admission of Crawford's statement was invited error, we find that limiting instructions were neither requested nor required and that no error occurred.

[4] Defendant Gonzalez finally assigns error to the court's admission of State's Exhibit #1, the pistol seized by police from defendant Woods when he was arrested in Star several hours after the robbery. Gonzalez maintains that an insufficient chain of custody was shown by the State to render the pistol admissible and to allow testimony that the pistol seized from Woods was the same one taken from the service station during the robbery.

In *State v. Bishop*, 293 N.C. 84, 235 S.E. 2d 214 (1977), a pistol was admitted into evidence based on testimony from the owner that the gun was his " 'as far as [he] could tell' " and testimony from a codefendant that " 'this is the weapon or an identical weapon that came out of the Tucker home the night of the burglary and armed robbery.' " *Id.* at 88, 235 S.E. 2d at 217. The court held these identifications were adequate for admission of the evidence "even without the abundance of other more definite testimony found in this record to establish the identity of the gun." *Id.* The Supreme Court has also said of the authentication of real evidence: " 'There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. . . . Consequently, 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 . . . and that the object is in an unchanged condition. [Citations omitted.]' " *State v. Abernathy*, 295 N.C. 147, 161, 244 S.E. 2d 373, 382 (1978), quoting *State v. Harbison*, 293 N.C. 474, 483-84, 238 S.E. 2d 449, 454 (1977).

The evidence in this case showed that the pistol seized from defendant Woods by Chief Batten was given to Deputy Green, who submitted the pistol to the S.B.I. laboratory in a sealed and labeled package. The package was returned to Deputy Green after having been opened and resealed. Chief Batten testified that the gun "appeared to be" the same gun he seized from Woods. Deputy Green identified the gun as the one "turned over" to him by Chief Batten. Deputy Walser testified the pistol was the one "recovered by the Sheriff's Department and presented to Mr. Steve Dunn and he identified it as being his gun." Dunn viewed the pistol at trial and positively identified it as his revolver.

Based on these identifications, we hold the trial court did not abuse its discretion in admitting the pistol into evidence.

The portion of this assignment of error dealing with admission of Exhibits #6 and #7, the shell casings and bullet allowed into evidence, is deemed abandoned under Rule 28(a), N.C. Rules App. Proc. because no supporting discussion appears in Gonzalez's brief.

II. Defendant Woods' Appeal.

Defendant Woods presents four questions for review, although some of them combine arguments identical to those presented by the appeal of defendant Gonzalez. Woods, like Gonzalez, contends the court erred in denying his motion to sever the trials of the three codefendants, in admitting the confession of Crawford, in failing to give limiting instructions to the jury concerning the statements of Crawford and Gonzalez, and in admitting the pistol stolen from Dunn at the service station. For the reasons given under the corresponding discussion of defendant Gonzalez's questions, we find no merit in any of these assignments of error.

[5] Woods also contends that his trial was prejudiced by the admission of Gonzalez's confession, which also served in the consolidated trial as substantive evidence against Woods. Woods maintains that the "sanitized" version of Gonzalez's statement implicated him and prevented him from receiving a fair trial.

According to the record, the "sanitized" account of Gonzalez's statement, testified to by Deputy Walser, follows:

> "On November the 22nd, 1981, on a Sunday night, myself, Oscar Garcia Gonzalez, drove to a service station convenient store near Candor. I was riding in my vehicle, a green Buick stationwagon with mag wheels. I drove up to the store. I was parked near the back door. A customer came into the lot so I went into the store. I drove onto the road and then turned right. I stopped after traveling one mile or one and one-half miles and got into the back seat and took all the money from the cash drawer. After traveling about five minutes the police got behind me. I turned down a road which was a dead end. The car was stopped and I was getting ready to run when I heard a shot. I thought it was the police shooting so I ran. I ran into the woods and hid. I stayed there until the law left. I found a car with the keys in it which was a grey Ford LTD or Thunderbird."

We find that this statement in no way implicated defendant Woods, because the statement did not include mention of defendant Woods or of any companion. This paraphrasing of Gonzalez's statement sufficiently excluded all references to Woods in a man-

ner that would not prejudice Woods, meeting the requirements of G.S. 15A-927(c)(1). Because of our previously discussed holding regarding the admission of Gonzalez's statement against himself, the question of the admissibility of the statement is to be resolved on remand. If the presiding judge at the *voir dire* hearing on remand holds that Gonzalez's statement was not voluntarily given, then Gonzalez will be awarded a new trial, at which his confession will be excluded. However, in that event, Woods will not be entitled to a new trial because Gonzalez's confession did not implicate Woods.

[6] The remaining two questions presented by Woods are numbered 3 and 4. In question 3, defendant Woods contends the court erred in denying his motions to dismiss the charges against him on grounds that the State's evidence was insufficient to support the conviction of armed robbery. Woods argues the only evidence of his involvement in the robbery was circumstantial, with inferences built upon inferences to prove his guilt. There was no direct evidence which showed that Dunn's pistol was stolen at the same time the service station was robbed, for Dunn knew only that he had placed his gun under the counter when he began his shift at 3:00 p.m. and found it missing after the 9:00 p.m. robbery. None of the eyewitnesses could identify Woods as having been inside the station. When he was picked up in a nearby town in the early hours the following morning, a pistol was found on him that was later identified by Dunn as his gun which he had kept behing the store counter.

The well-established legal principles governing a motion for dismissal require that the evidence be considered in the light most favorable to the State, with contradictions resolved in the State's favor. *State v. McCoy,* 303 N.C. 1, 277 S.E. 2d 515 (1981); *State v. Everhart,* 291 N.C. 700, 231 S.E. 2d 604 (1977).

Under the doctrine of possession of recently stolen property, a jury may consider subsequent possession of goods, whenever goods have been taken as a part of a criminal act, as a relevant circumstance giving rise to a presumption that the defendant committed the entire crime when each of three factors are proven beyond a reasonable doubt: the property must have been (1) stolen, (2) in custody of the accused and subject to his control to the exclusion of others, and (3) in the possession of the accused

recently after the larceny. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981).

The evidence in the present case was sufficient to prove the property had been stolen, since the gunman had crouched down behind the counter when he saw a customer pull up in front of the station, and because Dunn testified he noticed the gun missing immediately after the two masked men ran away. Testimony from both Dunn and Chief Batten showed that the same gun kept behind the counter by Dunn was found in defendant Woods' possession when he was arrested by Chief Batten several hours later. Further, Woods appeared quite nervous, wore a jacket matching the description of one worn by the robber, and initially gave the officer an alias name until he was told warrants were outstanding on a person of that name. We find this evidence to be sufficient to support the armed robbery charge against Woods and find this assignment of error to be without merit.

[7] Defendant Woods' final argument is that the court erred in sentencing him to a term of 20 years on the armed robbery conviction, a sentence in excess of the presumptive sentence under the Fair Sentencing Act. Woods contends that the single aggravating factor found by the trial court—"the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants"—was not supported by the evidence.

Under G.S. 15A-1340.4(f) of the Fair Sentencing Act, and the armed robbery statute, G.S. 14-87(d), the presumptive term for armed robbery is 14 years. *State v. Leeper*, 59 N.C. App. 199, 296 S.E. 2d 7, *disc. rev. denied*, 307 N.C. 272, 299 S.E. 2d 218 (1982); *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), *disc. rev. denied*, 307 N.C. 471, 299 S.E. 2d 227 (1983). A sentence in excess of the presumptive must be based upon a finding of one or more aggravating factors which are supported by a preponderance of the evidence. G.S. 15A-1340.4.

Defendant Woods maintains that even though the court found as a mitigating factor for defendant Gonzalez that he was a "passive participant or played a minor role in the commission of the offense," it does not necessarily follow that Woods was a leader or in a position of dominance in carrying out the crime. The evidence showed that two masked robbers were involved,

one carrying a gun and getting the money, the other serving as lookout. Defendant Woods argues that he should be considered less culpable than the other robber because he was found wearing a blue jacket, the color jacket worn by the lookout, and because the robbers drove away in Gonzalez's car and Gonzalez took all of the stolen money when it was "divided." The State argues, however, that Gonzalez's statement reveals he was the lookout, thus Woods must have been the gunman. The State also submits that the court's understanding of the evidence and its exercise of discretion in determining aggravating factors should not be second-guessed.

We agree and find no error. The court's judgment in sentencing will not be disturbed absent a showing of an abuse of discretion, prejudicial procedural conduct, inherent unfairness and injustice, or conduct which offends the public sense of fair play. *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962).

We note that although both defendants appealed from each of their respective convictions, neither of them presented any reason or argument in their briefs on any questions other than those relating to the armed robbery convictions. Thus, under Rule 28(b)(5), N.C. Rules App. Proc., exceptions taken to defendant Gonzalez's conviction for larceny of an automobile and to defendant Woods' conviction for carrying a concealed weapon are deemed abandoned.

The results are: We find no error as to the defendant Woods.

We find no error in the trial of the defendant Gonzalez except on the issue of whether Gonzalez's custodial statement was voluntary. This cause is remanded to the Superior Court of Montgomery County where a judge presiding over a criminal session will conduct a hearing, after due notice and with his counsel present, to determine whether the statement allegedly made by Gonzalez to the officers on 2 December 1981 was made voluntarily and understandingly. If the presiding judge determines that the statement was not understandingly and voluntarily made, he will make his findings of fact and conclusions and enter an order vacating the judgment appealed from, setting aside the verdict and granting Gonzalez a new trial. If the presiding judge makes a determination based upon competent evidence that the statement

of Gonzalez was made voluntarily and understandingly, he will make his findings of fact and conclusions of law and thereupon order commitment to issue in accordance with the judgment appealed from and entered on 25 June 1982.

Remanded with instructions as to the defendant Gonzalez.

Judges HEDRICK and WHICHARD concur.

ROGER SWINDELL AND WIFE, BETTY L. SWINDELL v. LARRY OVERTON, SUBSTITUTE TRUSTEE, THOMAS EDISON CAHOON AND WIFE, JULIA JONES CAHOON, WALTER G. CREDLE AND WIFE, DONNA S. CREDLE

No. 822SC283

(Filed 17 May 1983)

1. **Appeal and Error § 6.2— summary judgment for fewer than all defendants—right of immediate appeal**

The trial court's order allowing summary judgment for fewer than all the defendants affected a substantial right and was immediately appealable, although the trial judge did not certify that there was no just reason for delay, since plaintiffs had a right to have all of their claims in this action heard by the same judge and jury. G.S. 1-277; G.S. 7A-27(d); G.S. 1A-1, Rule 54(b).

2. **Mortgages and Deeds of Trust § 31— foreclosure proceeding—injunctive relief—commencement prior to order of confirmation**

In order for the clerk's jurisdiction in a foreclosure proceeding to be divested and jurisdiction to vest in the superior court to consider injunctive relief under G.S. 45-21.34, the action seeking injunctive relief must actually be commenced prior to any order of confirmation entered by the clerk. G.S. 45-21.35 and G.S. 1A-1, Rules 2, 3 and 65.

3. **Mortgages and Deeds of Trust § 27— foreclosure of separate deeds of trust—one sale breach of fiduciary duty—issue of damages**

Defendant trustee breached his fiduciary duty to plaintiff debtors in selling together in one foreclosure sale two tracts of land encumbered by two separate deeds of trust, and a genuine issue of fact as to whether plaintiffs were damaged by such breach of fiduciary duty was presented where plaintiffs' evidence on motion for summary judgment tended to show that the final bid for the two tracts was $47,980 while the fair market value of the tracts was in excess of $70,000, and defendants' evidence tended to show that the sale price reflected the fair market value of the lands sold. G.S. 1A-1, Rule 56(b).

4. **Mortgages and Deeds of Trust § 42— foreclosure sale—right of purchaser to crops**

The purchaser at a foreclosure sale is entitled to crops unsevered at the time of the delivery of the deed by the trustee.

5. **Rules of Civil Procedure § 15.1— allowance of amendment of complaint—no abuse of discretion**

The trial court did not abuse its discretion in permitting plaintiffs to amend their complaint after defendants had filed answer to the original complaint. G.S. 1A-1, Rule 15(a).

APPEAL by plaintiffs from *Peel, Judge.* Judgments entered 15 December 1981 in HYDE County Superior Court. Heard in the Court of Appeals 7 February 1983.

The events and circumstances upon which this appeal is based are, in summary, as follows. On 15 May 1969, plaintiffs executed a deed of trust on a 30 acre tract of land in Hyde County, to secure a promissory note for $2,000.00. On 7 April 1978, plaintiffs executed a deed of trust on a 42.6 acre tract of land in Hyde County to secure a note for $30,000.00. The beneficiary of the first deed of trust was B. M. Weston; of the second, Wachovia Bank. On 19 April 1979, plaintiffs executed a demand note to defendants Thomas E. Cahoon and wife Julia Cahoon for $2,589.00, in which note plaintiffs acknowledged that the notes to Weston and Wachovia had been assigned to the Cahoons, which obligation plaintiffs promised to pay the Cahoons on demand. On 23 April 1980, defendant Overton, as substitute trustee, instituted foreclosure proceedings under both deeds of trust. On 9 May 1980, an order of foreclosure was entered by Walter A. Credle, Clerk of Superior Court for Hyde County. On 7 August 1980, defendant Overton sold both tracts of land in one sale, although plaintiffs had requested that separate sales be held. At the sale, defendant Overton did not request separate bids. The foreclosure sale resulted in an initial bid of $40,000.00 by Lennie Perry. Upon resale, the high bid was submitted by Ira Hale, in the sum of $45,600.00. On second resale on 17 October 1980, Walter G. Credle was the high bidder, in the sum of $47,980.00.

On 27 October 1980, plaintiffs communicated to Walter A. Credle, Clerk of Superior Court, their objection to confirmation of the sale. On 29 October 1980, prior to 9:30 a.m., plaintiffs applied to Superior Court Judge Frank R. Brown for a restraining order to restrain the Clerk from confirming the sale. On the same date,

at 9:45 a.m., an order was entered by Lenora Bright, Assistant Clerk of Superior Court, confirming the sale to defendant Walter G. Credle for the sum of $47,980.00. At 1:45 p.m., on that date, an order signed by Judge Brown was filed, granting plaintiffs a temporary injunction, enjoining the confirmation of the sale pending the outcome of plaintiffs' action. That order indicates it was signed at 10:30 a.m.

In their original complaint, filed at 1:48 p.m. on 29 October 1980, plaintiffs alleged that the fair market value of the lands sold was at least $70,000.00, and that defendant Walter G. Credle's bid was substantially inadequate and inequitable. They sought to have confirmation of the sale restrained and to have a third resale. On 3 November 1980, Judge Brown heard plaintiffs' motion to continue in effect his preliminary injunction entered on 29 October and denied plaintiffs' motion, entering an order dissolving the temporary injunction granted by him on 29 October. Plaintiffs excepted to, but did not appeal from that order. On 3 November 1980, defendant Overton conveyed plaintiffs' lands to defendants Walter G. Credle and wife Donna.

On 12 November, defendant Walter G. Credle and defendants Overton and Cahoon filed answers. On 25 January 1981, plaintiffs moved to amend their complaint. On 20 February 1981, Judge David E. Reid, Jr. entered an order dismissing plaintiffs' original complaint and allowing plaintiffs 30 days to file an amended complaint. On 23 March 1981, plaintiffs filed their amended complaint.

In their amended complaint, plaintiffs set out four claims for relief. In their first claim, plaintiffs alleged, in summary, the above-stated circumstances and events and alleged that they were damaged in the sum of $60,000.00 by the failure of defendant Overton to fulfill his duties as trustee.

In their second claim, plaintiffs alleged that on 3 October 1980, plaintiffs requested of defendant Walter G. Credle that they be allowed to harvest their soybean crop, but that defendant Walter G. Credle refused their request and harvested the crop himself and retained the proceeds of the sale of the crop. Defendant Walter G. Credle converted plaintiffs' crop, to plaintiffs' damage.

In their third claim, plaintiffs alleged that defendant Overton wrongfully paid attorneys' fees on behalf of defendants Cahoon as a part of the cost of the foreclosure, to plaintiffs' damage.

In their fourth claim, plaintiffs alleged that defendants Cahoon charged and collected an unlawful rate of interest from plaintiffs.

In their prayer for relief, plaintiffs demanded that the Clerk's confirmation be permanently restrained or enjoined, or in the alternative that the order of confirmation be declared null and void and the lands resold; that they recover monetary damages from defendant Overton and defendants Cahoon under their first claim for relief; that they recover monetary damages of defendants Credle for conversion of plaintiffs' soybean crop; that they recover from defendants Cahoon money paid to them in excess of the legal rate of interest and also recover all interest paid to the Cahoons under the agreement with them; and that they recover of defendants Cahoon and defendant Overton the legal fees paid out by Overton. All defendants answered and subsequently moved for summary judgment as to all claims against them. At the hearing on those motions, the materials before Judge Peel, other than the pleadings were the affidavits of defendant Overton and plaintiff Roger Swindell. In his affidavit, Overton stated that the advertisement of the foreclosure sale generated widespread interest but few bidders; that he believed the high bid at final sale to reflect the fair market value of the properties; that the sale confirmation order was entered prior to Judge Brown's temporary restraining order; that after the restraining order was dissolved, a deed was delivered on 3 November 1980 conveying the properties to Walter G. and Donna S. Credle; and that the attorneys' fees reflected in his final account were reasonable. In his affidavit, plaintiff Roger Swindell repeated the essential allegations in his complaint; stated that on 27 October 1980, his attorney related to Walter A. Credle his objections to confirmation on the grounds of inadequacy of Walter G. Credle's bid; that he requested of defendant Walter G. Credle that he be allowed to harvest his soybean crop, but that defendant Credle refused; that defendant Credle harvested the crop and retained possession of the proceeds; and that defendant Overton's attorney performed no service in the foreclosure, but was paid $2,165.00 by defendant Overton out of the proceeds of the sale. Following the hearing,

Judge Peel entered summary judgment in favor of defendant Overton on plaintiffs' first claim, but denied summary judgment on plaintiffs' third claim; entered summary judgment in favor of defendants Cahoon on plaintiffs' first claim, but denied summary judgment as to plaintiffs' third and fourth claims; and entered summary judgment in favor of defendants Credle as to the claim against them. Plaintiffs have appealed from those judgments.

J. Michael Weeks, P.A., by William H. Bingham, Jr., for plaintiff-appellants.

Cherry, Cherry and Flythe, by Thomas L. Cherry and Joseph J. Flythe, for defendant-appellee Overton.

Geo. Thomas Davis, Jr. for defendant-appellees Credle.

Taylor and McLean, by Mitchell S. McLean, for defendant-appellees Cahoon.

WELLS, Judge.

[1] Although not raised by appellees, the first issue we must address is whether this appeal is premature. G.S. 1A-1, Rule 54(b) of the Rules of Civil Procedure provides:

Judgment upon multiple claims or involving multiple parties.—

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of

decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In his judgments, Judge Peel did not state that there was no just reason for delay, and thus "certify" his judgments as final and ripe for appellate review. We hold, however, that under the decisions of our Supreme Court in *Bernick v. Jurden,* 306 N.C. 435, 293 S.E. 2d 405 (1982), and *Oestreicher v. Stores,* 290 N.C. 118, 225 S.E. 2d 797 (1976), plaintiffs had a right pursuant to G.S. 1-277 and 7A-27(d) to have all of their claims in this action heard by the same judge and jury. We, therefore, proceed to consider the merits of plaintiffs' appeal.

While plaintiffs' claims were disposed of by way of summary judgment, we note that some of the facts essential to our decision—that both of the tracts of land were sold together in one sale; that two upset bids were filed, with defendant Walter G. Credle eventually submitting the highest bid; and that an Assistant Clerk of Superior Court for Hyde County confirmed the sale to Walter G. Credle—are not in dispute. It is well-settled that summary judgment is only proper when the undisputed facts warrant judgment as a matter of law. *Lowe v. Bradford,* 305 N.C. 366, 289 S.E. 2d 363 (1982). It is in light of the foregoing that we review the judgments rendered by Judge Peel.

The second issue we address is whether plaintiffs are entitled to pursue injunctive relief in this action. We answer that issue against plaintiffs.

G.S. 45-21.34 provides, in pertinent part, that "[a]ny owner of real estate . . . may apply to a judge of the superior court, *prior to the confirmation* of any sale of such real estate by a . . . trustee . . . authorized to sell the same, to enjoin such sale *or the confirmation* thereof, upon the ground that the amount bid or price offered therefore is inadequate and inequitable and will result in irreparable damage to the owner . . ., or upon any other legal or equitable ground which the court may deem sufficient . . . ." (Emphasis supplied).

G.S. 45-21.35 provides, in pertinent part, that "[t]he court or judge granting such order or injunction, . . . shall have the right *before, but not after, any sale is confirmed* to order a resale . . . ." (Emphasis supplied).

[2] These foregoing statutory provisions must be considered in *para materia* with G.S. 1A-1, Rules 2, 3, and 65 of the Rules of Civil Procedure. Rule 2 provides, in summary, that there shall be but one form of action to be known as a civil action. Rule 3 provides, in summary, that a civil action is commenced by filing a complaint, or by the issuance of a summons under certain conditions not applicable to this case. The provisions of Rule 65 clearly imply that injunctive relief is available only in pending civil actions. *See* Shuford, N.C. Practice and Procedure (2nd ed.) § 65-6. The record before this court clearly indicates that the Clerk's Order of Confirmation was entered at 9:45 a.m. on 29 October 1980, and that plaintiffs did not file their complaint until 1:48 p.m. on that date. When plaintiffs filed their motion for an injunction at 9:30 a.m. on that date, this action had not been commenced and Judge Brown, therefore, was without jurisdiction to hear plaintiffs' motion or to enter his initial order, which was entered at 10:30 a.m. on that date. *See Freight Carriers v. Teamsters Local*, 11 N.C. App. 159, 180 S.E. 2d 461, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 601 (1971); *see also In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978); *Swenson v. Assurance Co.*, 33 N.C. App. 458, 235 S.E. 2d 793 (1977). We hold that for the Clerk's jurisdiction in a foreclosure to be divested and jurisdiction to vest in the superior court to consider injunctive relief under G.S. 45-21.34, the action seeking injunctive relief must be actually commenced prior to any order of confirmation entered by the Clerk. Once the Clerk's Order of Confirmation is entered, an action for injunctive relief will not lie, and Judge Brown, in his order of 3 November 1980, therefore, correctly concluded that he was without jurisdiction to enjoin the Clerk's Order of Confirmation. Judge Peel, therefore, correctly entered summary judgment for defendants Overton, Cahoon and Credle as to plaintiffs' right to injunctive relief, and we therefore affirm Judge Peel's judgment in that respect.

[3] The next issue we address is whether defendant Overton, acting as substitute trustee, breached his fiduciary duty to plaintiffs by selling the two separately indentured tracts of land in one sale. On this issue, we are persuaded that the materials before Judge Peel raised genuine issues of material fact as to the manner of notice and sale and resulting injury or damage to plaintiffs. G.S. 1A-1, Rule 56(b) of the Rules of Civil Procedure. In their first claim for relief in their amended complaint, plaintiffs alleged the

existence of the two separate initial debts and two separate deeds of trust on the two separate tracts of land. The affidavits before Judge Peel show that these facts are not in dispute. Plaintiffs also alleged that the two separate tracts were foreclosed in one proceeding, noticed for sale together in all notices of sale, and actually offered for sale and sold together at each sale by defendant Overton. These facts are not in dispute. Plaintiffs further alleged that they had requested that defendant Overton request separate bids, that the highest or final bid, confirmed by the Clerk, was in the amount of $47,980.00, while the fair market value of the lands sold was in excess of $70,000.00, and that they were damaged by defendant Overton's failure to fulfill his duties as trustee. In his affidavit in support of his motion for summary judgment, defendant Overton stated that the sale price of $47,980.00 reflected the fair market value of the lands sold and set out facts and circumstances to support that opinion. In response to Overton's motion, plaintiffs offered the affidavit of Larry W. Windley, a licensed real estate broker experienced in the valuation, listing, and sale of real property in Hyde County, who estimated the fair market value of plaintiffs' two tracts of land to be $70,000.00. Thus, the materials before Judge Peel reflect a genuine material issue of fact as to the fair market value of the property sold.

While our Courts have consistently held that inadequacy of sale price alone is not sufficient grounds to attack or overturn a foreclosure under a power of sale, such inadequacy of sale price, coupled with any other irregularity or inequitable element, constitutes grounds for relief. *See Foust v. Loan Assoc.*, 233 N.C. 35, 62 S.E. 2d 521 (1950), and cases cited therein; *Sloop v. London*, 27 N.C. App. 516, 219 S.E. 2d 502 (1975). The dispositive question, therefore, is whether defendant Overton's conduct of the sale at issue in this case was irregular or inequitable as to plaintiffs. In *Mills v. Building and Loan Assoc.*, 216 N.C. 664, 6 S.E. 2d 549 (1940), Justice Barnhill (later Chief Justice), speaking for our Supreme Court, stated the duties and obligations of a trustee under a deed of trust as follows:

> That it is inequitable to permit a mortgagee to purchase the mortgagor's equity of redemption apparently was first declared (inferentially) by this Court in *Lee v. Pearce*, 68 N.C. 76, and in express terms in *Whitehead v. Hellen*, *supra*. The

principle was fully discussed and reaffirmed in *McLeod v. Bullard, supra.*

The restrictions upon the creditor in respect to the security when the conveyance was made directly to him in the form of a mortgage brought about the creation of deeds of trust as a more acceptable form of conveying real property for security. This form of security has now come into general and, in some instances, universal use. . . . When a sale is had under power in this form of security the creditor may bid at the sale, . . . for, by the intervention of a disinterested third party, the opportunity for oppression is removed.

The object of deeds of trust is, by means of the introduction of trustees as impartial agents of the creditor and debtor alike, to provide a convenient, cheap and speedy mode of satisfying debts on default of payment; to assure fair dealing and eliminate the opportuinity for oppression; to remove the necessity of the intervention of the courts; and to facilitate the transfer of the note or notes secured without the necessity for a similar transfer of the security.

The relaxation of the strict rules equity imposes upon the mortgagor in relation to deeds of trust is predicated upon the theory that the trustee is a disinterested third party acting as agent both of the debtor and of the creditor, thus removing any opportunity for oppression by the creditor and assuring fair treatment to the debtor. He is trustee for both debtor and creditor with respect to the property conveyed. A creditor can exercise no power over his debtor with respect to such property because of its conveyance to the trustee with power to sell upon default of the debtor. . . .

The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor. . . . And he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale. . . . He is charged with the duty of fidelity as well as impartiality, of good faith and every requisite degree of diligence, of making due advertisement and giving due no-

> tice. . . . Upon default his duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries. (cites omitted).

See also Sloop v. London, supra.

The irregularity or inequitable action asserted by plaintiffs was the notice, advertisement, sale, and resale of plaintiffs' two separately indentured tracts of land together. Our careful review of the entire statutory scheme relating to foreclosures under a power of sale, *see* Article 2A of Chapter 45 of the General Statutes, persuades us that sales of separately indentured properties must be separately conducted, in order to (1) maximize the potential value of each tract; (2) to facilitate the debtor's opportunity to satisfy each separate debt before sale is completed; (3) to properly allow upset bids on each separate property; and (4) to properly apply the proceeds from each sale, including the surplus, if any. The forecast of evidence before Judge Peel clearly established that defendant Overton noticed, advertised and sold the properties together, in one offering. We hold that this constituted a breach of his fiduciary duty to plaintiffs.

Defendant Overton contends that the execution by plaintiffs of the 14 October 1978 note to defendants Cahoon had the effect of combining the two deeds of trust so as to allow a single foreclosure sale. We disagree. Neither do we agree with Overton's argument that our Supreme Court's opinion in *Dillingham v. Gardner,* 219 N.C. 227, 13 S.E. 2d 478 (1941), furnishes the blessing Overton seeks for his single sale. In *Dillingham,* the properties in the two deeds of trust were just separately offered for sale, then sold together for a higher combined price. The Court stated:

> While the offering of the properties in the two deeds of trust together was unusual, no prejudice was thereby created against the plaintiff, but, on the contrary, this proceeding inured to its benefit rather than to its detriment in that the amount realized thereby was increased by $200.00, and the amount thereof, $2,200.00, was within $4.00 of the total amount due on both notes, $2,204.00.

For the reasons stated, we must reverse the trial court's entry of summary judgment for defendant Overton as to plaintiffs'

claim for relief for breach of fiduciary duty and remand for trial on this claim.[1]

[4] We next address plaintiffs' claim for relief against defendants Credle, who were the purchasers at the final sale. Because we have held that the trustee's final sale to the Credles was validly confirmed and may not be set aside, plaintiffs' claim for conversion of their soybean crop must fall. The long-standing rule in North Carolina is that the purchaser at a foreclosure sale is entitled to crops unsevered at the time of the delivery of the deed by the trustee. *Collins v. Bass*, 198 N.C. 99, 150 S.E. 706 (1929); *see also Price v. Davis*, 208 N.C. 75, 179 S.E. 1 (1935). While this rule, on the surface, may seem harsh, and may, under some circumstances, result in significant losses to farm debtors, we find no basis in the decisional law of this State to hold to the contrary. All of the materials before Judge Peel show that plaintiffs' soybean crop had not been harvested on 3 November 1980, the date the trustee's deed was delivered to the Credles. There being no factual dispute on these matters, defendants Credle were entitled to judgment as a matter of law, and to summary judgment on plaintiffs' second claim for conversion.

We have examined plaintiffs' other assignments of error and find them to be without merit.

[5] Finally, we address defendant Overton's cross-assignment of error to the trial court's granting plaintiffs' motion to amend their complaint. G.S. 1A-1, Rule 15(a) of the Rules of Civil Procedure provides that leave to amend pleadings shall "be freely given when justice so requires." The ruling on such a motion is in the discretion of the trial court; and the objecting party must show that he will be prejudiced if the motion is allowed. *See Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979) and cases cited therein; *Public Relations, Inc. v. Enterprises, Inc.* 36 N.C. App. 673, 245 S.E. 2d 782 (1978). Defendant Overton has not shown any prejudice by this action of the trial court, there was no abuse of discretion, and this cross-assignment is overruled.

1. Although plaintiffs also argue that defendant Overton failed to properly advertise and post notice of the sales, defendant Overton's affidavit clearly establishes compliance with the statutory requirements, *see* G.S. 45-21.17, which were the requirements incorporated into the deeds of trust. Plaintiffs have not rebutted this showing, and it therefore appears that the issue of proper notice and advertising has been settled in defendant Overton's favor.

The results are:

As to the trial court's granting of summary judgment against plaintiffs on plaintiffs' claim to set aside the Clerk's confirmation of sale,

Affirmed.

As to the trial court's granting defendant Overton's motion for summary judgment as to plaintiffs' claim for damages for breach of fiduciary duty,

Reversed.

As to the trial court's granting summary judgment on plaintiffs' claim against defendants Credle for conversion of crops,

Affirmed.

As to the trial court's allowing plaintiffs' motion to amend their complaint,

Affirmed.

In all other respects, the judgments entered by Judge Peel are

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

THE NORTH CAROLINA STATE BAR v. REGINALD L. FRAZIER

No. 8210NCSB374

(Filed 17 May 1983)

1. **Constitutional Law § 5— separation of powers—appointments by Governor, Lieutenant Governor and Speaker of House to State Bar Hearing Commission**

Although the Governor, the Lieutenant Governor and the Speaker of the House make appointments to the State Bar Hearing Commission, there is no provision mandating the appointment of legislators to the Commission and the ability of the government officials to make appointments is alone insufficient to show a violation of the separation of powers principle.

2. **Attorneys at Law § 11— sufficiency of Hearing Committee's findings and conclusions**

The findings, conclusions and decisions of the State Bar Disciplinary Hearing Committee were supported by substantial competent evidence.

3. **Attorneys at Law § 11— disciplinary hearing—discovery**

The State Bar Rules and not G.S. 84-30 address the question of discovery in disciplinary proceedings, and inasmuch as defendant failed to take full advantage of the discovery procedures available to him, he could not complain that he was not provided full disclosure and discovery prior to his hearing.

APPEAL by defendant from the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar. Order entered 8 September 1981. Heard in the Court of Appeals 16 February 1983.

The North Carolina State Bar instituted this disciplinary action before the Hearing Committee by a complaint alleging that defendant, a licensed attorney, had violated various Disciplinary Rules of the Code of Professional Responsibility. All of the alleged violations arose out of defendant's representation of Robert Vierheller in a domestic action.

Evidence presented by the State Bar at the disciplinary hearing tended to show the following: On 21 June 1978, Robert Vierheller and his wife entered into a separation agreement. They subsequently reunited and then separated again, entering into a second separation agreement on 31 October 1978. On 3 May 1979, Vierheller went to defendant's law office, told defendant he was having marital problems, and told him he wanted a divorce. Vierheller informed defendant that he and his wife had entered into two separation agreements. Defendant was given copies of

both agreements. Defendant and Vierheller discussed defendant's fee, and Vierheller told defendant that the divorce would be contested.

In September, Vierheller returned to defendant's office and signed a complaint, dated 29 June 1979, seeking an absolute divorce. It was alleged in the complaint that Vierheller and his wife had continuously lived separate and apart since 21 June 1978. Vierheller's wife answered the complaint on 10 October 1979, and counterclaimed for $1,340 to pay the costs of her transportation to her native home in Okinawa, Japan; for custody of the minor children of the parties; for enforcement of the parties' 31 October 1978 separation agreement which provided for $300 per month in child support; and for reasonable attorney's fees. Mrs. Vierheller's attorney also issued a subpoena requiring Vierheller to provide certain documents and served notice on defendant that a hearing date was set for 5 November 1979.

After signing the complaint, Vierheller heard nothing further about the matter until Friday, 2 November 1979. On that date, his wife informed him that she would see him in court on Monday, 5 November. Concerned, Vierheller called defendant and was told that defendant was going in for a postponement and that Vierheller did not have to appear.

On 5 November 1979, without appearing in court, defendant filed a voluntary dismissal of the claims in the complaint, apparently realizing that he had alleged the wrong separation date. He made no attempt to continue the scheduled hearing. District Court Judge Herbert O. Phillips, III conducted the hearing and entered an order in Mrs. Vierheller's favor on her counterclaim. The order was signed and dated 12 March 1980, for the 5th day of November 1979. In the meantime, on 21 November 1979, defendant filed a second complaint for absolute divorce, alleging a 31 October 1978 date of separation.

The first knowledge Vierheller received of his wife's judgment against him came on 17 March 1980 when he was informed that the sheriff was attempting to execute on the judgment. Vierheller immediately went to defendant's office, and defendant told Vierheller not to worry about the execution, that he was going to appeal. On 14 April 1980, defendant filed a motion, pursuant to Rule 60(b)(5) of the Rules of Civil Procedure, asking that

Mrs. Vierheller's judgment be vacated in that Vierheller would suffer severe hardship if compelled to satisfy the judgment. Defendant did not request a hearing on this motion until 27 May 1980; that same day he learned from Vierheller that the sheriff had a warrant for Vierheller's arrest.

On 3 June 1980, Vierheller went to defendant's office, and defendant told him that a 9 June 1980 court date had been set on his motion. On that same date, Mrs. Vierheller's attorney moved that an order issue directing Vierheller to show cause why he should not be held in contempt for failing to pay the $1,340. Vierheller went to court on 9 June, but defendant did not appear. Defendant's secretary brought a letter to the court which stated that defendant had another court case and could not appear. The motion was rescheduled for hearing on 30 June. On that date, the case was rescheduled at defendant's request for 2 July. On 2 July, defendant appeared and represented Vierheller. Following the hearing, the court entered an order finding Vierheller in willful contempt for failing to pay the $1,340. Defendant told Vierheller not to worry because, he, defendant, was going to appeal. Notice of appeal, however, was not filed by defendant until 15 July 1980.

District Court Judge James Reagan, who presided over the 2 July hearing, signed a written order on 25 August 1980, for 2 July 1980, holding Vierheller in contempt and ordering the clerk to place the case on the trial calendar for review on 8 September 1980. This order was served on defendant by mail on 27 August 1980.

On 18 September 1980, Vierheller's wife called Vierheller and asked him why he wasn't in court on 8 September. Vierheller was unaware that he had an 8 September court date because defendant had never informed him about it. Vierheller went to see defendant and asked him to withdraw from his case. A release was prepared by defendant's secretary, dated 19 September 1980, which Vierheller signed, terminating the services of defendant and releasing him "from any and all liability and professional responsibility in these matters."

In answering interrogatories from the State Bar, defendant did not contend that prior to 2 November 1979, he had notified Vierheller of the hearing scheduled for 5 November 1979. In

responding to the State Bar's request for admissions, defendant admitted that he did not attend the 8 September 1980 hearing.

Defendant did not testify before the Hearing Committee. He presented evidence tending to show that, after finding Vierheller in contempt, Judge James Reagan told Vierheller he had until 8 September 1980 to purge himself of contempt by paying what he had been ordered to pay. Barbara Evans, an employee of defendant, testified that Vierheller had brought only one separation agreement when he came in for his initial appointment but had told them there were two. She further testified that defendant was trying a criminal case in Superior Court on 5 November 1979, and a letter was delivered to the court on 5 November by defendant's secretary, Dianna Cooke, stating that defendant was in Superior Court that day. Ms. Evans could not produce a copy of that letter.

At the completion of the hearing, the Hearing Committee filed a written order, finding facts and making the following conclusions of law:

> The conduct of the defendant, Reginald L. Frazier, was in violation of North Carolina General Statute 84-28(b)(2), in that the defendant violated the Code of Professional Responsibility of the North Carolina State Bar as follows:
>
> 1. By failing to notify his client of the hearing set for November 5, 1979, and of the subpoena issued for the production of documents or objects, the defendant neglected a legal matter entrusted to him, in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility of the North Carolina State Bar.
>
> 2. By advising his client not to attend the November 5, 1979, hearing; by filing the voluntary dismissal of his client's claim; and by failing to attend the November 5, 1979 hearing, or give due or adequate notice to the Court of his reasons for not attending, when a counterclaim by the opposing party was pending and the matter being calendared for hearing, the defendant neglected a legal matter entrusted to him and handled a legal matter without adequate preparation under the circumstances then and there existing in violation of Disciplinary Rule 6-101(A)(3), and 6-101(A)(2) . . .

3. By failing to take appropriate steps or timely file appropriate process in March, 1980, upon receipt of the March 12, 1980 order, the defendant . . . [violated] Disciplinary Rule 6-101(A)(3) and 6-101(A)(2) . . .

4. By failing to timely and properly file the notice of appeal in July, 1980, the defendant . . . [violated] Disciplinary Rule 6-101(A)(3), and 6-101(A)(2) . . .

5. By failing to advise his client of the hearing scheduled for September 8, 1979 [sic], and by failing to attend that hearing or take other appropriate measures concerning that hearing, the defendant . . . [violated] Disciplinary Rule 6-101(A)(3) and 6-101(A)(2) . . .

6. By having his client sign the release dated September 19, 1980 . . . the defendant attempted to exonerate himself from or limit his liability to his client for his personal malpractice in violation of Disciplinary Rule 6-101(A) . . .

The Committee ordered that defendant be suspended from the practice of law in the State of North Carolina for a period of 12 months. From this order, defendant appeals.

David R. Johnson, for the North Carolina State Bar.

Bowen C. Tatum, Jr., for defendant appellant.

JOHNSON, Judge.

I

[1] In his first assignment of error, defendant indirectly challenges the Committee's order by attacking the composition of the State Bar Hearing Commission. Specifically, he contends that the members of the Hearing Commission of the North Carolina State Bar are appointed in violation of the Separation of Powers clause in Article 1, Section 6 of the North Carolina Constitution which reads: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

Membership on the Hearing Commission is statutorily determined by G.S. 84-28.1. This statute provides for a total of fifteen members, 10 of whom are required to be members of the State

Bar, appointed by the Council of the State Bar. The five remaining members are to be non-lawyers; three of whom are to be appointed by the Governor, one by the Lieutenant Governor and one by the Speaker of the House of Representatives. Defendant challenges the appointment of Hearing Commission members by the Governor, the Lieutenant Governor and the Speaker of the House based on the Supreme Court decision in *State ex rel. Wallace v. Bone* and *Barkalow v. Harrington*, 304 N.C. 591, 286 S.E. 2d 79 (1982). We find this case to be inapposite.

In *Bone*, the Supreme Court held that G.S. 143B-283(d), which required four legislators to serve on the Environmental Management Commission (EMC), violated the separation of powers principle of the North Carolina Constitution because the duties of the EMC are administrative or executive, rather than legislative, in nature. We recognize that the State Bar, like the EMC, does not perform a legislative function. Rather, the State Bar has certain regulatory powers, foremost of which is its power to discipline and regulate attorneys under G.S. 84-15 and 84-23. This is where the similarity between *Bone* and the present case ends. In *Bone*, legislators were required to serve on the EMC. There is no provision mandating the appointment of legislators to the State Bar Hearing Commission, and defendant has not shown that any members of the legislature actually serve on the Commission. Although the Governor, the Lieutenant Governor and the Speaker of the House make appointments to the Commission, we do not believe, and indeed defendant cites no cases to show, that this alone is sufficient to show a violation of the separation of powers principle. This assignment of error is overruled.

II

[2] Next, defendant maintains that all six of the Hearing Commission's conclusions of law are "legally insufficient."

The appropriate standard for judicial review of a disciplinary hearing is the "whole record" test set out in the Administrative Procedure Act at G.S. 150A-51(5). Under the "whole record" test, the reviewing court is required to consider the evidence which supports the administrative findings and must also consider contradictory evidence. "Under the whole record test there must be substantial evidence to support the findings, conclusions and result. G.S. 150A-51(5). The evidence is substantial if, when con-

sidered as a whole, it is such that a reasonable person might accept [it] as adequate to support a conclusion." *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E. 2d 89, 98-99 (1982). Applying this test to the present case, we hold that the findings, conclusions and decision of the Disciplinary Hearing Committee are supported by substantial evidence.

Defendant contends that the Committee's Conclusion of Law 1 and 2 are legally insufficient because defendant had advised the District Court in a letter that he was required to be in Superior Court on 5 November 1979. We do not agree. Conclusion of Law 1, concerning defendant's failure to notify Vierheller of the 5 November hearing, is supported by uncontradicted evidence that Vierheller first learned of the 5 November court date from his wife. Vierheller thereafter had to contact defendant regarding this information. Conclusion of Law 2 is partially supported by uncontradicted evidence (1) that, upon contracting the defendant, Vierheller was told not appear; (2) that defendant filed a voluntary dismissal; and (3) that defendant did not appear. There remains, then, only the question of whether the defendant gave adequate notice to the court of his reasons for not attending. The only evidence that defendant gave such notice was Barbara Evans' testimony about a letter which she neither prepared nor delivered to the court. Obviously, the Hearing Committee did not find her testimony credible. The fact that the court on 5 November ruled on Mrs. Vierheller's counterclaim is evidence that the court did not receive adequate notice from defendant of his reasons for not attending. Under the "whole record" test, we cannot substitute our judgment for the Committee's in choosing between two reasonably conflicting views of the evidence. *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979). There is clearly substantial evidence in the record to support the Committee's findings upon which Conclusions of Law 1 and 2 are based.

As to the Committee's Conclusion of Law 3, there is substantial evidence that defendant waited until 14 April 1980 to file a motion to vacate the order, signed 12 March 1980, and that he did not request a hearing on this motion until 27 May 1980. The Committee made findings of fact reflecting this evidence, and these findings clearly support this conclusion of law.

The Committee's fourth conclusion of law is also supported by findings which are based on substantial, uncontradicted evidence. The Committee found that notice of appeal was filed on 15 July 1980, which was more than ten days after the 2 July 1980 order was entered. Notice of appeal is required to be filed within ten days of entry of judgment. *See* Rule 3, Rules of Appellate Procedure; G.S. 1-279. The Committee also found that defendant did not serve notice on opposing counsel and did nothing more to perfect the appeal. These findings are supported by the notice of appeal itself. Defendant attempts to explain the late filing of the notice of appeal by blaming it on an administrative oversight in the operation of his office. This is clearly no excuse for the failure to file notice of appeal in a timely manner.

In its Conclusion of Law 5, the Committee stated that defendant failed to advise his client of the hearing scheduled for 8 September 1979 and failed to attend that hearing on his client's behalf. (The year 1979 was obviously a typographical error since the only 8 September hearing mentioned in the findings of fact was in 1980). This conclusion is based on the Committee's findings which are supported by the following substantial evidence: Vierheller testified that defendant was present at the 2 July 1980 hearing. The written order signed by the presiding judge on 25 August 1980, for 2 July 1980, provided that the clerk was to place the case on the 8 September 1980 calendar for review. On 27 August 1980, defendant was served by mail with a copy of this order. Finally, Vierheller's uncontradicted testimony shows that defendant never advised him of the 8 September hearing.

The last conclusion of law which defendant challenges concerns the release which Vierheller signed at defendant's request. Defendant admitted in his answer to the complaint that he requested the release on 19 September 1980. We have reviewed the language of the release and find that it is a clear attempt by defendant to exonerate himself from personal malpractice. This is forbidden by Disciplinary Rule 6-102(A).

We hold that the Committee's findings of fact are supported by substantial competent evidence and that those findings in turn support its conclusions of law. All of defendant's assignments of error to the Committee's conclusions of law are overruled.

III

Next, defendant argues that he was deprived of due process due to the cumulative effect of certain errors committed during the hearing. Although a fair hearing is a basic requirement of due process, *see e.g. Re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 2d 942 (1955), we are unable to find any merit to defendant's argument.

Defendant first requests this Court to "impose rules of laches or equity" because there was an unexplained lapse of time between the formal grievance against defendant, dated 26 September 1980, and the filing of the complaint of the Grievance Committee on 15 April 1981. Defendant has failed to show that this lapse of time was, in fact, unreasonable or to show any prejudice caused thereby. Furthermore, defendant's allegations of delay have not been made the basis of any exception or specific assignment of error. Defendant has thus waived his right to appellate review of this argument. Rule 10(a), Rules of Appellate Procedure.

Defendant next contends that the powers and duties of the counsel for the State Bar, as set forth in State Bar Rules, Article IX, § 4 (3) and § 7, are inconsistent with due process because they create an appearance of "collusion" between counsel, the Disciplinary Hearing Commission, and the Disciplinary Hearing Committee. Defendant has neither shown nor alleged any actual collusion. This assignment of error is overruled.

Defendant also complains that he was prejudiced by "[t]he denial of . . . [his] efforts to inquire into the grievance committee's probable cause hearing . . ." The record reveals that the materials presented to the Grievance Committee were, in fact, turned over to or made available to defendant. Furthermore, even if defendant had a due process right to appear before the Grievance Committee, which issue we do not decide here, the record fails to show that defendant made any request to personally appear before that Committee. No prejudicial error has been shown.

Next, defendant objects to certain rulings on motions made by the Chairman of the Hearing Committee. He maintains that these rulings were made without consultation, advice or consent from other committee members. There is no indication in the

record that any of the members disagreed with or objected to these rulings. Again, defendant has failed to show prejudicial error.

Defendant further complains that the Chairman improperly interfered with his cross-examination of Robert Vierheller. We have reviewed the numerous exceptions cited by defendant in support of this argument and can find no prejudicial error.

Finally, defendant argues that the Hearing Committee should have called Judge Herbert O. Phillips, III and Mrs. Vierheller's attorney as witnesses for the Committee to explain the delay between the 5 November 1979 hearing and the 12 March 1980 date the order was actually signed. Defendant could have called these witnesses had he believed they had relevant testimony to present. This, he did not do. Defendant essentially concedes in his brief that there is no merit to his argument. We agree. This assignment of error is overruled.

IV

[3] In his last argument, defendant contends his due process rights "were violated when he was not provided with full disclosure and discovery before the trial" as required by G.S. 84-30. G.S. 84-30 does not address the question of discovery in disciplinary proceedings; it simply provides for the issuance of process for the compulsory attendance of witnesses, the production of documents and representation by counsel. The State Bar Rules specifically state that discovery is available to all parties in accordance with the North Carolina Rules of Civil Procedure. State Bar Rules, Article IX, Section 14(7). Defendant, in fact, submitted Requests for Admission which the State Bar answered. The record reveals that defendant did not make a proper request for any other discovery. Inasmuch as defendant failed to take full advantage of the discovery procedures available to him, he cannot now complain that he was not provided full disclosure and discovery prior to the hearing. We find no merit to this argument.

For the foregoing reasons, the order appealed from is

Affirmed.

Judges WELLS and HILL concur.

HERBERT WILLIAM KENNEDY, JR. v. ELIZABETH ROSS STARR

No. 8218SC418

(Filed 17 May 1983)

1. **Rules of Civil Procedure § 60.2— default judgment—constructive service on defendant—no mistake, inadvertence, surprise or excusable neglect**

A default judgment entered after constructive service was obtained on defendant through the Commissioner of Motor Vehicles could not be set aside under G.S. 1A-1, Rule 60(b)(1) on the ground that it was the result of "mistake, inadvertence, surprise, or excusable neglect."

2. **Rules of Civil Procedure § 60.2— default judgment—refusal to set aside for other reason justifying relief—no abuse of discretion**

The trial court did not abuse its discretion in refusing to set aside a default judgment under G.S. 1A-1, Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment" in an automobile accident case in which constructive service was obtained on defendant through the Commissioner of Motor Vehicles, although plaintiff's counsel had negotiated with defendant's automobile liability insurer and failed to notify the insurer of the suit.

Judge WHICHARD concurring.

APPEAL by defendant from *Kivett, Judge.* Order entered 18 February 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 March 1983.

This is an appeal from an order denying defendant's motion, purportedly made pursuant to N.C. Gen. Stat. § 1A-1, Rules 60(b)(1) and 60(b)(6), to set aside a "default judgment and entries of default entered herein."

The allegations contained in defendant's motion are summarized as follows. Defendant was never actually served with process. She did not receive the mailings from the Commissioner of Motor Vehicles and had not had actual knowledge of the filing of this action. She had at no time received any communication from plaintiff, his counsel, or any other source, "regarding the pendency of this civil action or any proceedings that may have taken place herein."

Plaintiff, through counsel, had been in contact with defendant's insurance carrier. Representatives of defendant's carrier "made multiple requests for information to counsel for the plaintiff soon after the accident which were not replied to." Plaintiff,

through counsel, had "proceeded with this civil action without at any time notifying said insurance carrier that a civil action had been initiated or that the Defendant's whereabouts could not be determined."

This action was commenced on 19 November 1979, two years and ten months after the accident occurred. The first notice of the action to defendant's carrier was by letter of 30 June 1981 from plaintiff's counsel enclosing a copy of the default judgment. This was "long after the carrier's file on the accident had been closed and destroyed." Counsel for plaintiff did not communicate with any representative of the carrier with regard to the accident from approximately the end of 1977 until the 30 June 1981 letter enclosing the default judgment.

Finally, defendant alleges that she has a meritorious defense in that the accident was caused, not by her negligence, but by "the [icy] conditions then present and the location of Plaintiff's car in the left lane of [the] highway."

In support of her motion the defendant filed her own affidavit, an affidavit of a claims representative from her liability insurance carrier, and an affidavit of her father. These affidavits tended to support the allegations in the motion.

After a hearing, the trial judge made the following findings:

1. On January 3, 1977, the plaintiff was operating his automobile in a northerly direction of N.C. Highway 68 approximately 2.8 miles north of the city limits of High Point, North Carolina. After the plaintiff stopped his vehicle for traffic ahead of him, a vehicle operated by the defendant failed to stop and collided with the rear of the plaintiff's vehicle, resulting in personal injuries being suffered by the plaintiff.

2. The defendant reported the accident to her liability insurance company. Thereafter, both the plaintiff and his attorney discussed the plaintiff's claim for personal injuries with the Claims Department of the defendant's liability insurance company. However, the claim was not resolved.

3. The plaintiff filed this action for damages for personal injuries on November 19, 1979. The Sheriff of Guilford County was unable to serve the original summons, noting that he

was unable to locate the defendant and that the defendant had moved, leaving no forwarding address. The plaintiff procured the issuance of an alias summons on December 5, 1979. The Sheriff of Guilford County returned this summons unserved, with the notation that the defendant had moved to Alexandria, Virginia.

4. The defendant resided in Fairfax, Virginia from July, 1978 to March 1980, when she moved temporarily to Springfield, Virginia. The plaintiff attempted service of process of pluries summons dated December 18, 1979 and December 28, 1979, by certified mail, addressed to the defendant's residence in Fairfax, Virginia. The certified letters were not delivered, and [were] returned as unclaimed. On January 22, 1980, the plaintiff obtained issuance of a pluries summons directed to the defendant at her Fairfax, Virginia address, and the plaintiff placed such process in the hands of the Sheriff of Fairfax County, Virginia for service. Said pluries summons was returned by the Sheriff of Fairfax County on February 27, 1980, bearing the notation "Elizabeth Ross Starr seems to be avoiding service. Is vacating house, and will not reply to numerous messages left."

5. The plaintiff obtained the issuance of another pluries summons on March 7, 1980, and served this process upon the Commissioner of Motor Vehicles, the process agent for the defendant, pursuant to N.C.G.S. § 1-105.1. The registered letter sent by the North Carolina Department of Motor Vehicles to defendant's Fairfax, Virginia address was returned unclaimed, but showed a forwarding address at 1403 Gerard Street, Rockville, Maryland 20850. On May 19, 1980, the plaintiff caused to be issued another pluries summons and caused said summons to be served upon the North Carolina Commissioner of Motor Vehicles, pursuant to N.C.G.S. § 101-105.1. The North Carolina Department of Motor Vehicles forwarded said registered letter to defendant's residence at 1403 Gerard Street, Rockville, Maryland. Said registered letter was returned unclaimed, after attempted delivery from June 2 through June 20, 1980.

6. Default was entered against the defendant on August 11, 1980. Thereafter, during the session of Guilford County

Superior Court beginning June 1, 1981, Robert A. Collier, Jr., Superior Court Judge Presiding, heard the evidence presented by the plaintiff with respect to the injuries he received in the accident and his damages, and entered detailed findings of fact and conclusions based thereon in the judgment dated June 3, 1981.

7. The affidavits and other materials offered by the defendant fail to satisfy the Court that the judgment of June 3, 1981, was entered as a result of mistake, surprise, or excusable neglect, without the negligence or fault of the defendant. The Court is further not satisfied that the defendant has a meritorious defense to this action.

The trial judge made the following conclusions:

1. The defendant has f[a]iled to show mistake, surprise, excusable neglect or any other reason justifying relief from the judgment. . . .

2. The defendant has failed to show a meritorious defense to the plaintiff's action, such as would entitle her to relief from the judgment. . . .

From an order denying her motion, defendant appealed.

Nichols, Caffrey, Hill, Evans & Murrelle, by R. Thompson Wright for the plaintiff, appellee.

Smith, Moore, Smith, Schell & Hunter, by Douglas W. Ey, Jr., for the defendant, appellant.

HEDRICK, Judge.

Defendant contends it was error for the trial court to deny her motion to set aside the default judgment. Defendant's argument is two-fold: first, that the trial court was required under Rule 60(b) to find as fact certain uncontroverted assertions contained in the affidavits offered in support of the motion and, second, that the facts which the trial court should have found established defendant's right to have the default judgment set aside.

Defendant's argument is apparently offered in support of her position with respect to both subsections of Rule 60(b) under

which her motion was made. While motions made under these subsections, if meritorious, result in the same relief, the difference between them is more that semantic. Rule 60(b)(1) requires that a judgment be set aside when it is shown to the court that the judgment from which relief is prayed was the result of "mistake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1). Whether the facts justify relief under 60(b)(1) is a matter of law. On the other hand, Rule 60(b)(6) allows a trial court to set a judgment aside for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). This provision is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. Defendant fails to recognize this distinction. We are thus required to consider her argument as it relates to subsections (1) and (6) of Rule 60(b).

[1] No construction of the evidence given in support of the motion will support a finding or conclusion that the default judgment was entered as a result of "mistake, inadvertence, surprise, or excusable neglect." The defendant did not allege in her motion facts which would entitle her to relief under Rule 60(b)(1). Moreover, since there was no finding of "mistake, inadvertence, surprise, or excusable neglect," the finding with respect to a meritorious defense was mere surplusage, and whether such finding was supported by the evidence is of no legal significance. Thus, the trial court did not err in denying the defendant relief from the judgment pursuant to Rule 60(b)(1).

With respect to motions made under Rule 60(b)(6), the Supreme Court has said, "The broad language of clause (6) 'gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.'" *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E. 2d 446, 448 (1971) (citation omitted). Rule 60(b)(6) is an equitable provision and motions thereunder are addressed to the discretion of the trial judge. *Id.; Sides v. Reid*, 35 N.C. App. 235, 241 S.E. 2d 110 (1978).

[2] While the trial judge did not make findings of fact with respect to all of the uncontroverted evidence in defendant's several affidavits, he was not required to do so since none of the facts would require him to set the judgment aside as a matter of law although such findings might have justified his exercising his

discretion to set the judgment aside. *Fountain v. Patrick*, 44 N.C. App. 584, 261 S.E. 2d 514 (1980). In any event, the facts found clearly support the trial court's order denying defendant's motion and defendant has failed to show any abuse of discretion in the ruling of the trial judge.

Affirmed.

Judges WHICHARD and BRASWELL concur.

Judge WHICHARD concurring.

Our Supreme Court has indicated that this Court cannot substitute "what it consider[s] to be its own better judgment" for a discretionary ruling of a trial court, and that this Court should not disturb such a ruling unless it "probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum* and *Cogdell v. Bynum*, 305 N.C. 478, 486-87, 290 S.E. 2d 599, 604-05 (1982). It has also stated: "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980).

While *Worthington* and *Clark* did not involve discretionary rulings on Rule 60 motions, as does this case, the strictures they impose on appellate review would appear equally applicable to such rulings. Because plaintiff here did all the law required in obtaining constructive service on defendant, and because the damages awarded were not extensive, it is difficult to say that the discretionary refusal to set aside the judgment "probably amounted to a substantial miscarriage of justice" or was "manifestly unsupported by reason." I therefore concur in the foregoing opinion. I file this concurring opinion, however, to express thorough disagreement with the ruling and a belief that the law should impose more exacting prerequisites upon constructive service.

In exercising their discretion as to setting aside entries of default and judgments by default, trial courts should be guided by the principle that default judgments are not favored in the law. Any doubt should therefore be resolved in favor of setting aside such entries and judgments. *Peebles v. Moore*, 48 N.C. App. 497,

504-05, 269 S.E. 2d 694, 698 (1980), *modified and affirmed*, 302 N.C. 351, 275 S.E. 2d 833 (1981). *See Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510, 181 S.E. 2d 794, 798 (1971).

> [P]rovisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have the case disposed of on the merits to the end that justice be done. Any doubt should be resolved in favor of setting aside defaults so that the merits of the action may be reached.

Howard v. Williams, 40 N.C. App. 575, 580, 253 S.E. 2d 571, 573-74 (1979).

Appellate courts are rightfully reluctant to find that trial courts have abused their discretion. "Given the strong policies favoring the resolution of genuine disputes on their merits, however, an abuse of discretion in refusing to set aside a default judgment 'need not be glaring to justify reversal.' " *Jackson v. Beech*, 636 F. 2d 831, 835 (D.C. Cir. 1980).

In affirming an order setting aside a default judgment where service was obtained by publication, this Court recently stated:

> [B]y the time this action was commenced, plaintiff had already negotiated with defendants' insurance carrier acting on behalf of defendants. Evidence tended to show that plaintiff could have easily notified the carrier of her potential civil action and solicited aid in ascertaining defendants' addresses for purposes of service of process. Finally, it appears that plaintiff had available to her the option of requesting defendants' insurance carrier to answer the complaint voluntarily and defend the claim where the defendants could not be located, although there was no duty to do so by either party. There was no attempt to pursue any of these options. Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper.

Fountain v. Patrick, 44 N.C. App. 584, 587, 261 S.E. 2d 514, 516 (1980).

A "due diligence" requirement should be equally applicable where, as here, constructive service is obtained through the Commissioner of Motor Vehicles. The fact that the trial court set aside the judgment in *Fountain*, and refused to here, should not be determinative. Absent proof of the due diligence to obtain actual service discussed in *Fountain*, the provision of G.S. 1-105 and -105.1 (Cum. Supp. 1981) that constructive service has the same legal force and validity as personal service should not apply.

G.S. 20-279.21(f)(1) (Cum. Supp. 1981) makes notice to the carrier a prerequisite to using default judgment as a basis for judgment against the carrier where the applicable policy is issued under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility. This requirement should be one of general applicability.

Proof of due diligence to obtain actual service cannot be found from the record here. There is no evidence that plaintiff made any effort to obtain an accurate address for defendant from defendant's father or her carrier. Defendant's uncontroverted evidence in support of her motion to set aside the judgment is to the contrary. The ease with which defendant was contacted through her father and her carrier once default judgment was obtained indicates a strong probability that she could have been reached through them at the service of process stage.

Here, as in *Fountain*, counsel for plaintiff negotiated with defendant's insurance carrier. They then ceased all contact with the carrier until in a position to demand payment of a default judgment against its insured. Without commenting on the ethics of such dealings, surely the law should require more.

It is at least implicit in finding of fact number seven that the failure to obtain actual service here resulted from the negligence or fault of defendant. Such a finding is unsupported by competent evidence in the record. The notation by the deputy sheriff in Virginia that plaintiff appeared to be avoiding service was incompetent hearsay, and the record contains no competent evidence indicating in any way that defendant was in fact attempting to avoid service. It indicates nothing more than that she was at a very mobile stage of life and living in a very mobile society. The law did not require her immobilization pending expiration of the statute of limitations on plaintiff's potential claim.

To establish a meritorious defense, defendant need only show the possibility that she will prevail at trial. In my view a jury could find from the evidence in this record that when the accident occurred defendant was exercising due care under the circumstances, and thus was not negligent. It also could find that plaintiff was contributorily negligent. The meritorious defense requirement has thus been met.

Since the rationale expressed by this Court in *Fountain* is equally applicable here, the effect of allowing the judgment here to stand, when the one there was set aside, is to deny equal access to the courts and equal justice to litigants. The "due diligence" requirement expressed in *Fountain* thus should be a matter of law, and the setting aside of judgments by default upon constructive service should be mandatory absent a showing of due diligence to obtain actual service. The method by which the judgment here was obtained contains an unconscionable element of ambush which leaves much to be desired in a legal system committed to due process, fair play, equal access to the courts, and equal justice. *See Townsend v. Coach Co.*, 231 N.C. 81, 84, 56 S.E. 2d 39, 41 (1949).

My vote of concurrence is grounded on the stringent strictures on appellate review of discretionary rulings of trial courts, and on plaintiff's compliance with the limited requirements of the extant law on constructive service. It is cast with considerable regret, and with a perception that the result reached reflects an inadequacy in a legal system which aspires to provide equal access to the courts and equal justice to litigants.

STATE OF NORTH CAROLINA v. MELVIN GRANT TEW AND BONNIE TEW

No. 822SC782

(Filed 17 May 1983)

Arson and Other Burnings § 4.2— burning a building—insufficient evidence

The evidence was insufficient to convict defendants of burning a building used in trade in violation of G.S. 14-62 where the State failed to place either defendant at or near the scene of the building during the day and a half that preceded the fire; failed to show that there were fruits of the crime, much less connect the defendants with them; and failed to connect them with the criminal device or method used in perpetrating the burning.

APPEAL by defendants from *Small, Judge.* Judgment entered 27 February 1982 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 21 January 1983.

Defendants, husband and wife, were convicted by a jury of burning a building used in trade in violation of G.S. 14-62. Grant Tew, also tried for presenting a false insurance claim, obtained a dismissal of that charge at the close of the State's case. The evidence, essentially without conflict, was to the following effect:

In a leased, one-story building with a partial loft on one side, the defendants operated a business near the Town of Plymouth known as "The Loft." A sort of tavern, the business sold beer, had coin-operated games and machines of all kinds, and occasionally presented live entertainment; it was closed on Sundays and Mondays. At approximately 1:43 o'clock Tuesday morning, September 29, 1981, a passerby saw that the building was on fire; the Plymouth Fire Department was notified and the fire, which had not gotten underway very well, was extinguished in less than fifteen minutes. The fire was clearly of incendiary origin. At one end of the building in a storeroom area, it was burning, but not brightly; at the other end on the bathroom floor there was an ashtray with three cigarettes, which had been, but were not then, lit in it, and each cigarette was taped to a paper trailer that had matches affixed to it. This device or arrangement, completely surrounded by paper towels, apparently failed to work because the cigarettes went out before igniting the matches and papers. The outside doors to the building were all locked, had not been noticeably tampered with, and the defendants had the only known keys. The windows on the ground or first level of the building were all covered by iron bars that were still in place. The second level or loft windows were not barred.

During their investigation, the officers noted that some of the coin-operated machines had been pried open and the money boxes were empty; latent fingerprints removed from these machines did not belong to either defendant. Many pictures of the building, both inside and out, were taken, and the next day Grant Tew called the chief investigating officer's attention to a picture that showed an open second story window with a window shade, peculiarly streaked, hanging out of it. Mr. Tew expressed the opinion to the officer that someone had entered the building

through that window, theorized about how the streaking might have been caused by the smoke, asked the officer "to work as hard for me as you do against me," and specifically requested that the window's condition and the cause of it be investigated. But that admittedly was not done, though the officer later observed the window from the parking lot, and no evidence relating thereto was offered. Nor was any evidence presented as to how long the fire in the storeroom area had been burning when it was discovered, or how long the incendiary device in the bathroom could burn after being lit before igniting the matches and paper, or as to either defendant knowing anything about, or having ever made or used, an incendiary device of any kind.

The Loft was between a mile and a half and two miles from their home and there was no evidence at all that either defendant was in or near the building at any time during the day or night preceding the fire. The only evidence that they were there on Sunday, two days before the fire, was Mr. Tew's testimony and statement that he went there that afternoon to get some beer to take home, and Mrs. Tew's testimony that she went there to pick up some articles needed for a meeting of their daughter's high school class Monday night in their garage. The purpose of that meeting was to construct a float, and it was attended by twenty or thirty students, a schoolteacher, assistant principal, principal, and several parents.

Both defendants testified that they were at or near their home all day and night Monday, partially because they had the day off and partially because of the float-building project, which they helped on by cleaning up the garage, getting the trailer for the float into it, and by supplying and serving refreshments to those present. They also testified that they had nothing to do with the fire, had not been to "The Loft" for a day and a half before it, were still at home when the fire department telephoned, and that immediately after receiving the call Grant Tew went to the fire and cooperated, as requested by the officials. The defendants' testimony about being at home all Monday evening and night was corroborated by several witnesses.

The defendants had been having financial difficulties for several months and were behind in their rent and other bills. About ten days before the fire, Grant Tew obtained an insurance

policy on the contents of the building in the amount of $30,000; getting such a policy had been discussed with his insurance broker several times during the preceding year or so.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Trimpi, Thompson & Nash, by C. Everett Thompson, for defendant appellants.

PHILLIPS, Judge.

Though the evidence of record certainly points the finger of suspicion at the defendants, it is not sufficient, in our opinion, to justify their conviction of the offense charged, and the case against them must be dismissed. This is because the record, even when favorably viewed for the State, as our law requires on motions to dismiss, *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980), does not contain substantial evidence of every essential element of the crime charged. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

The essential elements of the crime that the defendants were tried for, and that the State had the burden to prove, are that: (1) The building was used in trade; (2) a fire occurred in it; (3) the fire was of incendiary origin; and (4) the defendants unlawfully and wilfully started or were responsible for it. G.S. 14-62. The record is replete with evidence as to all these elements but one—the defendants' responsibility for the fire. As to that most important element, the evidence falls short of the standard that our law sets in matters of this kind.

The main reason that the evidence fell short, of course, was the State's inability to place either defendant at or near the scene of the crime at any time when the fire could have been started. When that time was, even approximately, the evidence does not show; but nothing about the fire would justify a finding that it could have been started more than an hour or two before it revealed itself. And that there was no evidence that either of the defendants had been near the place during the preceding day and a half or were otherwise connected with the fire in any way is fatal to the State's case. This is a void that proof of the other elements of the crime cannot fill. That there was a fire and that it

was of incendiary origin does not prove or tend to prove that either of these defendants was the incendiary. *State v. Needham*, 235 N.C. 555, 71 S.E. 2d 29 (1950). Nor was this missing element established by proof of motive. Though motive evidence in arson and other burning cases can be highly probative and persuasive when it supplements evidence of a criminal scheme, plan or act, when such essential evidence is lacking, as it is here, motive evidence has no probative value. *State v. Needham, supra.* Which is as it should be, since many more people have motives to commit crimes than ever commit them and innumerable people often have a motive to commit a crime that only one perpetrates.

The State's contention that this gap in the proof was bridged by evidence showing that only the defendants could have perpetrated the crime and that they did certain things from which their criminal scheme and act can be inferred, if supportable as a legal proposition, which is doubtful and no legal authorities close to the point were cited, is not supported by the record. The evidence that after the fire the street level doors and windows of the building were still secure and apparently had not been tampered with and that defendants had the only keys does not justify the inference that only the defendants could have entered the building—(and in view of the myriad unexplained criminal entries that occur in this country every year, it may not justify the inference that they were the only ones that could have entered at street level)—since the loft window was admittedly open and that possible entry place was not even investigated, much less eliminated, by the officers.

In contending that the defendants' criminal plan and act could be inferred from evidence that they "overinsured" the contents of the building by obtaining a $30,000 policy, the State's brief points not to testimony as to the *value* of the contents in either their damaged or undamaged state, but only to the irrelevant testimony of an insurance adjuster to the effect that the contents could be *cleaned* for between $3,000 and $5,000, smoke staining being the only damage done. Thus, the fact of "overinsurance," like other facts essential to the State's case, stands unproven.

The State's further contention that the defendants' criminality is inferable from the fact that, incompatible with their con-

tinued operation of the business, they removed many articles from the building before the fire likewise fell of its own weight. Instead of depleting the place of its contents or removing articles of considerable value that were needed at the business and not at home, evidence of which might have cast things in a different light, the only articles removed from "The Loft" before the fire, according to the evidence, were a red sofa, which, according to defendants' uncontradicted testimony, was in the way and had been needed at home for a long time and that from aught that the record shows had no significant value, some soft drinks, paper cups and ice needed for a school social, and a broom and vacuum cleaner to clean out the garage where the social was held. Under our law criminal acts and schemes cannot be inferred from such insubstantial and apparently innocuous acts.

Nor were the inadequacies of the evidence against them remedied by the "acting in concert" principle, erroneously contended for by the State and charged on to the jury by the court. Though "acting in concert" is a perfectly good principle of law, long recognized and applied by our courts to properly reduce the quantum of proof as to some defendants in suitable instances, its use here was singularly inappropriate. This principle justly enables one to be found guilty of an offense if he is "present at the scene of the crime and the evidence is sufficient to show he was acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979); quoted with approval in *State v. Cox*, 303 N.C. 75, 86, 277 S.E. 2d 376, 383 (1981). But here, so far as the record reveals, there was neither action nor concert in regard to anything criminal. Neither defendant was shown to be present at the criminal scene; neither defendant was shown to have committed the criminal act or any part of it; and no common plan or purpose to burn the building was shown.

Though a different crime was involved, what the Supreme Court said in *State v. Burton*, 272 N.C. 687, 691, 158 S.E. 2d 883, 887 (1968) is strikingly applicable here:

> In the instant case the State fails to place defendants at or near the scene of the crime on the date the crime was committed; fails to show any of the "fruits of the crime" in

the possession of either defendant, and relies solely upon possession of a crowbar used by someone in the commission of the crime to show "substantial evidence of all material elements of the offense." True, the evidence is sufficient to put the instrument used at the scene of the crime, but whether one of the defendants, or both of the defendants, or either of the defendants was the person or persons who on or about 17 January 1967 "unlawfully and wilfully and feloniously did, by the use of a crowbar and other tools, force open a safe of General Electric Supply Company . . ." remains in the realm of speculation and conjecture.

Here the State failed to place either defendant at or near the scene of the fire during the day and a half that preceded it; failed to show that there were any fruits of the crime, much less connect the defendants with them; and failed, unlike in *Burton*, to connect them with the criminal device or method used in perpetrating the burning. And, as the court did there, we cannot but conclude that whether either of the defendants, or both of them, or someone else, was the person or persons that set fire to "The Loft" September 29, 1981 has not been judicially established, but still "remains in the realm of speculation and conjecture."

Our belief that this case ought to be dismissed is bolstered by the Supreme Court's like action in two burning cases that were based on much stronger evidence than is recorded here. In *State v. Needham*, 235 N.C. 555, 565, 71 S.E. 2d 29, 36 (1952), ". . . the defendant's car was seen parked near the tobacco barn before the fire and . . . it was not seen there after the fire was discovered and . . . people along the road saw him drive in the opposite direction about the time the smoke from the fire was first seen." In *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971), the evidence was that: A fire began outside of the house and there was an odor of gasoline on the ground around the house; before the fire an automobile similar to the defendant's was seen about a mile from the dwelling; the defendant had bought a gallon jug of gasoline a week before the fire and a gallon jug was found in defendant's car after the fire; and tracks made by the defendant's boots were found beside the road about sixty feet from the burned house. In dismissing the case the court pointed out that no criminal inference could be drawn from the jug of gasoline, which many people have for lawnmowers and other machines, and

that the defendant's explanation as to the presence of the automobile and the tracks made by his boots clarified, rather than contradicted, the State's evidence.

That somebody violated the statute in burning the building in question, there can be no doubt. But since the humanity of our law requires that the "all-important question whether the culprit was the defendant or somebody else," *State v. Wooten*, 239 N.C. 117, 79 S.E. 2d 254 (1953), not be left to conjecture and surmise, the convictions and sentences of the court below must be vacated, and judgments of acquittal entered pursuant to their motions for a directed verdict, which were erroneously denied.

Reversed.

Judges WEBB and BECTON concur.

BRACEY ADVERTISING COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND NORTH CAROLINA BOARD OF TRANSPORTATION

No. 8210SC526

(Filed 17 May 1983)

Highways and Cartways § 2.1— Outdoor Advertising Control Act—nonconforming use on effective date—vested right to complete signs

Petitioner's outdoor advertising sign structures along a new segment of I-95 were a nonconforming use on 15 October 1972, the effective date for the enforcement of the Outdoor Advertising Control Act, such that petitioner had a vested right to complete the signs where the ordinance setting the 15 October 1972 effective date for the enforcement of standards controlling outdoor advertising was not adopted until 5 October 1972; prior to 15 October 1972 poles were in place for 19 signs but the sign facings and advertising had not been added thereto; petitioner had obtained building permits for the 19 signs from Robeson County; beginning in 1971, petitioner made searches for sign sites along the unopened area of I-95, and before 1 June 1972 petitioner had oral leases with landowners for the 19 sign locations and oral agreements for advertising to be located on the 19 signs; beginning 18 August 1972 the agreements with advertisers were reduced to writing, and beginning 15 September 1972 the leases were reduced to writing; and petitioner had incurred expenses prior to 15 October 1972 of $12,696.77 for poles, concrete to implant poles, rent, employee's time for leasing, securing permits and advertising contracts, labor for transporting and implanting poles, and overhead. G.S. 136-134.1 and G.S. 136-131.

ON writ of certiorari to review Judgment entered by *Brannon, Judge.* Judgment entered 3 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 12 April 1983.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas H. Davis, Jr., for respondent appellants.

McLean, Stacy, Henry & McLean by H. E. Stacy and William S. McLean for petitioner appellee.

BRASWELL, Judge.

The facts relate to outdoor advertising signs on interstate highways. The law involves the subject of nonconforming use. The only question presented for review, as phrased by the respondent appellants, is: "Did the trial court err in ruling that as of October 15, 1972, the petitioner's sign structures were a nonconforming use such that petitioner had a vested right to build the subject outdoor advertising signs?" We find the trial judge ruled correctly.

Over the years Bracey Advertising Company, Inc. (hereafter called Bracey) has conducted its business of outdoor advertising on signs erected on poles along highways in Robeson County and elsewhere. A new segment of Interstate Highway 95 in Robeson County between Lumberton and the North Carolina-South Carolina State Line was opened to traffic on 15 December 1972. Previously, Bracey had contracts with existing customers who leased outdoor advertising signs along U.S. Highway 301, which ran parallel to the new and unopened segment of I-95. Bracey's clients desired to continue their advertising by contracting for new signs along the new segment of I-95. Certain preparations were made by Bracey for 19 new signs along I-95 before 15 October 1972. When the respondents learned of Bracey's activity, the Board of Transportation approved a resolution on 8 June 1979 directing Bracey to remove its outdoor advertising within 30 days and for the Department of Transportation to take whatever legal action was necessary to seek compliance with the order. It was Bracey's view that the resolution and order were erroneous, that the respondents were estopped, and that Bracey's prior activity vested it with the status of nonconforming use. Bracey petitioned for judicial review of the 8 June 1979 administrative order.

After an evidentiary hearing, the trial judge made extensive findings of fact and adjudged that Bracey's signs "constituted a non-conforming use and [Bracey's] rights therein were vested as of October 15, 1972. Respondents may not retroactively abrogate such rights." The judge also permanently restrained the respondents from enforcing the Board's order of 8 June 1979 as against Bracey.

Our review in this appeal is controlled by G.S. 136-134.1. *See Advertising Co. v. Bradshaw, Sec. of Transportation*, 48 N.C. App. 10, 268 S.E. 2d 816, *disc. rev. denied*, 301 N.C. 400, 273 S.E. 2d 446 (1980). G.S. 136-134.1 provides that the court may affirm, reverse or modify the decision if the decision is in violation of constitutional provisions, not made in accordance with D.O.T. regulations, or affected by other error of law. The basic facts are not in dispute. Respondents bring forward no exceptions to the trial judge's findings of fact. The respondents argue that the judgment is reversible because of errors of law: (1) the trial judge should not apply decisions relating to non-conforming use in the zoning laws to a situation controlled exclusively by the Outdoor Advertising Control Act; and (2) even if zoning case law should be applied, that the offending signs are unlawful and ought to be removed because Bracey had knowledge of the pendency of the Act when it performed its activity, that it knew the Act would go into effect when federal funds became available, that Bracey was put on notice that its sign activity might be curtailed in the future, and that Bracey raced to beat the clock and lost. We disagree on both arguments.

North Carolina's Outdoor Advertising Control Act was enacted in 1967. In its declaration of policy, G.S. 136-127 declares that "outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways," and then declares a policy of regulation and control of same. In G.S. 136-128(2a) the article recites that a " 'Nonconforming sign' shall mean a sign which was lawfully erected but which does not comply with the provisions of State law or State rules and regulations passed at a later date or which later fails to comply with State law or State rules or regulations due to changed conditions. Illegally erected or maintained signs are not nonconforming signs."

Prior litigation established 15 October 1972 as the effective date for the enforcement of North Carolina's Outdoor Advertising Control Act. *Advertising Co. v. Dept. of Transportation*, 35 N.C. App. 226, 241 S.E. 2d 146, *disc. rev. denied*, 295 N.C. 89, 244 S.E. 2d 257 (1978). Another decision, *Days Inn v. Board of Transportation*, 24 N.C. App. 636, 640, 211 S.E. 2d 864, 867, *cert. denied*, 287 N.C. 258, 214 S.E. 2d 429 (1975), held that the Act "did not become effective on 17 July 1972."

What did Bracey do on or before 15 October 1972? Bracey's activity, fully supported in the record, follows: Commencing in 1971 and before, Bracey made searches for likely sign sites on I-95 in the area in question. Before 1 June 1972, Bracey had oral leases with landowners for the 19 sign locations [note: only 17 signs sites were in controversy at trial according to the parties' statements in the record] on the unopened segment of I-95. Beginning 15 September 1972 the oral leases were reduced to writing. Prior to 1 June 1972 Bracey had oral agreements with customers for advertising to be located on the 19 signs, and beginning 18 August 1972 these agreements were reduced to writing.

In 1971 Bracey incurred expenses relating to the search for sign sites including travel and salary of James L. Bracey, an officer and employee. Bracey would go to or near the unopened segment of highway, discover the person in possession, conduct a search of courthouse records to establish landowners, and would thereafter meet and negotiate with landowners. Bracey also incurred expenses in making contact with its advertising customers and securing contracts with them. Bracey erected sign support poles on or before 15 October 1972.

Applications for permits for the erection of the signs in question were made by Bracey to Robeson County, and prior to 15 October 1972 Robeson County issued building permits for the 19 signs. For these permits Bracey incurred an expense of $95.00, which was paid prior to 15 October 1972.

Other expenses incurred prior to 15 October 1972 were: cost of poles at 19 locations, $1,654.77; cost of concrete to implant poles, $627.00; rent, $1,100.00; time of James L. Bracey *re* leasing, securing permits and advertising contracts, approximately $1,200.00; labor for transporting and implanting the poles, $6,820.00; overhead expenses, $1,200.00; with a total expense in-

curred (including $95.00 for building permits) prior to 15 October 1972 of $12,696.77.

Between 15 October 1972 and March 1973 Bracey incurred expenses of $12,886.18 for completing the 19 signs. Bracey had not added facings and advertising messages to the signs as of 15 October 1972. The project had not been completed, and there was no traveling public on this segment of the highway to see any advertising signs until 15 December 1972. The project was not completed and accepted by the State Highway Commission until approximately 28 June 1973 to 28 July 1973.

What did the State Highway Commission (the predecessor of respondents) do prior to and soon after 15 October 1972? On 5 October 1972 the State Highway Commission revised its ordinance to hold that the effective date for the enforcement of standards controlling outdoor advertising was 15 October 1972. On 13 October 1972 the District Engineer of the State Highway Commission and his Assistant conducted an inventory of the highway segment in question and found numerous poles in place, but found no completed sign structures. On 16 October 1972 another inventory by the same persons found no change from the condition of the inventory of 13 October 1972. On 13 November 1972 three sign facings were found on poles in the questioned area.

A meeting of division engineers of the respondents was held on 27 September 1972. The memorandum calling the meeting was dated 13 September 1972. (Exhibit F of the pre-trial order.) It says: "The date of October 15, 1972, has been *tentatively* established as the effective date for implementation of our billboard permit program." (Emphasis added.)

At the 27 September 1972 meeting the District Engineers and Assistants were given a printed procedure which shows that they were to prepare "to be mailed on 6 October 1972" to each known sign owner a package which would include: "(a) Mimeographed letter of notification of permit requirement, (b) Outdoor Advertising Manual, (c) Sufficient applications for permits for each sign within your area." (Exhibit H of the pre-trial order.) On the subject of enforcement of permit requirements, the procedure stated:

"If an application for a permit to maintain an existing sign is not received by November 15, 1972, notification by certified

mail should be given the sign owner that the sign must be removed or a permit obtained. (A form letter is provided for this purpose). If the owner fails to act within say three weeks, you should take action to have the sign removed and line through the sign on your inventory form."

On 17 October 1972 Bracey received by hand delivery a letter dated 9 October 1972, along with applications for permits and a manual. In part, it stated that, "Effective October 15, 1972, permits are required to erect new sign structures in controlled areas and to maintain existing outdoor advertising signs." The letter gave a 30-day period within which to apply for permits or to remove signs.

On 1 December 1972 Bracey received formal notification from respondents that the 3 outdoor advertising structures discovered on 13 November 1972 were illegal and must be removed in 30 days. Thereafter a series of court petitions and orders occurred in various proceedings between the parties which culminated with the 8 June 1979 order of the respondents and the initiation of this case.

We recognize that in *Advertising Co. v. Dept. of Transportation, supra,* at 230, 241 S.E. 2d at 148, our Court said: "Those persons or parties, including petitioner [who is the same petitioner here], who erected outdoor advertising devices on or after 15 October 1972 without complying with the established standards did so at their peril." However, the statute recognizes that nonconforming signs due to changed conditions are lawful. In acknowledgment that the Department would be faced with nonconforming advertising, G.S. 136-131 provides a means of State removal by "purchase, gift, or condemnation."

The principles of law of nonconforming use that have been developed by our courts in the area of zoning law are applicable here. Typical of those decisions is *Town of Hillsborough v. Smith,* 276 N.C. 48, 55, 170 S.E. 2d 904, 909 (1969), which express the rules as follows:

". . . [O]ne who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction

> or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land."

In *Hillsborough* the defendant had acquired an option on a piece of land to build a dry cleaning plant. Defendant got a building permit, exercised its option, signed a $15,000.00 contract to build and ordered plant equipment. The town enacted a zoning ordinance 5 days later, restricting the area which included the site of the dry cleaning plant to residential use. Although the town revoked the permit, the defendant continued to build the plant. The Supreme Court upheld defendant's right to go forward, complete the construction, and use the property in accordance with the permit.

In *In re Campsites Unlimited*, 287 N.C. 493, 215 S.E. 2d 73 (1975), the question was whether Campsites had a vested right to continue its development after the passage of a zoning ordinance restricting development, when there was no prior ordinance requiring a permit to develop its property. In upholding Campsites' use of the property, the court compared case law in which building permits were a prerequisite in order to make any use lawful with the situation before it where there was no ordinance in effect which required a permit before development could be begun lawfully. The Court allowed Campsites to proceed with its construction and development by pointing out that a party may acquire a vested right without a permit where a permit is not required at the time of the good faith expenditure.

Here, Bracey obtained the only required permit, the one from Robeson County, prior to 15 October 1972. The ordinance, resolution, manual, or directive of the respondents did not require any permit prior to 15 October 1972.

We feel that the findings of fact of the trial judge supported by the evidence brings Bracey within the provisions of *Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E. 2d 782, 786-87 (1964): "[t]he law accords protection to nonconforming users who, relying on

the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy." It was not until 5 October 1972 that the ordinance was adopted declaring 15 October 1972 as the effective date of enforcement. Even as late as 13 September 1972, the memorandum of respondent, mentioned earlier above, referred to 15 October 1972 as "tentative." Also, the letter of notice and materials delivered to Bracey on 17 October 1972 allowed 30 days for applications for permits and even then gave alternative instructions should the applications not be received by respondents by 15 November 1972.

We do not feel, as apparently does appellant, that the facts show that respondent failed to act in good faith. *See Keiger v. Board of Adjustment*, 281 N.C. 715, 190 S.E. 2d 175 (1972). Bracey began its activities of site acquisition, began incurring expenses, began the placement of sign poles, and obtained the required county permits without actual knowledge of the 15 October 1972 date. It did not act hurriedly to beat a deadline. The ordinance setting the 15 October 1972 effective date was not adopted until 5 October 1972. Bracey had made a substantial beginning in good faith. It had earlier made substantial expenditures in reliance upon the nonexistence of any law requiring a sign permit from the respondents and in reliance of having obtained the required county permits.

The State's public policy to proscribe outdoor advertising sign activity did not become policy until 15 October 1972. Mere knowledge that at some future time an outdoor advertising ordinance would be enacted is not sufficient to prohibit Bracey's activity prior to 15 October 1972 because all advertisers who did complete their signs prior to 15 October were not violating any ordinance. Had Bracey completed its sign facing prior to 15 October, apparently no lawsuit would have resulted. Bracey has successfully brought itself within the meaning of, and compliance with, the principles of law of the *Hillsborough*, *Warner* and *Keiger* cases.

Affirmed.

Judges WEBB and WHICHARD concur.

FOUR SEASONS HOMEOWNERS ASSOCIATION, INC. v. W. K. SELLERS

FOUR SEASONS HOMEOWNERS ASSOCIATION, INC. v. THOMAS G. SIMPSON

No. 8226DC602

(Filed 17 May 1983)

1. Rules of Civil Procedure §§ 8.1, 12.1— failure to grant motion to require repleading—no error

Where defendant did not move for a more definite statement pursuant to G.S. 1A-1, Rule 12(e), and where plaintiff's complaint complied with the G.S. 1A-1, Rule 8(a)(1) requirements, the trial court did not err in failing to grant defendant's motion to require plaintiff to replead since defendant's remedy for additional facts was to use discovery pursuant to Article 5, G.S. 1A-1, Rule 26 *et seq.*

2. Rules of Civil Procedure § 40— denial of continuance—proper

The trial judge did not abuse his discretion by denying defendant's motion for a continuance made at the beginning of trial and seventy-seven days after plaintiff's complaint was filed. G.S. 1A-1, Rule 40(b).

3. Rules of Civil Procedure § 12.1— waiving defense of failure to join necessary party

Defendant waived his defense of failure to join a necessary party pursuant to G.S. 1A-1, Rule 12(b)(7) by failing to raise the issue prior to appeal. G.S. 1A-1, Rule 12(h)(2).

4. Appeal and Error § 28.1— failure to except to trial court's findings or conclusions—presumed supported by evidence

Where defendant failed to except to any of the trial court's findings of fact or conclusions of law, they are presumed to be supported by competent evidence and are binding on appeal. App. Rule 10.

5. Deeds § 20— restrictive covenants—touch and concern land

In an action brought by a homeowners' association against defendants for unpaid monthly assessments which were required by the restrictive covenants, the trial court properly found that the covenants, conditions, and restrictions were enforceable as covenants running with the land since (1) the original instrument contemplated the covenants would run with the land, (2) there was privity of estate between the parties, and (3) the recreational facilities touched and concerned the land in that they were for the use of all people who live in the subdivision.

6. Deeds § 20.7— enforcement of restrictive covenants—payment of attorneys' fees

Where a restrictive covenant clearly provided for the collection of attorneys' fees, the trial court properly allowed attorneys' fees as part of the costs against defendant.

7. Deeds § 20— restrictive covenants in defendants' chain of title

Where the deed from the first owner of defendants' lot clearly specified that the conveyance was subject to a recorded declaration of restrictions, the restrictions were within defendants' chain of title.

APPEAL by defendants from *Brown, Judge.* Judgments entered 10 March 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 20 April 1983.

On 5 November 1981, plaintiff Homeowners Association filed a complaint against defendants for unpaid monthly assessments which were required by the restrictive covenants in the Four Seasons subdivision. The Declaration of Covenants, Conditions and Restrictions for Four Seasons subdivision was on file at the register of deeds, recorded in Book 3347, at page 215. The Declaration provided that all the property in the subdivision would be sold subject to the restrictions, which were to be construed as running with the land. The restrictions established a Homeowners Association composed of every lot owner. The Association has the power to levy assessments to provide funds for, among other things, maintenance, landscaping, and beautification of the common areas of the subdivision. The common areas are all the real property owned by the Association for the use and enjoyment of members of the Association. Every owner has a nonexclusive right and easement of enjoyment in the common areas. The easements are appurtenant to each lot. The Declaration also provides that an owner who fails to pay his assessment may be charged for interest, attorneys' fees, and the costs of collection. The charge may be a lien on the land and a personal obligation of the owner.

The small claim actions were dismissed by the Magistrate upon a finding that plaintiff failed to prove its case by the greater weight of the evidence. Plaintiff appealed for a trial de novo in District Court. Defendant Sellers filed a motion for a continuance and a motion to require plaintiff to replead. The motions were denied.

The District Court, pursuant to G.S. 1A-1, Rule 52, made the following findings of fact and conclusions of law. The covenants and restrictions obligated defendants to pay maintenance assessments and attorneys' fees in the event that collection of unpaid assessments is referred to an attorney. Defendant Sellers

owed $675.88 in unpaid maintenance assessments. Defendant Simpson owed $798.76 in unpaid maintenance assessments. Each defendant owed interest at six percent until the date of judgment and eight percent from the date of judgment until paid. Defendants owed plaintiff attorneys' fees of $250.00. The judgments were entered 8 February 1982.

Defendants moved for a new trial pursuant to G.S. 1A-1, Rule 59 on the grounds that the District Court's conclusion was contrary to the holding in *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). Their motions were granted. The parties presented additional evidence through affidavits at the new trial. The court concluded that the 8 February 1982 judgment was not contrary to law and entered a judgment identical to the previous judgment.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by William P. Farthing, Jr., and Christian R. Troy, for plaintiff appellee.

William D. McNaull, Jr., for defendant appellants.

VAUGHN, Chief Judge.

At the outset, we note that defendants' assignments of error, as set forth in the record, fail to comply with Rule 10(c), Rules of Appellate Procedure. Rule 10(c) provides, in part:

> The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear.

Defendants, however, merely grouped all their assignments of error into two assignments of error each consisting of several issues. Technically, this is ineffectual as a broadside assignment. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E. 2d 115

(1964), *modified*, 266 N.C. 725, 147 S.E. 2d 241 (1966); 1 Strong's North Carolina Index 3d, Appeal and Error § 24.1.

[1] Defendant Sellers' first argument is that the trial court erred in failing to grant his motion to require plaintiff to replead, which was filed 18 January 1982, more than two months after the complaint was filed. Plaintiff's complaint against Sellers is as follows:

> For payment of Homeowners Association monthly assessments.
>
> 1. Plaintiff is a resident of Mecklenburg County; defendants are residents of Mecklenburg County, North Carolina.
> 2. Defendant owes plaintiff $675.88 for payment of Homeowners Association monthly assessments due plaintiff plus reasonable attorneys fees as allowed by the Association Covenants and Restrictions.
>
> Wherefore plaintiff demands judgment against defendant for the amount of $675.88 plus interest at 6% per annum from the 30th day of April, 1981, and reimbursement for court costs.
>
> This 2nd day of November, 1981.

Sellers did not move for a more definite statement pursuant to G.S. 1A-1, Rule 12(e). The complaint complied with the G.S. 1A-1, Rule 8(a)(1) requirement of "A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." Sellers' remedy for additional facts was to use discovery pursuant to Article 5, G.S. 1A-1, Rule 26 *et seq. See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Ross v. Ross*, 33 N.C. App. 447, 235 S.E. 2d 405 (1977).

[2] Defendant Sellers' second argument is that the trial court erred by denying his motion for a continuance. A continuance may be granted only for good cause shown. G.S. 1A-1, Rule 40(b). A motion for continuance is addressed to the sound discretion of the trial judge. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). Defendant moved for a continuance at the beginning of

trial on 21 January 1982, seventy-seven days after plaintiff's complaint was filed. Defendant contends he was entitled to 120 days for discovery, so the motion for continuance should have been granted. Defendant, however, misreads Rule 8, General Rules of Practice (adopted pursuant to G.S. 7A-34), which does not require 120 days for discovery, but limits discovery to no more than 120 days. Defendant should have heeded the second paragraph of Rule 8: "Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed." We find no abuse of discretion in the denial of defendant's motion for a continuance.

[3] Defendants' next argument, which they have not raised prior to this appeal, is that the court erred in entering judgment on the grounds that the property was owned by the entireties and defendants' wives were not parties to the action. Defendants, however, have waived this defense because they did not move for dismissal due to failure to join a necessary party pursuant to G.S. 1A-1, Rule 12(b)(7). G.S. 1A-1, Rule 12(h)(2). The comment to G.S. 1A-1, Rule 12 clarifies this point.

> The waiver provisions of Rule 12(h) provide in effect that the defenses of failure to state a claim, or failure to join a necessary party may be raised at any time before verdict. After verdict however, the defenses of failure to state a claim and failure to join a necessary party cannot then be raised or noted for the first time.

[4] Defendants' third argument is that the court erred in ruling that the covenants, conditions, and restrictions were enforceable as covenants running with the land. Defendants, however, failed to except to any of the trial court's findings of fact or conclusions of law. Rule 10(a), Rules of Appellate Procedure, provides: "Except as otherwise provided in this Rule 10, the scope for review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error. . . ." Since no exceptions were taken to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *City of Goldsboro v. Atlantic Coastline Railroad*, 246 N.C.

101, 97 S.E. 2d 486 (1957). Accordingly, the exception to the signing of judgment properly presents for review only two questions: whether the judgment rendered is supported by the findings of fact and whether any error of law appears on the face of the record. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696 (1956). Since the trial judge found the covenants and restrictions ran with the land, and defendants were delinquent in paying the required assessments, the judgment obviously was supported by the findings of fact and conclusions of law. Although not necessary to the disposition of this case, we will briefly address the issues defendants have attempted to raise in their brief.

[5] Had defendants properly excepted to the findings of fact on which they try to base their assignments of error, their assignments of error would, nevertheless, be overruled for the following reasons. Defendants argue, in essence, that the restrictions and covenants are void because they do not run with the land. The essential requirements for a real covenant are: "(1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant." *Raintree Corp. v. Rowe,* 38 N.C. App. 664, 669, 248 S.E. 2d 904, 908 (1978). Here, it is obvious the original instrument contemplated the covenants would run with the land. It is also undisputed that there is privity of estate between the parties. Apparently, defendants are contending the second requirement, touching and concerning the land, is not met. To touch and concern the land the object of the covenant must be annexed to, inherent in, or connected with, the land. *Raintree, supra.* Defendants argue that the covenant does not touch and concern the land because some of the recreational facilities, which are financed by the maintenance fees, are several blocks away from defendants' lots. The covenant, however, runs with each lot in the entire subdivision of which defendants' lots are but a small part. The recreational facilities are in the subdivision, for the use of all the people who live in the subdivision. It does not matter that the facilities are not adjacent to each lot, it is sufficient that they touch and concern the entire subdivision. Defendants argue that *Raintree* supports their contention that the facilities do not touch and concern the land. Their reliance on *Raintree* to support their

argument is misplaced. In *Raintree*, the lots in the subdivision were subject to recorded covenants, conditions, and restrictions. The relevant restrictions were: (1) the property owners had rights of enjoyment in the common areas; (2) each owner and subsequent owners covenant to pay assessments to the Homeowners Association for maintenance of common areas and other purposes by accepting a deed; (3) every owner is a mandatory member of the Raintree Country Club and must pay club dues; and (4) unpaid maintenance assessments and unpaid club dues subject the owner's lot to a lien. The plaintiff, Raintree Corporation, brought the action against defendants for balance due on maintenance assessments, country club dues, interest, and attorneys' fees. The trial court dismissed the action on the ground that Raintree Corporation was not the real party in interest. In affirming the trial court's entry of summary judgment for defendants, the Court of Appeals agreed that Raintree Corporation was not the real party in interest to collect the maintenance assessments. Instead, the Homeowners Association should have brought the action. As to the country club dues, this Court held that the covenant was personal because the country club facilities did not touch and concern the land. (Also, it is unlikely that there was privity of estate.) This case is easily distinguishable from *Raintree* because the recreation facilities here are not in a country club, but are actually on the Four Seasons subdivision for the benefit of the lot owners.

[6] Defendants' fourth argument is that the court erred in allowing attorneys' fees as part of the costs against each defendant. Again, defendants failed to except to the findings of fact and conclusions of law regarding the attorneys' fees. Regardless, this assignment of error is overruled because the covenant clearly provides for the collection of attorneys' fees:

> In order to secure payment of the annual and special assessments hereinabove provided, such charges as may be levied by the Association against the Lot(s), together with interest, costs of collection and reasonable attorneys fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment or charge is made. Each such assessment, together with interest, costs of collection and reasonable attorneys fees shall also be the per-

> sonal obligation of the person who is the Owner of such Lot at the time when the assessment fell due.

[7] Defendants' last argument is that the trial court erred in rendering judgment against defendant Sellers because the covenants were not in his chain of title. Again, we note that Sellers failed to except to any findings of fact, this assignment of error is based only on exceptions to the judgments. This assignment of error is without merit for the additional reason that the exhibits on record clearly show that the covenants are in Sellers' chain of title. Exhibit nine, the deed from The Ervin Company to Steven and Rachael Nelsin, provides:

> Without limitation, this conveyance is made subject to Declaration of Restrictions recorded in Book 3715 at page 86, and to Supplement to Declaration of Covenants, Conditions and Restrictions recorded in Book 3722 at page 333 in the Mecklenburg Public Registry.

Exhibit eight is a deed from the Nelsins to Wayne and Sandra Smith. Exhibit seven is a deed from the Smiths to Calvin and Rose Cooke. Exhibit six is a deed from the Cookes to defendant Wilbur Sellers and his wife Anne Sellers. A purchaser of land has the duty to examine every recorded deed or instrument in his line of title; he is conclusively presumed to know the contents of such instruments and is put on notice of any fact or circumstance affecting his title which is disclosed by such instruments. *Lamica v. Gerdes*, 270 N.C. 85, 153 S.E. 2d 814 (1967); *Turner v. Glenn*, 220 N.C. 620, 18 S.E. 2d 197 (1942). The deed from The Ervin Company to the first owner of Sellers' lot clearly specifies that the conveyance is subject to the recorded Declaration of Restrictions. This deed is in Sellers' line of title, so he is presumed to know the contents of the Declaration of Restrictions.

For the reasons stated, the judgments appealed from are

Affirmed.

Judges HEDRICK and ARNOLD concur.

MARY GALLOWAY v. PACE OIL COMPANY, INC.

No. 825SC252

(Filed 17 May 1983)

Trespass § 3; Waters and Watercourses § 1.1— ponding of water during rainfall—intermittent trespass—statute of limitations—damages

The ponding of water on plaintiff's land during periods of rainfall caused by an oil refinery constructed on defendant's land in 1972 which blocks the natural drainage of water from plaintiff's land constituted an intermittent rather than a continuing trespass, and plaintiff's action commenced on 29 March 1978 was not barred by the 3-year statute of limitations of G.S. 1-52(3). Plaintiff has the option to recover damages for injuries to her property from 29 March 1975 to the time of the trial of the action or to recover damages for the permanent injury since 29 March 1975.

APPEAL by plaintiff from *Strickland, Judge.* Judgment entered 1 December 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 19 January 1983.

Plaintiff first sued defendant on 29 March 1978 alleging that a third party had constructed an impediment on lands owned and controlled by the defendant, which obstructed the natural drainage of water from the plaintiff's land to the Cape Fear River. The plaintiff took a voluntary dismissal without prejudice and filed a new action alleging the same matters within one year of the voluntary dismissal.

The defendant filed an answer in which it pled the statute of limitations. The defendant made a motion for summary judgment. The papers filed in support of and in opposition to the motion for summary judgment showed that plaintiff has owned her home in Wilmington for many years. The surface water from plaintiff's lot drained northward through a pipe to the Cape Fear River. In 1972 an oil refinery was constructed on the property owned by the defendant which blocked the drainage from the plaintiff's property, causing water to pond on the plaintiff's lot during periods of rainfall.

The plaintiff made a motion to amend her complaint to allege as a second claim that the "Defendant has taken by prescription and condemnation, an easement into and across the Plaintiff's land . . . ." The court did not rule on the plaintiff's motion to

amend her complaint but granted the defendant's motion for summary judgment. The plaintiff appealed.

Newton, Harris and Shanklin, by Kenneth A. Shanklin, for plaintiff appellant.

Poisson, Barnhill and Britt, by Donald E. Britt, Jr. and Stuart L. Egerton, for defendant appellee.

WEBB, Judge.

The first question on this appeal is whether the plaintiff's claim is barred by the statute of limitations, G.S. 1-52(3), which provides:

> Within three years an action—
>
> * * *
>
> (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

All the evidence shows the oil refinery was completed in 1972 and the drainage problems began occurring shortly thereafter. If the interference with the drainage from the plaintiff's land during periods of rainfall was a continuing trespass, the plaintiff is barred from asserting her claim.

There have been several cases in this state dealing with this problem. *Gibbs v. Mills*, 198 N.C. 417, 151 S.E. 864 (1930); *Duval v. R.R.*, 161 N.C. 448, 77 S.E. 311 (1913); and *Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346 (1909) hold that if water is put upon a person's land irregularly, intermittently and variably, it is not a continuing but an intermittent trespass. In such a case a plaintiff may recover for any damages within three years before the action is filed.

In *Lightner v. Raleigh*, a 206 N.C. 496, 174 S.E. 272 (1934), the plaintiffs sued the City of Raleigh for damages to their dairy farm. The evidence showed the City had been dumping raw sewage for 40 years into Walnut Creek which bounded the plaintiffs' farm. During periods of rainfall, the creek would overflow into the plaintiffs' field, leaving raw sewage to such an extent that the plaintiffs' farm was ruined. There was evidence that the City, in

the course of its sewage disposal operations, had changed the configuration of the banks of the creek, which increased the overflow onto plaintiffs' land. In its discussion as to whether this constituted a continuing or intermittent trespass, the Supreme Court did not cite *Gibbs, Duval,* or *Roberts.* The Court said the distinction lay in whether the damages could be ascertained and recovered in a single action. It said if the damages cannot be so ascertained, separate and successive actions may be brought to recover the damages as they accrue. The Supreme Court further said:

> "[T]herefore so long as the cause of the injury exists and the damages continue to occur plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred, and this has been the general rule, to which the rule, where the injury is permanent, is an exception. (Citations ommitted.)"

Lightner, supra, at 504, 174 S.E. at 276 (1934) *quoting* 37 C.J., *Limitations of Actions,* Sec. 249 (1925), at pp. 883-4. The court in that case allowed the plaintiffs to recover permanent damages because their property had been taken for a public purpose. It approved a charge which did not allow the plaintiffs to recover any damages that accrued more than three years prior to the commencement of the action.

In *Teseneer v. Mills Co.,* 209 N.C. 615, 184 S.E. 535 (1936) the plaintiffs sued for damages to their land by the construction of a dam downstream from their property. The dam had been constructed 40 years before the action was commenced. There was evidence that the way in which the dam was operated caused flooding and the deposit of sand on the plaintiffs' land. The plaintiffs procured a judgment for $1,000.00 and the defendant appealed. The Supreme Court affirmed and said it would not discuss the question of whether the action was barred by the statute of limitations because the question of a continuing trespass had been recently considered in *Lightner.* The Supreme Court approved a charge that said, "[I]f that wrongful act was done prior to 15 December, 1931, which caused or has produced all of the damage and injury to the plaintiff, then his cause of action is barred by the statute of limitation." *Teseneer, supra,* at 621, 184 S.E. at

538. We do not believe this charge is consistent with *Lightner* and if it is the law, it would bar the plaintiff in this case. In *Teseneer* the defendant appealed from a judgment against it. The plaintiffs did not assign error to the charge and the court did not have to approve the charge to decide the case.

In *Hooper v. Lumber Co.*, 215 N.C. 308, 1 S.E. 2d 818 (1939), the plaintiff alleged his land was damaged by intermittent water flow caused by the defendant in its logging operations including certain construction the defendant had done. The evidence showed the defendant had leased the land on which it performed the logging operations, which lease had expired more than three years prior to the commencement of the action. In affirming a judgment of nonsuit, the Supreme Court emphasized that the defendant could not be held responsible for the condition of the property over which it had not had control for more than three years.

In *Davenport v. Drainage District*, 220 N.C. 237, 17 S.E. 2d 1 (1941) the plaintiff brought an action against the drainage district, of which he was a member, alleging that the defendant had failed to construct a canal properly in 1923 which had caused flooding on his land from 1923 through 1938. The evidence showed the flooding commenced immediately after the canal was completed and "continued practically every year following through 1936, and occurred again in 1938, but did not occur in 1939." *Davenport, supra*, at 238, 17 S.E. 2d at 2. In affirming a judgment of nonsuit, the Supreme Court did not cite *Gibbs, Duval, Roberts, Lightner,* or *Teseneer*; but said that if the flooding of plaintiff's land was a trespass which originated in 1923 and continued through 1938, it was a continuing trespass and a claim for this trespass was barred by the statute of limitations. The Supreme Court cited *Hooper* as authority and quoted a passage from it which said that to repel the bar of the statute of limitations, it must appear the conditions causing the trespass "were under control of the defendant, and the breach of duty with reference thereto had taken place some time within the period of three years preceding the injury." *Davenport, supra*, at 239, 17 S.E. 2d at 2-3, *quoting Hooper, supra*, at 311, 1 S.E. 2d at 820. We do not believe the language quoted from *Hooper* is authority for the holding of *Davenport,* and we do not believe *Davenport* can be reconciled with *Gibbs, Duval, Roberts, Lightner,* or *Teseneer.*

In *Tate v. Power Co.*, 230 N.C. 256, 53 S.E. 2d 88 (1949), the plaintiffs sought damages from the construction of a dam. There was no evidence of ponding of water on the plaintiffs' land. The plaintiffs' evidence showed his land gradually became unfit for cultivation because of the retardation of the stream which had been dammed. The first substantial injury occurred in 1928 and became progressively worse until the action was instituted in 1945. The complaint alleged that the "dam does not require any maintenance whatever," and the plaintiffs' evidence was to that effect. The evidence also showed the defendant had sold the dam more than three years prior to the commencement of the action. The Supreme Court affirmed a judgment of nonsuit. In its rationale, the Supreme Court did not mention the fact that the defendant had not had control of the dam for more than three years prior to the commencement of the action. The Court said that the plaintiffs had not alleged any fresh act after the construction of the dam which eliminated any intermittent trespass. The Court also said, "Clearly, the consequential trespass resulting from the retardation of the flow of the waters in Lower and Little Creeks, which the plaintiffs say began in 1928 and thereafter remained constant, is barred by this statute." *Tate, supra*, at 259, 53 S.E. 2d at 90.

In *Whitfield v. Winslow*, 48 N.C. App. 206, 268 S.E. 2d 245 (1980), this Court held, relying on *Duval*, that a claim based on the creation of a permanent pond on the plaintiff's land by the construction of a dam was not barred by G.S. 1-52(3).

We have discussed the cases on this subject at some length because we believe the law is somewhat confusing as to what is a continuing trespass in water diversion cases. Under *Gibbs*, *Duval*, and *Roberts*, we believe it is clear that if water is not diverted to a person's land so that it is permanently there, it is not a continuing trespass. Under this rule, the plaintiff would not be barred in this case. If the rule is that once the defendant has done something which causes the water to be diverted, the statute begins to run from that date and does not begin to run again until the defendant does another act which causes a diversion, the plaintiff is barred in this case. There is language to this effect in *Tate* although it is not necessary to a decision in the case. The encroachment in that case was constant from the time it started and this was given as a reason for the Supreme Court's decision.

The Supreme Court in *Teseneer* approved a charge to this effect but the evidence was that the encroachment had been constant since its inception. The Supreme Court's approval of the charge was not necessary to a resolution of the case. In *Lightner,* the Supreme Court enunciated the rule in terms of whether permanent damage could be calculated at the time of the initial entry onto the land and said "so long as the cause of the injury exists and the damages continue to occur plaintiff is not barred . . . ." *Ligthner, supra,* at 504, 174 S.E. at 276. In that case the Supreme Court allowed recovery for intermittent overflows for three years before the commencement of the action. We believe that under the facts of *Lightner,* the plaintiff should not be barred in this case. In *Hooper,* the holding was that a defendant cannot be held liable for a condition diverting water to someone else's land if the defendant has not controlled the condition for three years before the commencement of the action. We could make a negative inference from this that if a person is in control of the condition within three years, he is liable. We believe *Davenport* is the only case which held squarely that if construction is done which causes water to enter another person's land periodically, the statute runs from the date of the construction. The Supreme Court in *Davenport* gave no reason why this is so. It cited a case as authority which we do not believe held this, and it failed to cite cases which held the opposite.

We believe the best reasoned rule, and one which is consistent with all the cases except *Davenport,* is found in *Gibbs, Duval,* and *Roberts.* We base this in part on a reading of the statute which says a continuing trespass is barred after three years. Webster's Third New International Dictionary defines "continuing" as "constant; needing no renewal." We do not believe the intrusions of water on the plaintiff's land are constant in this case. The fact that the structure which causes the intrusions is constant should not be controlling. The structure causes the trespasses. The intrusions of water are the trespasses. For the reasons stated in this opinion, we hold it was error to allow the defendant's motion for summary judgment.

We have not relied on *Whitfield v. Winslow, supra,* in which the writer of this opinion concurred. Under that case, we believe we would also have to find error in the allowance of the motion for summary judgment.

Since this case must be remanded for trial, we believe we should comment on the measure of damages. The plaintiff is barred from recovering any damages to her property that occurred prior to 29 March 1975. It may be that the court in its discretion will not order the defendant to remove the obstruction if the plaintiff can prove it is causing ponding on her land. For this reason, we believe the plaintiff should have the option of recovering damages for injuries to her property from 29 March 1975 to the time of the trial of the action, or she may in this action recover damages for the permanent injury since 29 March 1975. This has been done in a very similar case in Georgia. *See Cox v. Cambridge Square Town Houses*, 239 Ga. 127, 236 S.E. 2d 73 (1977); *see also* Restatement, Second, Torts, Sec. 930 (1979).

The plaintiff also assigns error to the court's refusal to rule on her motion to amend her complaint. We beleve that any error committed by the court in this regard was harmless to the plaintiff. The plaintiff alleged in her proposed amended complaint that the defendant had taken an easement by "prescription and condemnation." The defendant could not have taken an easement by condemnation. It does not have the power of eminent domain. An easement by prescription is established by open and hostile use of another's property for 20 years. *See* 5 Strong's N. C. Index 3d, *Easements*, Sec. 6 (1977). This case does not involve an easement by prescription.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ANTHONY LEE REEVES

No. 8215SC1049

(Filed 17 May 1983)

1. Larceny § 7— property taken without owner's consent—sufficiency of evidence

Evidence that defendant was asked to stop before he left the store by two store employees; that the employees noticed a bulge in his pants; that both of them followed the defendant outside and both asked him to come back; and that one employee told defendant's female companion that no charges would be

pressed against her if she would cooperate was sufficient evidence to establish that defendant took a jacket from a store without the owner's consent.

2. Criminal Law § 18.3— arrest warrant—allowance of motion to amend

Where the trial judge heard arguments from counsel on the propriety of amending a larceny warrant, and where the warrant was amended at trial only to change the owner of the property and did not change the nature of the offense charged, it was not error for the trial judge to allow the State to amend the arrest warrant. G.S. 15A-922(a), G.S. 15A-922(f) and G.S. 15-24.1.

3. Criminal Law § 73.2— statements concerning ownership of property—not hearsay

Where a witness testified that the company she worked for was owned by one industry and after voir dire stated that the store was a division of another industry, the statement after the voir dire was not inadmissible hearsay since she did not say that another person said that the store was owned by the industry asserted.

4. Criminal Law § 99.6— questions of court to witness—no expression of opinion

The trial judge did not fail to act impartially when he raised an ownership problem in the arrest warrant by questioning a witness since the questions were not asked in the presence of the jury and since the trial judge can properly question a witness to clarify and promote understanding of the testimony. G.S. 15A-1222.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 31 March 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 March 1983.

The defendant was arrested based on a warrant alleging misdemeanor larceny of a suede jacket, which was the personal property of Southland Shirt Outlet in Burlington. The crime was alleged to have occurred on 14 November 1981.

He was found guilty in District Court on 22 December 1981 and sentenced to two years imprisonment. The defendant then appealed to the Superior Court for a trial de novo.

Malcolm Leath, a part-time employee of the Southland Shirt Outlet, testified first for the State. According to Leath, the defendant was in the store on 14 November 1981 between 5:15 and 5:45 p.m. The defendant tried on some jackets and then took some back to the dressing room.

Ann King, another employee who was working at the same time, then came to the front of the store and told Leath to look at the bulge in the defendant's pants. Leath noticed a bulge around

the calf area on both legs, which he had not noticed when the defendant came into the store.

As the defendant started for the door, both Leath and King told him to stop. The defendant stopped at the door and pulled something out of his pocket when Leath approached him. Although Leath did not know what the defendant pulled out, he stepped back.

Leath and King followed the defendant out of the building, remaining about fifteen to twenty feet behind. The defendant went out of their sight when he turned a corner. When Leath turned the corner, he found a garment like one that the defendant tried on in the store.

Leath brought the jacket back into the store. It was introduced at trial as State's exhibit one. Leath testified that the jacket's fair market value was $25.

On cross-examination, Leath said that he could not be "one hundred percent sure" that State's exhibit one was the same jacket as the one that he found outside the store. He did not see the defendant wearing the jacket or see him lay it down outside the store.

King, the District Manager of North Carolina for Southland Shirt Outlet, also testified for the State. Her testimony about the events on 14 November 1981 at the store corroborated the key points of Leath's description of that day.

When King completed her testimony about what happened on the day of the crime, the trial judge asked her what the name of the store was and who owned it. He then sent the jury out of the courtroom and a voir dire examination of King was conducted.

Voir dire proceeded as follows:

Q. Do you know whether Southland Shirt Outlet is an incorporated business?

A. Yes, I think it is.

MR. PAISLEY: Object to what she thinks.

COURT: Sustained.

Q. Who would be able to testify to that?

A. My supervisor, Austin Ericson, out of Wilmington. He's the vice president of the company, you know. I—you could call him or Mr. Fred Block either one if you like. . . .

COURT: I'll grant the State a recess for it to determine what it shall now choose to do in light of the evidence. . . .

CONTINUANCE OF DIRECT EXAMINATION OF ANN KING by MR. MENSER ON VOIR DIRE:

Q. Mrs. King, you work at Southland Shirt Outlet?

A. Yes, sir.

Q. And is that a division of some corporation?

A. Okay. It's a—

MR. PAISLEY: Objection, your Honor. She has already indicated that she was not sure previously. I would object, sir.

COURT: Over—

A. Now—

COURT: —overruled. You may cross-examine her on voir dire about whatever she says.

DEFENDANT'S EXCEPTION NO. 4

A. I know for a fact that we are a division of N.S.I., which is National Service Industries, Incorporated. We do business as Southland Shirt Outlet.

At the close of voir dire, the trial judge allowed the State's motion to amend the warrant to allege ownership in National Service Industries, Inc. d.b.a. Southland Shirt Outlet.

King then testified in front of the jury that Southland Shirt Outlet was owned by National Service Industries, Inc. She explained her earlier testimony that the store was owned by Block Industries by stating that the store used to be known by that name.

On cross-examination, King stated that she did not see the defendant leave with State's exhibit one or drop the jacket. The

defendant's motions for a dismissal and to quash the warrant were denied at the close of the State's evidence.

Leath was the defendant's only witness. He testified that he did not know who owns the company he works with and that the defendant had no difficulty in walking out of the store. The defendant's motion to dismiss at the close of all the evidence was denied.

Following the jury's verdict of guilty and a two-year sentence by the trial judge, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

John P. Paisley, Jr., for defendant-appellant.

ARNOLD, Judge.

[1] The defendant first argues that his motions to dismiss should have been granted. In passing on a motion to dismiss, it is the court's duty to ascertain if there is substantial evidence of each essential element of the offense charged. *State v. Hutchins,* 303 N.C. 321, 344, 279 S.E. 2d 788, 803 (1981). "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Fletcher,* 301 N.C. 709, 712, 272 S.E. 2d 859, 860-61 (1981).

The evidence must be interpreted in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Porter,* 303 N.C. 680, 685, 281 S.E. 2d 377, 381 (1981). Applying these standards to the facts before us, we hold that the motions to dismiss were properly denied.

To convict a defendant of larceny, it must be shown that he (1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently. *State v. Perry,* 305 N.C. 225, 235, 287 S.E. 2d 810, 816 (1982); *State v. McCrary,* 263 N.C. 490, 492, 139 S.E. 2d 739, 740 (1965). G.S. 14-72(a) provides that larceny of goods with a value of not more that $400 is a misdemeanor. There is no dispute here that the jacket taken was worth less than $400.

The defendant contends that it has not been shown that the jacket was taken without the owner's consent. We disagree.

The evidence showed that the defendant was asked to stop before he left the store by Leath and King. They wanted to talk to him because King noticed a bulge in his pants. Both of them followed the defendant outside and both asked him to come back. King told the defendant's female companion that no charges would be pressed against her if she would cooperate.

This evidence, when considered under the tests for a motion to dismiss, is sufficient to establish the fact that the taking was without consent.

[2] The second exception raised by the defendant is that the trial judge should not have been allowed to amend the arrest warrant during the trial.

In this misdemeanor case, the warrant for arrest serves as the State's pleading. G.S. 15A-922(a). An allegation of ownership in the person from whom the property was taken is essential. *See State v. Greene*, 289 N.C. 578, 584, 223 S.E. 2d 365, 369 (1976). The warrant "may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged." G.S. 15A-922(f). We also note G.S. 15-24.1, which allows for amendment of a warrant in superior court "when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property if, in the opinion of the court, such amendment will not prejudice the defendant."

Amending the arrest warrant at trial to change the owner of the property taken does not change the nature of the offense charged. After the amendment, defendant was tried for the same offense that is alleged in the warrant.

In addition, the trial judge heard arguments from counsel on the propriety of amending the warrant. We can only assume that he then allowed the amendment in the belief that it would not prejudice the defendant.

[3] The defendant also contends that it was error to let King's testimony on ownership be based on hearsay. King first testified in front of the jury that Southland Shirt Outlet was owned by Block Industries. On voir dire, she stated that the vice-president of the company or Fred Block could tell who owned the company. The trial judge then granted the State a recess.

After the break, King was allowed to testify over the defendant's objection that the store is a division of National Services Industries, Inc. The defendant contends that King's testimony was based on information generated during the recess and is inadmissible hearsay.

Hearsay is defined in North Carolina as an assertion of a person, other than the witness in his present testimony, which is offered to prove the truth of the matter asserted. *See* 1 Brandis, N.C. Evidence § 138 (2nd rev. ed. 1982).

An examination of the transcript when King was testifying reveals that her statements about who owned the store might not be hearsay. She did not say that another person said that the store was owned by National Services. Her testimony after the recess was no more hearsay than were her statements before it about ownership. Both were based on what someone had told her.

Even if her testimony about ownership was hearsay, we find that it was not prejudicial. The defendant has not carried his burden on this point. *See State v. White,* 298 N.C. 430, 439, 259 S.E. 2d 281, 287 (1979); *State v. Sparks,* 297 N.C. 314, 333, 255 S.E. 2d 373, 385 (1979).

As for the difference in King's answers before and after the recess about the ownership of the store, that conflict is for the jury to resolve. *See State v. Mabry,* 269 N.C. 293, 296, 152 S.E. 2d 112, 114 (1967); *State v. Crawford,* 29 N.C. App. 117, 119, 223 S.E. 2d 534, 535 (1976).

[4] Finally, the defendant argues that the trial judge did not act impartially when he raised the ownership problem in the arrest warrant. He correctly cites G.S. 15A-1222 for the proposition that the trial judge may not express an opinion in the presence of the jury on any question of fact to be decided by the jury. But that provision was not violated here.

The transcript shows that the jury never heard the trial judge's questions about the warrant.

COURT: What is the name of your store?

A. Southland Shirt Outlet.

DEFENDANT'S EXCEPTION NO. 1.

COURT: Who is it owned by?

A. Block Industries.

DEFENDANT'S EXCEPTION NO. 2.

COURT: Let me see counsel at the bench one moment.

The jury was then sent to the jury room and a voir dire of King was held. They were not brought back into the courtroom until the voir dire of King and the legal arguments over amendment of the warrant were completed.

A trial judge can properly question a witness to clarify and promote understanding of the testimony. Such questions are prejudicial error only if he expressed an opinion by their tenor, frequency, or persistence. *State v. Rinck*, 303 N.C. 551, 562, 280 S.E. 2d 912, 921 (1981). That did not occur here.

No error.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ROBERT ELIMU MOREHEAD

No. 8218SC1071

(Filed 17 May 1983)

1. Forgery § 2.1— indictment for uttering—allegation of intent to defraud

An indictment for uttering a forged check sufficiently alleged that defendant uttered the check with the intent to defraud where it appears that the words "with the intent to defraud" as they appear in the indictment modify the words "did utter and publish."

2. Criminal Law § 113.7— giving requested instructions on aiding and abetting

The trial court in a prosecution for uttering forged checks in effect gave defendant's requested instructions on aiding and abetting which were supported by the evidence.

3. Criminal Law § 91— statutory speedy trial period—exclusion of times for continuances and motion to discharge counsel

Although 153 days elapsed between the time of defendant's arrest and his trial, the 120-day statutory speedy trial period was met when 45 days for two continuances and four days between defendant's request for the discharge of

his counsel and the court's order discharging counsel are excluded from the 153-day period.

4. **Indictment and Warrant § 2— voluntary dismissal with leave—reinstatement of indictments by prosecutor**

Where defendant was indicted on 5 January 1981, the State took a voluntary dismissal with leave on 27 April 1981 because defendant could not be found, and defendant was arrested on 15 October 1981, the prosecutor could properly reinstate the indictments on 4 January 1982 without further action by the grand jury. G.S. 15A-932 and G.S. 15A-701(b)(11).

5. **Searches and Seizures § 40— search under warrant—item not listed in warrant—plain view doctrine**

Although a typewriter was not listed as an item to be seized in a warrant to search for stolen goods, the typewriter was properly seized under the plain view doctrine during a search of defendant's residence pursuant to the warrant where the affidavit for the warrant contained information that a codefendant had said that a manual typewriter was used to fill out forged checks at defendant's residence, and the typewriter was thus evidence of another crime.

APPEAL by defendant from *Helms, Judge.* Judgment entered 19 March 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 April 1983.

Defendant was indicted on four charges of forgery and four charges of uttering a forged instrument. Four forged checks were uttered by cashing and placing them in the channels of commerce by Jo Laverne Young Aikens in Greensboro on 16 October 1980. Defendant Morehead, Dwight Leath and Tony Phillips participated with Aikens. Aikens testified as a State's witness. Defendant Morehead was convicted of 4 charges of uttering forged instruments and appeals.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General T. Buie Costen for the State.

Graham, Cooke, Miles & Bogan by Donald T. Bogan for defendant appellant.

BRASWELL, Judge.

[1] Defendant's first assignment of error is to the failure of the court to allow his motion to dismiss the indictments on the counts of uttering forged checks on the ground that each indictment fails to allege that defendant uttered the check with the intent to defraud another. He contends this essential element is missing

and that therefore the indictment is void. He relies principally upon *State v. Hill*, 31 N.C. App. 248, 229 S.E. 2d 810 (1976).

As the four indictments are substantially identical, we excerpt and examine the challenged part of one as being dispositive of the issue. A copy of the front and back of each check in the amount of $175.58 was attached to the indictment. All checks were dated 16 October 1980 and drawn on the account of Eastside Grocery at First Citizens Bank & Trust Company. The sample indictment follows:

> ". . . [W]ittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited bank check, to which said bank check had been falsely forged the name of Faith Cooper as Payee, and the name of Lee V. Moore, Jr., as Maker to said bank check so that said bank check appeared to be genuine, and which said forged bank check is as follows that is to say: As per copy of check, marked Exhibit A, attached hereto and made a part hereof as though fully set out herein, with intent to defraud _he_, the said Robert Elimu Morehead at the time _he_ so uttered and published the said false, forged and counterfeited bank check then and there well knowing the same to be false, forged and counterfeited against the form of the statute in such case made and provided, and against the peace and dignity of the State."

In *State v. Hill*, *supra*, at 249-50, 229 S.E. 2d at 811, the indictment reads:

> "'. . . [W]ittingly unlawfully and feloniously did utter and publish as true a certain false, forged, and counterfeit check, which said false, forged and counterfeit check is as follows: A check drawn upon the account of Craven Steel Company, Inc., Route #11, Box 430, Greensboro, North Carolina, dated October 29, 1974, check #2394 payable to the order of Billy G. Hill in the amount of $123.33, and drawn upon The Northwestern Bank, Greensboro, North Carolina, upon which the signature of Betty Bush had been forged with the intent to defraud, he the said Billy Gray Hill, at the time he so uttered and published the said false, forged, and counterfeit check, then and there well knowing the same to be false, forged and counterfeit.'"

We think *Hill* is clearly distinguishable. The court in *Hill* said, "Nowhere does the indictment allege that defendant uttered the check with the intent to defraud others. The words 'with the intent to defraud,' as they appear in the indictment, modify the word 'forged' and are irrelevant to the distinct charge of uttering." *Id.* at 250, 229 S.E. 2d at 811. In our case the checks are not described in the body of the indictment but are attached and incorporated by reference. The phrase "with intent to defraud" is set off by a comma. Logic and reason interpret the phrase to modify its ultimate verb. In *Hill*, the phrase modified the preceding word "forged," which made the element defective. This assignment of error is without merit (even though someday someone should draft a less complex form).[1] The indictment here was sufficient to inform defendant of the charge, to enable the court to proceed to judgment, and to bar further prosecution on the same offense.

[2] The second assignment of error challenges the correctness of the jury instruction concerning aiding and abetting. Defendant contends he was not present when a codefendant passed the checks and that it was error for the trial court to fail to instruct the jury that they must find that he was actually or constructively present when the checks were passed.

The group planning of the offense took place in the defendant's apartment. The checks were forged by others in the apartment with the defendant's knowledge, and preparation for cashing the checks began there. Aikens, Leath, Phillips and the defendant left the apartment and traveled by automobile to four business establishments. Aikens went alone into each business. While Aikens was cashing each check, the others remained outside in the automobile, with defendant in the back seat. The auto was parked close to each establishment: J. C. Penney's, directly in front; Food Town, within 25 feet; Northgate Inn, within 35-40 feet;

1. We share the following sagacity from the State's brief:

"As for defendant's argument concerning the number of sentences, words, commas and colons in the indictments as proof of vagueness, it is respectfully submitted that exclusive of description, the usual fee simple warranty deed is prepared as a single sentence containing in excess of 230 words, 18 commas, 4 semi-colons and 2 colons. That deed is historically cited as a model of clarity and expression."

Wig World, in a parking lot across the street. Aikens testified that the defendant shared in the proceeds of her adventure.

When the group left the house, the checks had not been signed. After all were in the automobile, the checks were given to Aikens from someone in the back seat. During the time, and before going to Northgate Inn, the defendant suggested that "we try motels and hotels, because he said if you rent a room for more than one day, they will always cash the check." When this suggestion was made, Leath had been dropped off, and only Aikens, Phillips and defendant were in the car.

After full comparison and examination of the defendant's request for special instructions on aiding and abetting and of that portion of the charge on this same subject, we find this assignment of error to be without merit and that it would serve no purpose to quote from the requested instruction and from the charge. While the trial judge did not use the exact language as phrased by defendant, the judge correctly covered the substantive law and applied it to the evidence in his charge. *State v. Sledge*, 297 N.C. 227, 234-35, 254 S.E. 2d 579, 584-85 (1979). Although defendant's brief says: "The crime of an aiding and abetting (principle in the second degree) is a *lesser* included offense of the principal felony and a defendant may be convicted as such in an indictment charging the principal offense," (emphasis added), we point out that "aiding and abetting" is not a separate crime, is not a lesser offense, and does not require a separate issue. Where one aids and abets another, he is guilty as a principal. *State v. Holloway and State v. Jones*, 7 N.C. App. 147, 171 S.E. 2d 475 (1970). The subject of the presence of defendant and his participation with Aikens in the crime in the role of one aiding and abetting was amply covered by the trial judge. Where supported by the evidence, the defendant's requested instructions were given.

Defendant's reliance upon *State v. Glaze*, 37 N.C. App. 155, 245 S.E. 2d 575 (1978), is not well founded. While *Glaze* relied upon *State v. Lyles*, 19 N.C. App. 632, 635, 199 S.E. 2d 699, 701, *cert. denied*, 284 N.C. 426, 200 S.E. 2d 662 (1973), for the proposition that "[i]n order to determine whether a defendant is present, the court must determine whether 'he is near enough to render assistance if need be and to encourage the actual perpetration of the felony,'" the reported facts of *Glaze* differ substantially from

this defendant's conduct. In *Glaze*, codefendant Hart stayed inside the motel room where the parties met and did not go to the pharmacy where the crime was committed and did not participate in the split of the drugs seized. Defendant Morehead, in our case, went with the group in an automobile to knowingly aid, abet, and encourage Aikens to utter known forged checks, and he shared in the fruits of Aikens' adventure. While in the automobile at each business establishment, Morehead was near enough to render assistance to Aikens if need be and his participation with the others in the forgery in his apartment, riding to the scene, handing the checks to Aikens in the auto, and aiding in providing a getaway ride, all encouraged the actual perpetration of this felony.

[3] The fourth assignment of error alleges that the trial court erred in denying defendant's motion to dismiss for lack of a speedy trial, G.S. 15A-701 *et seq.* We disagree.

While the date of offenses was 16 October 1980, the defendant was never arrested until 15 October 1981. Jury trial began 17 March 1982. One Hundred Fifty-three (153) days elapsed.

Counsel does not contest the exclusion of 25 January 1982 through 22 February 1982 because he obtained a continuance to prepare for trial. This is 28 days.

On 16 October 1981, the day after his arrest, defendant obtained court-appointed counsel, a public defender. On 4 January 1982, defendant, by letter to Superior Court Judge Charles Kivett, requested that the public defender be discharged for reasons stated. On 5 January 1982 Judge Kivett ordered a hearing on the defendant's request, which was heard by Judge W. Douglas Albright on 8 January 1982. At that hearing the public defender joined in the motion of the district attorney to continue the trial of these cases retroactive from 16 October 1981 until 25 January 1982. The defendant had urged the public defender to get the cases tried as soon as possible. Finding a conflict of interest between counsel and defendant, Judge Albright discharged the public defender, appointed new counsel, and signed an order continuing the trial from 16 October 1981 through 25 January 1982. The time of 4 days from defendant's request for discharge of his attorney of 4 January 1982 through 8 January 1982, the date of the order, is clearly excludable. *State v. Rogers*, 49 N.C.

App. 337, 271 S.E. 2d 535, *disc. rev. denied*, 301 N.C. 530, 273 S.E. 2d 464 (1980). One hundred fifty-three (153) days, minus 28 days, minus 4 days, leaves 121 days. We also hold that the 17 days from 8 January 1982 to 25 January 1982, which formed a part of Judge Albright's order of 8 January 1982, were properly excludable. When the 17 days are subtracted from the 121 days, it leaves 104 days, and thus the trial began within the 120-day statutory rule. We do not need to discuss or consider the retroactive time from 15 October 1981 to 4 January 1982 in Judge Albright's order.

[4] We now turn to defendant's third assignment of error. He argues that it was error for the trial court to fail to dismiss the action where the indictments had previously been dismissed with leave by the State and were subsequently reinstated without further action by the grand jury and without adhering to the requirements of G.S. 15A-932.

The facts are that defendant was indicted on 5 January 1981. The defendant could not be found, and on 27 April 1981 the State took a voluntary dismissal with leave. Defendant was not arrested until 15 October 1981. On 4 January 1982 the indictments were reinstated.

We think defendant's argument is amply answered in *State v. Reekes*, 59 N.C. App. 672, 297 S.E. 2d 763 (1982). In *Reekes* the voluntary dismissal with leave was taken on 1 June 1981 for defendant's failure to appear. His arrest was on 29 August 1981. The reinstatement did not occur until 14 December 1981 when the case was placed on the calendar. The *Reekes* court stated: "Once the prosecutor entered a dismissal with leave for nonappearance of the defendant pursuant to G.S. 15A-932, G.S. 15A-701(b)(11) controlled and the speedy trial clock did not resume running against the State until the proceedings were reinstituted against the defendant on 14 December 1981." *Id.* at 676, 297 S.E. 2d at 766. The time of reinstatement was also found to be "reasonable."

[5] The final assignment of error alleges that the trial court erred in denying the motion to suppress evidence. In the suppression hearing the facts disclosed that a search warrant was issued to search for items taken in a breaking and entering offense at the Eastside Grocery. During the search a manual typewriter and a piece of paper with defendant's name on it in plain view were

also seized. The warrant did not list the typewriter as being a part of the stolen goods. However, in the affidavit portion of the search warrant there was sworn information that codefendant Aikens had said that a manual typewriter had been used to fill out the checks at defendant's residence. Defendant contends that seizure of the typewriter was unlawful "[s]ince the search warrant did not particularly describe a typewriter as an item to be seized." We hold the seizure was lawful under the plain view doctrine as shown in the evidence and that it was not required that the typewriter be described in the search warrant. We also note that the typewriter was not "stolen property" from the Eastside Grocery, but was already in the defendant's apartment at the time of the search. The affidavit did put the officer on notice of another crime, the forging of checks on a typewriter, and the officer was not required to be blind when he was lawfully in the defendant's quarters looking for goods from the breaking and entering.

We hold that the defendant has had a fair trial free from prejudicial error.

No error.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. CLARK PROCTOR, JR.

No. 8229SC795

(Filed 17 May 1983)

1. Searches and Seizures § 28— search warrant—exceeding territorial jurisdiction of officer

Where defendant's residence was more than a mile outside the city, the officer who executed the warrant exceeded his extraterritorial jurisdiction as limited by the provisions of G.S. 160A-286; however, admission of the evidence seized during that search did not constitute prejudicial error.

2. Criminal Law § 87.1— admission of leading question—no error

Where defendant objected to the testimony of an officer in which the officer enumerated the items seized from defendant's residence on the specific ground that the testimony was in response to a leading question, the trial

court did not abuse its discretion in overruling defendant's objection on the ground stated.

3. **Criminal Law § 50.2— opinion of non-expert—remedy by later expert witness's opinion**

The admission of an officer's testimony regarding the results of field tests conducted on substances purchased from defendant was harmless where an expert forensic chemist thereafter testified that he tested the substances purchased and found them to be heroin and cocaine.

Judge EAGLES concurring.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 11 March 1982 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 8 February 1983.

Defendant, Clark Proctor, Jr., was indicted on the following charges: 81CRS6229—possession of heroin with the intent to sell and deliver; 81CRS6231—sale and delivery of heroin; 81CRS6230—possession of cocaine with the intent to sell and deliver; 81CRS6232—sale and delivery of cocaine. A jury returned a guilty verdict on each count as charged. From judgments imposing active sentences of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alan S. Hirsch, for the State.

J. Nat Hamrick, for defendant appellant.

JOHNSON, Judge.

Evidence for the State tended to show that in November 1981 the Forest City Police Department of Rutherford County conducted an undercover campaign for the apprehension of persons violating the drug laws. On 17 November 1981, defendant sold cocaine to Officer Larry Boyles, a Shelby city police officer. Defendant also sold heroin to Officer Boyles on 18 November 1981. Both sales were consummated at Gardo's Motel in Rutherford County. The substances were transmitted to the SBI Lab for analysis.

Immediately following the 18 November sale, defendant was arrested and a search warrant for defendant's home was issued upon application of Detective Sergeant John L. Wilkins for the Forest City Police Department. The warrant was directed to any

officer with authority and territorial jurisdiction to conduct the search. Officer Wilkins served the warrant and executed a search of defendant's home. Items seized in the search were admitted into evidence over defendant's objection.

Defendant admitted at trial that he sold and delivered the heroin and cocaine to Officer Boyles. However, defendant relied upon the defense of entrapment. He testified that he sold the controlled substances at the request of and as a favor to Ted Harris, an informant for the Forest City Police Department. Defendant further testified that his house, although in Rutherford County, is located more than one mile outside the city limits of Forest City; that of the items seized from his residence, the hydrochloric acid and scales were the only items which belonged to him. The other items belonged to the adult members of his family who lived with him. Defendant testified that he uses the hydrochloric acid and scales to test and weigh silver and gold. Defendant has previously been convicted of possessing marijuana with intent to sell and deliver.

Defendant contends the court erred in failing to strike the testimony of Officer Wilkins that as a result of the search of defendant's residence he seized marijuana, hydrochloric acid, a jar of lactose and a brown pouch containing a "coke" spoon, a single edge razor blade and a small mirror, and in admitting these exhibits into evidence over defendant's objections. Defendant argues that the testimony and exhibits were incompetent because Officer Wilkins had no authority to search his residence which was located outside the extraterritorial jurisdiction of the officer. Defendant does not contest the appropriateness of the search warrant, nor the procedures used during the search. Defendant's sole contention concerns the extraterritorial jurisdiction of Officer Wilkins.

G.S. 15A-247 provides that a search warrant may be executed by any law enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved. G.S. 160A-286 provides that in addition to their authority within the corporate limits, city policemen shall have all the powers invested in law enforcement officers by statute or common law within one mile of the corporate limits of the city, and on all property owned by or leased to the city

wherever located. Any officer pursuing an offender outside the corporate limits or extraterritorial jurisdiction of the city shall be entitled to all of the privileges, immunities, and benefits to which he would be entitled if acting within the city, including coverage under the workmen's compensation laws.

[1] First, we consider defendant's contention that the court erred in admitting into evidence the items seized from defendant's residence. Defendant objected to each exhibit as it was offered into evidence. It is uncontradicted that Officer Wilkins, a municipal police officer of Forest City, seized this evidence pursuant to a search of defendant's residence which was located more than one mile beyond the corporate city limits. Further, the search was not the result of Officer Wilkins' pursuit of an offender outside the corporate limits or extraterritorial jurisdiction of the city; nor incident to an arrest. We therefore hold that the search exceeded the officer's extraterritorial jurisdiction as limited by the provisions of G.S. 160A-286. However, admission of the evidence seized during that search did not constitute prejudicial error. An error is prejudicial if there is a reasonable possibility that a different result would have occurred at trial if the error had not been committed. G.S. 15A-1443(a); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). In view of the overwhelming evidence that defendant sold and delivered the controlled substances to Officer Boyles, it is our opinion that there is no reasonable possibility that a different result would have occurred if the court had properly excluded this evidence.

[2] We now consider defendant's contention that the court erred in failing to strike the testimony of Officer Wilkins enumerating the items seized from defendant's residence. In a criminal prosecution, objections to testimony of a State's witness must be interposed to questions at the time they are asked and to the answers when given. *State v. Barrow, supra; State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598 (1943). However, if the objection interposed to the question specifies the ground for the objection, the competency of the evidence will be determined solely on the basis of the ground specified, even though there may be another ground upon which the evidence might be held incompetent. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *State v. Cumber*, 280 N.C. 127, 185 S.E. 2d 141 (1971). Failure to interpose a timely objection constitutes a waiver. *State v. Hunt, supra.*

When, on direct examination, the State asked Officer Wilkins the question which elicited his testimony enumerating the items seized from the residence, defendant objected to the question and specified as his ground for objecting that it was a leading question. It is generally held that leading questions may not be asked on direct examination, but the rulings of the trial judge are discretionary, and reversible only for an abuse of discretion. *State v. Harris,* 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974). We hold that the trial court, in allowing the single leading question presented here, did not abuse its discretion in overruling defendant's objection on the ground stated.

We also note that defendant failed to object to the witness' answer and failed to make a timely motion to strike the answer. Defendant's motion to strike the witness' answer was made later, during the cross-examination of Officer Wilkins. Where there is no timely objection to the testimony, a motion to strike is addressed to the discretion of the trial judge, and his ruling thereon is not subject to review in the absence of abuse. *State v. Hunt, supra.* In view of our holding that the trial court did not abuse its discretion in overruling defendant's objection to the "leading question" together with defendant's failure to make a timely objection to the testimony, or timely motion to strike the answer, we hold that the trial court did not abuse its discretion in denying defendant's motion to strike.

[3] Defendant next contends the court erred in allowing Officer Boyles to testify to the results of field tests Boyles conducted on the substances purchased from defendant where there was no evidence to establish his qualifications to conduct such tests or to give the results.

We conclude that any error in the admission of Officer Boyles' testimony regarding the results of the field tests was harmless. While Officer Boyles himself was not qualified as an expert witness for purposes of identifying the "controlled" nature of the substance purchased, the State later tendered the testimony of an expert forensic chemist, Ralph Johansen. Johansen thereafter testified that he tested the substances purchased and found them to be heroin and cocaine. This testimony was undisputed. In *State v. Ingram,* 23 N.C. App. 186, 208 S.E. 2d 519 (1974) this

Court ruled the erroneous admission of a non-expert opinion as to the nature of the substance (heroin), harmless error under strikingly similar circumstances. Defendant has presented no compelling reason to depart from that rule in the case *sub judice.* We therefore conclude that admission of Officer Boyles' non-expert testimony was harmless error.

Defendant also assigns as the judge's imposition of a sentence in excess of the presumptive sentence. However, defendant has failed to include a copy of the judgment within the record on appeal and has failed to set forth an exception to the judgment. Thus, defendant's assignment of error is not properly presented to this Court for review. Rules 9(b)(3) and 10(a), Rules of Appellate Procedure.

We have carefully considered defendant's other assignments of error and find them to be without merit.

In defendant's trial we find

No prejudicial error.

Judges HEDRICK and EAGLES concur.

Judge EAGLES concurring.

I concur, but would emphasize that the results of an expensive and far reaching police investigation could have been jeopardized by the failure of local police officers to scrupulously abide by jurisdictional limitations. In this case the error was harmless, but for a law enforcement officer to wilfully act outside of his territorial jurisdiction without excuse is error.

LANCE R. CUNNINGHAM AND WIFE, PAMELA H. CUNNINGHAM v. LOUISE JOHNSON BROWN

No. 821SC570

(Filed 17 May 1983)

Automobiles and Other Vehicles §§ 58.2, 80.2— collision with following vehicle—negligence in turning—no contributory negligence as matter of law

In an action to recover for injuries sustained by plaintiffs when their motorcycle struck defendant's car as it made a left turn across plaintiffs' lane of travel as plaintiffs were passing a tractor-trailer, plaintiffs' evidence was sufficient to permit the jury to find that defendant, in the exercise of a proper lookout to see that her turn could be made in safety, could have seen plaintiffs as they approached in the lane across which she was to turn, and by exercising due care and caution thereafter could have averted the collision, where it tended to show that defendant was traveling ahead of plaintiffs and in the same direction as plaintiffs; defendant's car was separated from plaintiffs' motorcycle by a tractor-trailer, and the parties could not see each other because of the tractor-trailer; plaintiffs' motorcycle pulled into the left lane to pass the tractor-trailer; and defendant's turning movement did not occur until plaintiffs' motorcycle was located "up near the rear wheels of the tractor" or "close to the front of the truck." Furthermore, plaintiffs' evidence was insufficient to establish contributory negligence as a matter of law but presented a jury question on that issue. G.S. 20-154(a) and (d).

APPEAL by plaintiffs from *Fountain, Judge.* Judgment entered 10 March 1982 in Superior Court, DARE County. Heard in the Court of Appeals 19 April 1983.

Plaintiffs appeal from a directed verdict for defendant in a negligence action.

Trimpi, Thompson & Nash, by C. Everett Thompson, for plaintiff appellants.

Leroy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendant appellee.

WHICHARD, Judge.

I.

Plaintiffs filed a complaint against defendant alleging the following: Plaintiffs resided in Massachusetts and defendant resided in North Carolina. On 9 September 1977 plaintiff Lance R. Cunningham (hereinafter "plaintiff-husband") was driving a motor-

cycle on which plaintiff Pamela H. Cunningham (hereinafter "plaintiff-wife") was a passenger. The plaintiffs were traveling north on U.S. Highway 158 in Currituck County, North Carolina. Defendant was also traveling north on Highway 158 ahead of plaintiffs, separated from them by a tractor-trailer. As plaintiff-husband passed the tractor-trailer defendant turned from her right lane of travel into her left lane of travel and into the path of plaintiffs' motorcycle, resulting in a collision. Plaintiffs sought recovery for numerous bodily injuries, loss of wages, and impairment of earning capacity.

Defendant answered denying her own negligence and asserting the contributory negligence of both plaintiffs. She also counterclaimed for damages to her automobile caused by the collision.

At the close of plaintiffs' evidence the trial court allowed defendant's motion for directed verdict as to the claims of both plaintiffs.

Plaintiffs appeal.

II.

> Settled principles establish that the purpose of a G.S. 1A-1, Rule 50(a) motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs; that in determining such a motion the evidence should be considered in the light most favorable to plaintiffs, and the plaintiffs should be given the benefit of all reasonable inferences; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiffs' prima facie case in all its constituent elements. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977); *Koonce v. May*, [59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982)]; *Everhart v. LeBrun*, 52 N.C. App. 139, 141, 277 S.E. 2d 816, 818 (1981); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644-45, 272 S.E. 2d 357, 359-60 (1980).

Wallace v. Evans, 60 N.C. App. 145, 146, 298 S.E. 2d 193, 194 (1982).

III.

The evidence for plaintiffs here, viewed, as required, pursuant to these principles, showed the following:

Plaintiff-husband testified that he and plaintiff-wife had come to Dare County from their home in Massachusetts on a motorcycle. They were returning to Massachusetts when the collision in suit occurred. He was driving their motorcycle with plaintiff-wife as a passenger.

Plaintiffs had been behind a tractor-trailer for several miles, and had been traveling at approximately thirty-five miles per hour. When they reached "a straight-of-way area," they attempted to pass the tractor-trailer. Plaintiff-husband did not see any oncoming traffic for "over half a mile, three-quarters of a mile," and he did not see any vehicles in front of the tractor-trailer.

When he "got up near the rear wheels of the tractor," he saw for the first time a car turning left in front of it. He could not go to the right because of the tractor-trailer. He "swerved a bit to the left," the car came directly in front of him, and he struck it. He and plaintiff-wife were hospitalized for five weeks as a result of injuries sustained in the collision.

On cross-examination plaintiff-husband reiterated that he never saw defendant's car in front of the tractor-trailer until he "got over by the side of the tanker." Defendant had commenced her turn the first time he saw her, and was across the center line in the process of turning into a driveway. Before that time the tractor-trailer had blocked his view of her car.

Plaintiff-husband was not in a position to testify as to whether defendant gave a turn signal before she came across the center line. He did not have time to blow his horn. He tried to stop, but his brakes "wouldn't hold well enough."

Plaintiff-wife testified that she and plaintiff-husband had been following the tractor-trailer at a speed much slower than the fifty-five miles per hour limit. When plaintiff-husband pulled out to pass the tractor-trailer, she looked to the front and the rear and saw nothing coming in either direction. When they "got up close to the front of the truck a car pulled out from in front of the truck and cut left across in front of [them]." She had not seen the car before.

Plaintiff-wife became upset when asked to describe what happened next. When she regained her composure, she described the events following the accident and the details regarding her injuries.

On cross-examination plaintiff-wife testified that she had not at any time objected to plaintiff-husband's attempt to pass the tractor-trailer. She said she had not known if anything was in front of the tractor-trailer. She had not been able "to catch a glimpse of the car in front of it" in the process of going around curves. She never saw defendant's car at all until it started turning. Before that time the tractor-trailer had blocked her view of it. She saw nothing objectionable about the way plaintiff-husband was operating the motorcycle or passing the tractor-trailer.

The tractor-trailer driver testified that he had observed defendant's car to his front and plaintiffs' motorcycle to his rear prior to the collision. He stated, however, that the drivers of each of these vehicles could not see the other vehicle prior to the collision because his vehicle was "in the way."

On cross-examination the tractor-trailer driver stated that when he first saw defendant commence her turn signal, he "glanced in the mirror and [saw] the motorcycle pulling out." He indicated that defendant's turning movement and plaintiffs' passing movement occurred simultaneously.

IV.

The crucial issue is whether there was "any evidence more than a scintilla" sufficient to justify an inference that defendant, before commencing her turning movement, could have seen that plaintiffs' motorcycle was traveling in the lane across which her turn was made. The only non-interested witness who observed the accident, the tractor-trailer driver, testified that she could not have. Plaintiffs' testimony did not directly indicate either that she could or could not have.

Plaintiffs did testify, however, as to the locale of their motorcycle when defendant's turning movement occurred. Plaintiff-husband's testimony indicated that he was "up near the rear wheels of the tractor" when, for the first time, he saw defendant turning left in front of the tractor-trailer. Plaintiff-wife testified: "[W]hen

we got up close to the front of the truck a car pulled out from in front of the truck and cut left across in front of us."

Plaintiffs' testimony in this regard, viewed, as required, in the light most favorable to them, indicates that defendant's turning movement did not occur until plaintiffs' motorcycle was located "up near the rear wheels of the tractor" (not the trailer) or "close to the front of the truck." If the jury believed this testimony as to the locale of plaintiffs' motorcycle when defendant turned, it could reasonably infer that defendant, in the exercise of a proper lookout, could have seen plaintiffs prior to commencing her turning movement, and that by failing to do so she violated the statutory mandate that she "first see that [her] movement [could] be made in safety." G.S. 20-154(a). While violation of this statute did not constitute negligence *per se*, G.S. 20-154(d), it was "evidence to be considered with other facts and circumstances in determining whether the violator used due care." *Cowan v. Transfer Co. and Carr v. Transfer Co.*, 262 N.C. 550, 554, 138 S.E. 2d 228, 231 (1964).

V.

In the trial court counsel for defendant contended that his motion for directed verdict should be granted on three grounds: (1) that there was no evidence of actionable negligence on the part of defendant, (2) that plaintiffs were contributorily negligent as a matter of law, and (3) that "release, compromise and settlement [was] established as a matter of law by plaintiffs' evidence."

The judgment does not indicate the ground or grounds on the basis of which the court allowed the motion. The parties have argued only the negligence question in their briefs and before the court. It will suffice to say that we find evidence to take the issue of contributory negligence to the jury, but not to establish it as a matter of law; and that the record before us does not establish "release, compromise and settlement" of plaintiffs' claims against defendant as a matter of law. The release itself was listed in the final pre-trial order as an exhibit which defendant might offer at trial. It was not in fact offered, however, and the record before us does not contain it. The only evidence relating to the release was testimony by plaintiff-wife on cross-examination, and that testimony did not establish that plaintiffs had released defendant as a matter of law.

VI.

Justice (later Chief Justice) Parker once referred to a matter similar to this as "a borderline case." *Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 234 (1962). Considering the evidence in the light most favorable to plaintiffs, however, as we must, we believe it would permit, but not compel, a finding that defendant, in the exercise of a proper lookout to see that her turn could be made in safety, could have seen plaintiffs as they approached in the lane across which she was to turn, and by exercising due care and caution thereafter could have averted the collision. Defendant's motion for directed verdict thus was improperly granted.

This is the second time this matter has been before this Court. *See Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981). The decision here remands for yet a third proceeding. In "borderline cases" such as this, juries, if allowed, will often terminate the proceedings with a verdict for defendants, thereby averting unnecessary and undesirable consumption of time by both the trial court and this Court. We therefore deem it appropriate to emphasize anew the following procedural point:

> Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

Manganello v. Permastone, Inc., 291 N.C. 666, 669-70, 231 S.E. 2d 678, 680 (1977). *See Koonce v. May*, 59 N.C. App. 633, 637, 298 S.E. 2d 69, 73 (1982); *Wallace, supra*, 60 N.C. App. at 148-49, 298 S.E. 2d at 196; *Kuykendall v. Turner and Booth*, 61 N.C. App. 638, 642, 301 S.E. 2d 715, 718 (1983).

Reversed and remanded.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA v. CHARLES ANTHONY SHOFFNER

STATE OF NORTH CAROLINA v. MARK ANTHONY SUMMERS

No. 8218SC1050

(Filed 17 May 1983)

1. **Rape and Allied Offenses § 4.3— exclusion of testimony concerning victim's prior sexual advances—error**

In a prosecution for second degree rape, the trial court erred in excluding testimony concerning the prosecuting witness's prior sexual conduct which tended to suggest that the prosecuting witness's *modus operandi* was to accost men at clubs, parties and make sexual advances by putting her hands "all over their bodies," and where the evidence tended to suggest that the prosecuting witness's sexual behavior on the night of the crime charged was no different from the prosecuting witness's pattern of sexual behavior. G.S. 8-58.6(b)(3).

2. **Rape and Allied Offenses § 4.1— cross examination of defendants about prior convictions and acts of misconduct—denial of opportunity to cross examine prosecuting witness concerning prior bad acts**

On the basis of *State v. Fortney,* 301 N.C. 31 (1980), defendant was not denied equal protection and due process by the trial court's decision to allow cross examination of defendants about prior acts of misconduct while denying defendants the opportunity to cross examine the prosecuting witness concerning her prior bad acts.

3. **Criminal Law § 26.2- dismissal of charges on day of preliminary hearing—no former jeopardy**

Where defendants were arrested on charges of rape and required to post bond, where on the day the preliminary hearing was scheduled in district court, the district attorney dismissed the charges, and where the defendants were later indicted on the same charges, arrested again, and required to post another bond, the former jeopardy defense was not available to defendants.

APPEAL by defendants from *Davis, Judge.* Judgments entered 4 June 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 March 1983.

From judgments imposing twelve-year prison sentences following their convictions of second degree rape, defendants, Charles Anthony Shoffner and Mark Anthony Summers, appeal.

Attorney General Edmisten, by Associate Attorney John R. Corne, for the State.

David M. Dansby, Jr., for defendant appellants.

BECTON, Judge.

I

The prosecuting witness visited defendants at their apartment on 20 November 1981 but later left with the defendants to visit a mutual friend. On the way to the friend's home, defendant Shoffner, who was driving, stopped the vehicle, and, according to the prosecuting witness, the defendants undressed her against her will and forced her into the back seat. The prosecuting witness testified that defendant Summers penetrated her with his penis but soon withdrew because she continued to kick and fight; that defendant Shoffner then got in the back seat and "grabbed my pubic hair and twisted it a couple of times to make me be still. And, so, he did put his penis inside me, but I was still fighting and they just decided to just give it up and take me back to the apartments."

Defendant Shoffner testified that he got on top of the prosecuting witness, but did not penetrate her because he could not get his "nature up." Defendant Summers admitted the sexual intercourse, but contended that it was with the prosecuting witness's consent. The defendants, and several other witnesses, testified that before leaving defendants' apartment, the prosecuting witness unzipped defendant Summers' pants, fondled his genitals, and asked defendants and others present if they wanted to have an orgy. The defendants also testified that the prosecuting witness fondled their genitals as they drove toward their friend's house, and that the prosecuting witness told defendant Shoffner where and when to stop the car.

II

The issues presented are whether the trial court erred (i) in denying defendants' motion to permit evidence of the prosecuting

witness's prior sexual conduct; (ii) in permitting the district attorney to cross examine the defendants about prior convictions and prior acts of misconduct while denying defense attorneys the same privilege to cross examine the prosecuting witness; and (iii) in denying defendants' motion to dismiss on the grounds of former jeopardy. For the reasons that follow, defendants are entitled to a new trial.

III

The Prosecuting Witness's Prior Sexual Conduct

The Rape Victim Shield Statute, N.C. Gen. Stat. § 8-58.6(b)(3) (1981) provides, in relevant part, that:

> (b) [t]he sexual behavior of the complainant is *irrelevant* to any issues in the prosecution *unlesss* such behavior:
>
> . . . .
>
> (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. . . . [Emphasis added.]

Sexual behavior is defined 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 trial court allowed seven witnesses, including the defendants, to testify that on the date of the alleged offense the prosecuting witness came to the residence of defendants and while there made sexual advances by putting her hand inside defendant Summers' pants and suggested that the parties present have an orgy. The trial court, however, excluded the following evidence, presented at the *voir dire* hearing, pursuant to G.S. § 8-58.6(b)(3):

1. That Kay Mitchell had observed the prosecuting witness, many times at a club, "attracting some of the men," dancing with them, and getting out of control by "feeling on them and stuff like that. . . . [Her] hands [would be] every which way on the man's body."

2. That at a party approximately a year and a half before 20 November 1981, the prosecuting witness tried to seduce Darryl Summers, the older brother of defendant Summers, and told Darryl to come by her house later that night. When Darryl Summers came by the prosecuting witness's house later that night, she got in his car. She had no underclothes on; in fact, she was clad only in a gown. Darryl Summers and the prosecuting witness then had sexual intercourse in the car.

3. During November 1981, defendant Summers observed the prosecuting witness go to his bedroom with Herman Summers, another one of defendant's brothers.

4. That several months prior to November 1981, the prosecuting witness told a Mr. Faust that she had been caught at some hotel with a Mr. Lynn.

5. That Mr. Faust had had sexual intercourse with the prosecuting witness.

6. That a Mr. Pennix had observed the prosecuting witness seated on a "soda crate" in the Circle Inn with two men standing in front of her, one of whom was zipping his pants.

Because even the most promiscuous among us can be raped, the Rape Victim Shield Statute may properly be invoked to exclude the testimony that Mr. Faust had sexual intercourse with the prosecuting witness; that the prosecuting witness told Mr. Faust that she had been caught at a hotel with a Mr. Lynn; and that defendant Summers saw the prosecuting witness go to a bedroom with Herman Summers.

[1] The trial court erred in excluding the other testimony, however. The testimony of Mr. Pennix, although circumstantial, when combined with the testimony of Kay Mitchell and Darryl Summers, suggests that the prosecuting witness was the initiator, the aggressor, in her sexual encounters. The evidence excluded suggests that the prosecuting witness's *modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands "all over their bodies." Defendants contend that the prosecuting witness's sexual behavior on 20 November 1981—fondling their genitals, trying to get them to

engage in an orgy, and telling them where and when to stop the car—was no different from the prosecuting witness's pattern of sexual behavior.

We do not believe the Rape Victim Shield Statute requires the prior sexual behavior of a complainant to parallel on all fours a defendant's version of the prosecuting witness's sexual behavior at the time in question. If G.S. § 8-58.6(b)(3) is to have any application, it has to be applied in this case. As our Supreme Court said in *State v. Fortney*, 301 N.C. 31, 43, 269 S.E. 2d 110, 116-117 (1980):

> Defendant presented no testimony at either of the *in camera* hearings held on this point that indicated that the victim's sexual *behavior* on past occasions conformed to the defendant's version of the facts in this event. If the defendant had shown that the victim commonly accosted strangers in parking lots seeking sexual partners or that she often met men in apartment parking lots and took them to her car for sexual congress, then clearly the relevance of such evidence is established under the statute and would have been admissible.

In this case, Shoffner and Summers tendered evidence indicating that the prosecuting witness's sexual behavior on past occasions conformed to their version of what happened on 20 November 1981. They are, therefore, entitled to a new trial. (We note parenthetically, that ordinarily, Shoffner would be entitled to no relief since he denied penetration. However, the jury may have viewed Shoffner's credibility differently had the trial court not erroneously excluded evidence suggesting that Shoffner may have had a reasonable belief that the prosecuting witness consented to his getting on top of and trying to have sexual intercourse with her. Because of that, Shoffner's failure to get his "nature up" is irrelevant to the issue of consent.)

IV

Prior Convictions and Prior Acts of Misconduct

[2] Although conceding that a district attorney may cross examine defendants about prior convictions and prior acts of misconduct generally, defendants contend that on the facts of this case the prejudicial effect of the cross examination outweighed its

probative value and that the trial court's decision to permit defendants to be cross examined about their prior convictions and prior acts of misconduct while denying the defendants the opportunity to cross examine the prosecuting witness concerning her prior bad acts constitutes a denial of equal protection and due process. Even if defendants were to make a right of confrontation argument under the Sixth Amendment, we would reject their constitutional arguments on the basis of *State v. Fortney.* A full legal analysis is not necessary, however, because we have already ruled in Part III above that the trial court erred in excluding evidence of the complainant's sexual behavior.

V

Former Jeopardy

[3] The defendants were arrested on the charges of rape and required to post bond. On the day the preliminary hearing was scheduled in district court, the district attorney dismissed the charges. The defendants were later indicted on the same charges, arrested again, and required to post another bond. Defendants' argument that jeopardy attached by reason of the above is summarily rejected. Although defendants are quite properly concerned that they had to post bond twice, a practice that should not be countenanced, we can afford them no relief on this appeal based on a claim of former jeopardy.

For the reasons stated above in Part III of this opinion, the defendants are entitled to a new trial.

New trial.

Judges VAUGHN and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DAVID MEDLIN

No. 8220SC1151

(Filed 17 May 1983)

1. Criminal Law § 138— felonious assault—aggravating factor—especially heinous, atrocious or cruel crime—insufficient evidence

In imposing a sentence for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel based upon evidence that the crime was committed without provocation while the victim was on the ground, the victim was shot five times, and defendant fled the scene without rendering assistance to her, since the evidence did not reflect "excessive brutality" beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury.

2. Criminal Law § 138— felonious assault—severe physical disability from crime—improper aggravating factor

In imposing a sentence for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as an aggravating factor that the victim suffered very severe physical disability from the crime since such factor does not relate to the character or conduct of the defendant. G.S. 15A-1340.3 and G.S. 14-318.4.

Judge EAGLES concurring.

APPEAL by defendant from *Morgan, Judge.* Judgment entered 13 August 1982 in UNION County Superior Court. Heard in the Court of Appeals 14 April 1983.

Defendant pled guilty to the felony of assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence at defendant's sentencing hearing tended to show the following pertinent facts and circumstances.

On 1 May 1982, defendant went to a house belonging to the mother of his girl friend, Ms. Diana Nivens, the victim. Defendant found Ms. Nivens getting out of a car driven by Doug Huntly, a friend of Ms. Nivens of whom defendant was jealous. Defendant and Ms. Nivens went into Ms. Nivens' mother's house. An hour later, after visiting and arguing with Ms. Nivens, defendant dragged the victim from the house, and into the yard trying to convince her to leave with him. She resisted and defendant hit her in the eye, stated to her, "If I can't have you, ain't nobody going to have you," and shot her five times with a .22 caliber pistol.

The victim then heard defendant tell her daughter "I have killed your mother." Defendant got in his car and turned it around, got back out of the car and went to where the victim lay on the ground, partially picked up the victim, went to the front of his car and shot himself in the chest. Defendant then fled. He later turned himself in to the authorities and immediately after doing so fell face forward on the ground. Defendant was taken to the hospital and was found to have a serious injury. Defendant refused to talk with law enforcement officers at the hospital.

At the time of defendant's sentencing hearing, the victim was 30 years old. As a result of the shooting, she had sustained bullet wounds to the head, the ear, the neck, the chest and the hand. The bullet in her chest has not been removed. She was hospitalized for 10 weeks and thought she might need future operations. At the time of the hearing, Ms. Nivens' face remained partially paralyzed, she could not hear out of one ear, she was disabled to the extent that she could not drive a car, and would not be able to return to her work as a nurse's assistant for at least four more months. The victim's medical and hospital bills incurred as of the time of the hearing were in excess of $20,000.00.

The trial judge made findings of aggravating and mitigating factors and, finding that the factors in aggravation outweighed factors in mitigation, sentenced defendant to a term of imprisonment in excess of the statutory presumptive term. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Harry B. Crow, Jr., for the defendant.

WELLS, Judge.

Defendant having been given a sentence in excess of the presumptive term, his appeal is as a matter of right. G.S. 15A-1444(al). On such an appeal, the only question before the appellate court is whether the sentence is supported by the evidence presented at trial and the sentencing hearing. *Id.* The factors found must be supported by a preponderance of the evidence. G.S. 15A-1340.4(a).

The trial judge found two factors in aggravation: (1) "that the offense was especially heinous, atrocious, or cruel in that it was done without provocation while the victim was on the ground; that the victim was shot five times; and that defendant fled the scene without rendering assistance to her;" and, (2) "that the victim suffered very severe physical disability from this crime." As a mitigating factor, the trial judge found that defendant had no prior criminal record of convictions of offenses punishable by more than 60 days imprisonment.

[1] We first consider whether the trial court correctly found that the offense was especially heinous, atrocious or cruel. To begin our discussion and analysis, we recognize that *any* assault with a deadly weapon with intent to kill inflicting serious injury falls within that classification of offenses which are *mala in se*; thus, such an assault has inherent characteristics of depravity of mind. Heinous, atrocious and cruel are terms, words, or expressions which are significantly synonymous, all reflecting the underlying characteristic of depravity. It must, therefore, be assumed that in setting the presumptive sentence, the General Assembly understood the depraved nature of such an assault; and that in allowing evidence of these inherent characteristics of the offense to be used as a factor in aggravation in sentencing, the legislative intent was that the question be narrowed to whether assault was especially heinous, atrocious or cruel; and further, that the use of the word, "especially" was not merely tautological. Our Supreme Court has articulated these principles, in a capital homicide case, *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), as follows:

> While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. (Cites omitted.)

See also State v. Johnson, 298 N.C. 47, 257 S.E. 2d 597 (1979); *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982); and *State v. Ahearn*, --- N.C. ---, 300 S.E. 2d 689 (1983).

While we are loath to reach such result, we are persuaded that the evidence in this case did not reflect the requirement of "excessive brutality," beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury, and that the trial court erred in finding this factor in aggravation.

[2] We now consider whether the trial judge properly found as an additional factor in aggravation "that the victim suffered very severe physical disability."

Factors in aggravation other than the statutorily enumerated factors, if proven by a preponderance of the evidence and reasonably related to the purposes of sentencing, may be considered by the sentencing judge. Facts that are both transactionally related to the offense and reasonably related to the purposes of sentencing, if not facts used to establish elements of an offense the defendant has pled guilty to or been convicted of, must be considered by the sentencing judge. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983).

G.S. 15A-1340.3 provides that

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Our Supreme Court in *State v. Ahearn*, *supra*, and *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983) has put significant limitations on what factors trial judges may find and use to enhance a criminal defendant's sentence. Writing for the Court in *Ahearn*, Justice Meyer stated that

> The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when ap-

> propriate, to the particular offender. Presumptive sentences established for every felony provide certainty.

In *Chatman*, the Court relied on the foregoing portion of *Ahearn*. The defendant in *Chatman* had been given a sentence in excess of the presumptive term upon his conviction for first degree burglary. The trial judge found statutorily enumerated factors in aggravation and also made "additional written findings of factors in aggravation" including

> c. The defendant is a dangerous sex offender whose history makes it necessary to segregate him for an extended term from the public for its safety and protection.
>
> d. The sentence pronounced by the court is necessary to deter others from committing the same crime.
>
> e. A lesser sentence than that pronounced by the court will unduly depreciate the seriousness of the defendants [sic] crime.

The Court held that the finding that the defendant is a dangerous sex offender was reasonably related to a legitimate purpose of sentencing, *i.e.*, protecting the public, and that a defendant's dangerousness to others may be considered as an aggravating factor, citing *State v. Ahearn*. With regard to factors d. and e. found by the trial judge, the Supreme Court held that they were erroneously found, stating:

> Judge Albright erred in finding as factors in aggravation that the sentence was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to *the character or conduct of the offender. See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

State v. Chatman, supra (emphasis in original).

We believe that the question raised by the trial court's use of the factor in aggravation "that the victim suffered very severe

physical disability" in the present case presents a question analogous to that addressed by the Supreme Court in *Chatman.* Like the "necessary to deter" and "seriousness of the crime" factors found in *Chatman,* the "resulting disability to the victim" factor in the present case does not relate to the character or conduct of the defendant.

To further illustrate and support our impression of the legislative intent at issue here, we invite attention to the provisions of G.S. 14-318.4:

> § 14-318.4. *Child abuse a felony.* —
>
> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:
>
> (1) Permanent disfigurement, or
>
> (2) Bone fracture, or
>
> (3) Substantial impairment of physical health, or
>
> (4) Substantial impairment of the function of any organ, limb, or appendage of such child, is guilty of a Class I felony.
>
> . . .

The presumptive sentence for a Class I felony is two years. The General Assembly, in classifying the offense described in G.S. 14-318.4, required consideration of the nature and results of the *injury inflicted.* In classifying the offense with which defendant in this case was charged, the General Assembly chose not to require consideration of the *injury inflicted* beyond the requirement that such injury be "serious." We, therefore, must assume the trial judge in this case was without authority to consider evidence as to the nature of and results of the injuries to Ms. Nivens as a factor in aggravation.

For the reasons stated, the sentence imposed in this case must be vacated and the case must be remanded for re-sentencing.

Vacated and remanded.

Judge BECTON concurs.

Judge EAGLES concurs separately.

Judge EAGLES concurring.

I concur but would limit treatment of the second aggravating factor to a statement that it was inappropriate because the "very severe physical disability" was proven by evidence necessary to prove an element of the charged offense, assault with a deadly weapon with intent to kill *inflicting serious injury.*

TED CASH v. RICHARD CRAVER, MARY ADELAIDE AUSTELL CRAVER AND PHIL RUCKER

No. 8227SC510

(Filed 17 May 1983)

1. **Easements § 5.2— easement by implication—reasonable necessity**

The trial court properly found that defendants owned an easement by implication in a road where the road had been regularly used for farm and travel purposes before severance, and where there were extensive difficulties inherent in exploiting an alternate way onto defendants' property.

2. **Easements § 5— easement by implication—sufficiently identified**

In an action in which an easement by implication was established, the evidence presented sufficiently identified the easement over plaintiff's land where the evidence revealed the roadway had been substantially in place for over 60 years.

3. **Evidence § 11— dead man's statute—testimony admissible**

Although the trial court improperly sustained an objection to certain testimony on grounds of the North Carolina dead man's statute, G.S. 8-51, since the testimony was offered in favor of those claiming an interest through the decedent, the error was not prejudicial since the testimony was inadmissible as hearsay and therefore properly excluded.

APPEAL by plaintiff from *Friday, Judge.* Judgment entered 24 November 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 18 March 1983.

Plaintiff sought a permanent injunction barring defendant Mary Adelaide Austell Craver, owner of a tract of land abutting

plaintiff's property, her husband, Richard Craver, their lessee, Phil Rucker, and their tenants and assigns from using a road that crosses plaintiff's property. The trial court denied plaintiff's request for injunctive relief, ruling on defendant Mary Craver's counterclaim that defendants own an easement by implication in the road. Plaintiff appealed from the judgment.

Lamb & Bridges, by Forrest D. Bridges and James W. Morgan, for plaintiff-appellant.

DeLaney, Millette, DeArmon & McKnight, by Richard D. Craver, for defendant-appellees.

HILL, Judge.

Relying on the trial court's findings, which are supported by competent evidence and thus are conclusive, *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975), we consider the facts on which the court's order was predicated. We conclude the trial court properly found an easement by implication in favor of defendants and affirm the judgment below.

Plaintiff Ted Cash and defendant Mary Adelaide Austell Craver own adjoining tracts of land in Number VI Township, Cleveland County, North Carolina, that formerly were wholly owned by W. J. Roberts. In 1917, the 170-acre Craver tract was severed from the whole by a deed of record. The 70-acre Cash tract was severed by deed of record in 1942. Roberts School Road, the subject of this suit, ran across the Cash and Craver tracts prior to severance. The road, following generally known and visible lines, has always been used by plaintiff, defendant Craver, their predecessors in title, assigns and lessees as a schoolway and farm-to-market road, as well as a general means of ingress and egress to the interior lands for farming and transportation to the major highways abutting the tracts.

The trial court found that, while rights to Roberts School Road were never granted defendant by deed, "the use of the roadway in question was and is reasonably necessary to and for the lands now owned by the defendants" for purposes of farming and transporting crops to market. The court concluded an implied easement over the Roberts School Road exists in favor of defendants largely because, prior to severance, "the use, which gave

way to said easement, had been so long continued, observed and manifest as to show that it was meant to be a permanent one and that the easement was and is necessary to the defendant's beneficial enjoyment of the interior lands."

We hold, in affirming its order, that the trial court properly denied plaintiff's motion for a permanent injunction and found an easement by implication in favor of defendants; plaintiff's argument to the contrary is without merit.

It is apparent from Judge Friday's order that he found an easement implied from prior use (in technical parlance, an easement implied from a quasi-easement), an assessment with which this Court concurs. *See generally* Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C.L. Rev. 223 (1980) (to aid courts in differentiating between easements by necessity and easements implied from a quasi-easement, the author suggests that "easement implied by prior use" be substituted for its more technical formulation).

The elements of proof for easements implied from prior use are: (1) separation of title; (2) prior use "so long continued and so obvious or manifest as to show that it was meant to be permanent," and (3) that the claimed easement was "necessary to the beneficial enjoyment of the land." *Carmon v. Dick*, 170 N.C. 305, 308, 87 S.E. 224, 225-26 (1915); *Smith v. Moore*, 254 N.C. 186, 118 S.E. 2d 436 (1961); *McGee v. McGee*, 32 N.C. App. 726, 233 S.E. 2d 675 (1977). The court found facts, to which plaintiff failed to except, in accordance with the requisite elements of proof. Having excepted to the judgment, plaintiff raises only the question of whether the findings support the judgment. North Carolina Rules of Appellate Procedure, Rule 10(a). We hold that the findings of fact, which essentially recite the elements of the easement implied from prior use, do indeed support the judgment.

The plaintiff, who apparently concedes the existence of severance and prior use, contends in support of his first assignment of error that necessity has not been shown. While we need not discuss the sufficiency of the evidence in order to reach our conclusion, *id.*, we briefly consider the question to dispel any confusion regarding the degree of necessity required for an easement implied from prior use.

A showing of strict necessity is not required for an easement arising from prior use. *Smith v. Moore, supra.*

> It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the "fair" . . . "full" . . . "convenient and comfortable" . . . enjoyment of his property.

Id. at 190, 118 S.E. 2d at 438-39 (citations omitted); *see also Broome v. Pistolis,* 53 N.C. App. 366, 280 S.E. 2d 794 (1981) (creation of an easement implied from prior use cannot rest upon mere convenience). The party must establish by the greater weight of the evidence that the easement is reasonably necessary to the beneficial enjoyment of the land. *See Bradley v. Bradley,* 245 N.C. 483, 96 S.E. 2d 417 (1957). The presence of a second or alternative way onto the property is not conclusive proof that an implied easement arising from prior use is unnecessary. *See McGee v. McGee, supra.* Indeed, perhaps of greater significance is evidence that supports the inference that the parties intended the use to continue after severance.

[1] In the present case, the road had been used regularly for farm and travel purposes before severance. That the road has been regularly and similarly used by defendants, their predecessors in title, lessees and neighbors is certainly probative of their right to use the road. While there was evidence of another road on the Craver property by which access to a major abutting highway could be gained, there was also evidence that (1) the road would require major repairs to be passable; and (2) use of the road might necessitate defendants' crossing land belonging to others over which they have no enforceable right-of-way. In any event, the prior, regular and continuous nature of the use and the difficulties inherent in exploiting an alternate way, if one does exist, amply support the findings.

[2] We further hold that the findings of fact and evidence presented at hearing sufficiently identify the easement over plaintiff's land.

At trial, a county tax map of the premises on which witnesses marked location of the easement was used for illus-

trative purposes. The trial judge found that "the defendant has shown by the greater weight of the evidence an implied easement over the roadway in question, and the same is hereby established, ordered, and decreed to so be."

The evidence reveals the roadway had been substantially in place for over sixty years. One witness indicated the course of the roadway on the map. Another testified in reference to the map, "The roadway still runs the same course as during the time I was using it. You can see the old roadbed all the way through there . . . ." This witness identified monuments along the right of way and stated that he had attended the Roberts School. It is apparent the Roberts School Road may be readily located on the parties' land, a fact of which the judge obviously took account. *See Thompson v. Umberger*, 221 N.C. 178, 19 S.E. 2d 484 (1942). We conclude the description to be adequate and find plaintiff's contention to the contrary to be without merit.

Plaintiff argues that the trial judge improperly permitted defendants' attorney to ask leading questions of "friendly witnesses." We hold the court acted properly. In the exercise of its discretion, the court may allow leading questions to be asked of a witness when it seems advisable; in the absence of abuse, the exercise of such discretion will not be disturbed on appeal. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974), *see* 1 Stansbury *North Carolina Evidence* § 31 (Brandis Revision 1982). The plaintiff has failed to persuade this Court that the trial judge abused his discretion or that plaintiff was prejudiced.

[3] In his final argument, plaintiff contends the court improperly sustained an objection to certain testimony on grounds of the North Carolina dead man's statute, G.S. 8-51. Finding the testimony was offered *in favor of* those claiming an interest through the decedent, we agree that the judge misstated the grounds for exclusion. *See id.* (testimony regarding statements of the decedent *adverse* to those claiming an interest through the decedent is inadmissible). Nevertheless, the testimony was inadmissible as hearsay and therefore properly excluded. *See Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E. 2d 404 (1961), *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). This assignment is overruled.

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, THE TOWN OF TARBORO AND ELECTRICITIES OF NORTH CAROLINA v. VIRGINIA ELECTRIC AND POWER COMPANY AND POLYLOK CORPORATION

No. 8310UC114

(Filed 17 May 1983)

Electricity § 2.3— municipal corporation—no protection as "electric supplier"

A municipal corporation cannot be an "electric supplier" within the meaning of G.S. 62-110.2(b)(5), and that statute thus confers no right upon a municipality to continue to supply electricity to a customer within an unassigned service area. G.S. 160A-311(1) and G.S. 160A-110.2(a)(3).

Judge JOHNSON dissents.

APPEAL by defendants from the North Carolina Utilities Commission. Orders entered 9 December 1982 and 21 December 1982. Heard in the Court of Appeals 22 April 1983.

Suit for injunctive relief by the Town of Tarboro, North Carolina, to restrain Virginia Electric and Power Company (Vepco) from constructing distribution lines and other plant facilities, acquiring rights of way and doing other acts or things designed to enable it to serve power to Polylok Corporation (Polylok) and its subsidiaries, and from soliciting business from other electric power customers served by the town. Both Town of Tarboro and Virginia Electric and Power Company moved for summary judgment. Based on the pleadings, affidavits filed prior to the hearing, and stipulations of the parties, the Utilities Commission, in a split decision, allowed the motion for summary judgment filed by the Town of Tarboro, denied the motion for summary judgment filed by Vepco and entered an order permanently enjoining Vepco from providing power service to Polylok and its subsidiary, Polylok Finishing Corporation. Vepco and Polylok appeal.

Spruill, Lane, Carlton, McCotter & Jolly, by J. Phil Carlton, Ernie K. Murray and DeWitt C. McCotter, for plaintiff-appellee, ElectriCities of North Carolina.

Taylor, Brinson & Marrow, by Herbert H. Taylor, Jr., and Z. Creighton Brinson, for plaintiff-appellee, Town of Tarboro.

Hunton & Williams, by Edward S. Finley, Jr., and Edgar M. Roach, Jr., for defendant-appellant, Virginia Electric and Power Company.

Sanford, Adams, McCullough & Beard, by Charles C. Meeker and Nancy H. Hemphill, for defendant-appellant, Polylok Corporation.

HILL, Judge.

Among the facts not in dispute, the Commission noted the following as significant to its decision.

The Town of Tarboro, Edgecombe County, North Carolina, is a municipal corporation created and existing under the laws of North Carolina. Tarboro is a member of ElectriCities of North Carolina, intervenor in this case, which is a voluntary, nonprofit association having as its members 67 municipalities in North Carolina and Virginia. Virginia Electric and Power Company is a Virginia corporation, a public utility providing electric power in Edgecombe County, North Carolina.

In 1970, Polylok constructed a factory in Edgecombe County located about one mile from the city limits of Tarboro. At that time, the Town of Tarboro agreed to supply its need for electricity. The town constructed an electric line to the plant site at a cost of $79,300 and has since furnished Polylok's needs for electricity. In 1973, Tarboro also began serving Polylok Finishing Corporation. The Town of Tarboro is a member of the North Carolina Eastern Municipal Power Agency and has contracted to "take or pay" for its proportionate share of the project power of the Power Agency which included the load demand of Polylok and its subsidiary.

Polylok and its subsidiary are not located wholly or partially within any area assigned to any electric supplier pursuant to G.S. 62-110.2(c). Neither is the property on which Polylok and its sub-

sidiary are located within 300 feet of the lines of any electric supplier or partially within 300 feet of the lines of two or more electric suppliers. In fact, the area in which Polylok is located was left unassigned by the Utilities Commission at the request of Vepco and Edgecombe-Martin County Electric Membership Corporation in 1968, the Commission indicating that non-assignment would best serve "the public convenience and necessity." At the time, the Town of Tarboro advised the Commission it did not wish to intervene or protest, but requested it be notified and given an opportunity to intervene if any area adjacent to the Town be considered for assignment "to anyone other than the Town of Tarboro."

In 1982, the legislature extended the city limits of the Town of Tarboro to include the Polylok plant site, establishing the effective date of annexation as 30 June 1983. Immediately thereafter Polylok sought a release from its agreement with the town effective on the date of annexation. The town declined to release Polylok.

Polylok contends it desired to get its electrical power from Vepco for the following reasons:

1. Dissatisfaction with Tarboro's annexation of its premises effective 30 June 1983.
2. Tarboro's violation between October, 1981 and May, 1982 of its policy to charge electric rates competitive with those of Vepco.
3. Tarboro's membership in the North Carolina Eastern Municipal Power Agency which is a new, untested venture.
4. Polylok Corporation's conclusion that while future Tarboro rates will not be substantially better than Vepco's, such rates may be substantially worse.
5. Tarboro's rates for electric service are not regulated by any independent authority.

On 12 August 1982, Polylok notified the town that it had contracted to receive its electric service from Vepco, effective 1 January 1983. The utility began constructing lines and expanding its Anaconda substation located one-half mile distant to service

Polylok. On 8 November 1982, the Town of Tarboro filed its complaint against Vepco with the Commission, praying that Vepco be permanently enjoined from supplying Polylok and its subsidiary and from soliciting any of Tarboro's other customers, alleging that Vepco's provision of electric service would result in a duplication of facilities and adverse economic consequences to Tarboro.

The Commission issued a preliminary injunction, restraining Vepco and Polylok, but later amended its order to permit Vepco to continue construction. Various other pleadings raise issues not germane to this proceeding.

All parties agree the issue turns on an interpretation of G.S. 62-110.2(b)(5) which states:

> (b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:
>
> > (5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish services to such premises.

The plaintiff argued—and the majority of the Utilities Commission agreed—that the Town of Tarboro was the electric supplier initially chosen by Polylok and its subsidiary; and that Vepco, as a subsequently chosen electric supplier, is barred from furnishing services pursuant to the last clause of G.S. 62-110.2(b)(5). Polylok contends the town is not an electric supplier within the meaning of the statute, and thus Vepco constitutes its initial electric supplier.

Chapter 287 of the 1965 Session Laws is a comprehensive revision of the electric service statutes in North Carolina. When codified, it was divided into two sections. G.S. 160A-331, *et seq.*, deals with electric service in urban areas, including municipali-

ties, and G.S. 160A-312 provides that "a city may acquire, construct, establish, enlarge, improve, maintain, own and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service." G.S. 160A-311(1) defines a "public enterprise" to include "[e]lectric power generation, transmission and distribution systems." These statutes are a part of Chapter 160A entitled "Cities and Towns."

On the other hand, Chapter 62 of the General Statutes entitled "Public Utilities" relates to electric service outside the limits of municipalities. G.S. 62-110.2(a)(3) provides: " 'Electric supplier' means any public utility furnishing electric service or any electric membership corporation." In *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974), Justice Lake, speaking for the Court, said:

> G.S. 62-110.2, specifying the rights of, and restrictions upon, an "electric supplier," is, of course, a part of Ch. 62 of the General Statutes. G.S. 62-3, defining terms "as used in this chapter, unless the context otherwise requires," states in Clause 23(d), "The term 'public utility' except as otherwise expressly provided in this Chapter, *shall not include a municipality* * * *." (Emphasis added.) Thus, a municipality is not an "electric supplier" as that term is used in G.S. 62-110.2.

Id. at 142, 203 S.E. 2d at 842.

Vepco argues that the wording of the statute and the case law clearly excludes the Town of Tarboro as an electric supplier, and we agree. Electric suppliers are regulated by the Utilities Commission as public utilities. A municipality owns, operates, and regulates its public utilities under its charter and as a public enterprise under G.S. 160A-312. Thus, while the Town of Tarboro was acting within reasonable limitations in extending its lines to the Polylok site in an undesignated area to furnish power on a contractual basis, G.S. 62-110.2 confers no rights upon it as an electric supplier and provides no limitations to protect it.

It is for the legislature, and not this Court, to define "electric supplier" further than presently set out in G.S. 62-110.2(a)(3) if it

intends that municipalities be so designated. While we agree with the Town of Tarboro that equity favors it as the initial supplier, we conclude both statutory and case law compel us to decide otherwise.

The decision of the Utilities Commission granting the Town of Tarboro's motion for summary judgment is reversed and the case remanded to the Utilities Commission for entry of an order in accordance with the decision set out herein.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge JOHNSON dissents.

ARCHIE P. WEST, EMPLOYEE, PLAINTIFF v. BLADENBORO COTTON MILLS, INC., EMPLOYER, AND AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC450

(Filed 17 May 1983)

1. Master and Servant § 95— workers' compensation—proper appeals

In a workers' compensation proceeding in which the Industrial Commission ordered defendants to pay a certain amount to plaintiff prior to the time defendants appealed the award and subsequent to the time plaintiffs appealed the Industrial Commission decision, neither party's right to be heard before the appellate court was lost since defendant made payment pursuant to a legal order rather than pursuant to negotiations between the parties. G.S. 97-86; G.S. 97-86.1.

2. Master and Servant § 94.1— workers' compensation—insufficiency of findings and conclusions

A workers' compensation case must be remanded to the Commission since the Commission did not determine whether plaintiff's earning capacity has or has not been diminished as a consequence of an occupational disease, since the statutory basis for compensation was not specified, since the Commission was mistaken in stating, as a stipulation, the amount of plaintiff's average weekly wage, and since the Commission failed to rule on plaintiff's motion for attorneys' fees.

APPEAL by plaintiff and cross-appeal by defendants from the opinion and award of the Industrial Commission entered 23 November 1981. Heard in the Court of Appeals 10 March 1983.

Plaintiff had worked about thirty-five years for the defendant Bladenboro Cotton Mills. He has a fifth grade education and no significant training outside the cotton textile industry. A non-smoker, his employment with the cotton mill exposed him daily to high levels of cotton dust. When the plant closed down in 1979, he sought work with other textile companies in the area, but none of them, including Highland Yarns, which took over the defendant's Bladenboro plant, would hire him because pulmonary testing showed that his lungs were impaired.

After hearing the evidence, including medical testimony as to plaintiff's condition and its cause, the Deputy Commissioner found that plaintiff's long exposure to cotton dust in defendant's factory caused him to acquire the occupational disease byssinosis, that as a consequence thereof plaintiff has suffered permanent partial loss of respiratory function, that continuing bronchodilator treatments would "tend to lessen his disability," and awarded plaintiff $6,000.

Upon appeal, the Deputy Commissioner's findings, conclusions, and award were adopted by the Full Commission, and after certain developments referred to in the opinion, both parties appealed to this Court.

Hassell, Hudson & Lore, by R. James Lore, for the plaintiff appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis, III, for defendant appellees.

PHILLIPS, Judge.

Each party contends that the other's appeal should have been dismissed by the Industrial Commission. But the following chronology shows that both motions were properly denied and that both appeals are properly before us:

On 23 November 1981, the Full Industrial Commission made its award and opinion, notice of which was received by plaintiff on 27 November 1981 and by defendants on 3 December 1981. On 9

December, defendants paid the $6,000 awarded. On 23 December 1981, plaintiff appealed to this Court, not about the $6,000, but about the Commission's failure to award total disability benefits under G.S. 97-29, and on the same day the Industrial Commission ordered the defendants, who had not then appealed, to pay the $6,000, since it was not involved in the plaintiff's appeal. On Monday, 4 January 1982, defendants gave notice of appeal, which was timely under G.S. 97-86 and Rule 27(a), Rules of Appellate Procedure, since the 30th day from the entry of the award was Saturday, January 2, 1982, and the notice was filed the first business day thereafter. Four days later the Industrial Commission rescinded its order requiring defendants to pay the $6,000.

[1] In substance, plaintiff contends that defendants, by paying the $6,000, waived their right of appeal, and defendants claim that by accepting the $6,000, plaintiff did likewise. Neither contention has merit. Payment was made in compliance with an award that plaintiff had not then appealed from; and, obviously, the order directing payment was entered without knowledge that the defendants had already paid the $6,000 and that their time for appealing had not expired. At the time the defendants paid the $6,000, they were under a legal duty to pay it, but when defendants exercised their appeal rights, that duty ceased, at least for a time; and since the payment was made and received pursuant to a legal order, rather than negotiations between the parties, it was not binding on either as an accord and satisfaction, settlement, waiver, or otherwise. And, of course, in rescinding the earlier order, improvidently and mistakenly entered, the Commission did the proper and necessary thing. Under the circumstances, therefore, neither party's right to be heard here has been lost, waived, or bargained away. This holding is in accord with both the letter and spirit of G.S. 97-86, which relieves employers from paying awards while they are being contested on appeal, and G.S. 97-86.1, which authorizes the Commission to require that awards not involved in an appeal be paid before the other issues raised by the appeal are decided.

For different reasons, both plaintiff and defendants contend that the Industrial Commission erred in determining what to award plaintiff. Since the opinion does not state the statutory base for the award, approaching this question is rather awkward. We assume, however, that since the award is for permanent lung

damage done by an occupational disease, it is based on G.S. 97-31(24), which authorizes compensation up to $10,000 "in case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section." Defendants maintain that the payments were erroneously directed because (1) G.S. 97-31(24) does not cover occupational diseases, and (2) the requisite loss of earning capacity has not been proved. In contrast, plaintiff argues that permanent loss of earning capacity has been established and that he is entitled to compensation therefor under G.S. 97-29, in addition to the lung damage award already received.

[2] Each party's contentions on this point are unsound, at least in part, and whether either's contentions are partially sound depends upon findings and conclusions that the Commission has yet to make. Occupational diseases, including byssinosis, are compensable under the Workers' Compensation Act when they result in disability. G.S. 97-52 and 97-53(13). Compensation may be awarded for permanent total or partial disability, G.S. 97-29 and 97-30, or for disability because of injury (or occupational disease) under the schedule of injuries. G.S. 97-31. But before compensation can be awarded under any of these statutes, disability must exist. G.S. 97-2(9) defines "disability" as "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." A finding of disability is not recorded, although the word "disability" is incidentally used in the opinion and award, and evidence was presented which indicated that plaintiff was not hired by certain cotton mills because of his respiratory impairment. The findings that plaintiff contracted an occupational disease that has permanently damaged his lungs are abundantly supported by the evidence, and therefore cannot be disturbed. But since the Commission has not yet determined, as far as we can tell, whether plaintiff's earning capacity has or has not been diminished as a consequence of the occupational disease, the matter must be remanded to the Commission for such further findings and conclusions as are necessary to fully determine the rights and duties of the parties. *Brice v. Robertson House Moving, Wrecking and Salvage Company,* 249 N.C. 74, 105 S.E. 2d 439 (1958).

Upon remand, if the Commission finds plaintiff has a disability because of the occupational disease, then the statutory basis

for compensation should be specified. An award for damage to the lungs may be made under G.S. 97-31(24). In *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982) and in *Hundley v. Fieldcrest Mills,* 58 N.C. App. 184, 292 S.E. 2d 766 (1982), the plaintiff was awarded benefits under G.S. 97-31(24) for lung damage due to occupational disease. But such an award, by the express terms of the statute, would be in lieu of all other compensation. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). Such an award may also be based on G.S. 97-29, as has been done in many other reported cases involving byssinosis disability. *See, e.g., Smith v. American & Efird Mills,* 305 N.C. 507, 290 S.E. 2d 634 (1982); *Robinson v. J. P. Stevens,* 57 N.C. App. 619, 292 S.E. 2d 144 (1982). In many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work. *See,* 2 Larson Workmen's Compensation Law § 58.23 (1982). And, of course, as to any award that is finally made, the defendants will be given credit for whatever has been paid pursuant to the first award.

It also appears that in stating, as a stipulation, that plaintiff's average weekly wage was $144.27, the Commission was mistaken, and that the Commission has not ruled on plaintiff's motion for attorney's fees dated 10 March 1981. The stipulation was to a wage chart, rather than an average weekly wage, and if it becomes necessary to calculate his wage, it should be done in the manner specified in G.S. 97-2(5). Also, the plaintiff's motion for attorney's fees should be ruled on as provided in G.S. 97-88.1.

For the reasons stated, this matter is herewith remanded to the Industrial Commission for further proceedings consistent with this opinion.

Remanded.

Judges ARNOLD and BECTON concur.

JOSEPH M. PREVETTE, III, AND THOMAS A. PREVETTE, SONS OF JOSEPH M. PREVETTE, DECEASED, EMPLOYEE, PLAINTIFFS v. CLARK EQUIPMENT COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC572

(Filed 17 May 1983)

1. **Master and Servant § 71.1— average weekly wage—use of employee's short-term wages**

The evidence supported a finding by the Industrial Commission that a fair and just calculation of decedent's average weekly wage was reached by use of the 5-week wage record of decedent, and the Commission did not err in failing to calculate decedent's average weekly wage by using the wages earned by another employee in a comparable job during the 52 weeks prior to decedent's injury. G.S. 97-2(5).

2. **Master and Servant § 69— workers' compensation—no willful failure by employer to comply with OSHA safety regulations**

The evidence did not establish that the death of an employee who fell from a pallet which was on the forks of a forklift was caused by the willful failure of defendant employer to comply with OSHA safety regulations so as to require the Industrial Commission to increase compensation for the death of the employee by 10% under G.S. 97-12. G.S. 95-129(2).

APPEAL by plaintiffs and defendants from the North Carolina Industrial Commission Opinion and Award of 10 February 1982. Heard in the Court of Appeals 19 April 1983.

This action involves a claim by plaintiffs, who are decedent's two sons, for total disability and death benefits under the Workers' Compensation Act for an injury by accident arising out of and in the course of decedent's employment on 24 October 1978, which resulted in his death on 18 December 1978. Decedent fell to the floor from a pallet which was on the forks of a forklift, eleven feet and eight inches above a cement floor.

The case was originally heard before Commissioner Coy M. Vance who filed an Opinion and Award on 18 March 1981 awarding to plaintiffs temporary total disability payments, death benefits, medical expense reimbursement, funeral expenses and attorney's fees. Upon appeal by both plaintiffs and defendants, the Full Commission on 10 February 1982 adopted as its own the Opinion and Award of Commissioner Vance. Plaintiffs and defendants filed cross-appeals to this Court from that decision.

Pope, McMillan, Gourley & Kutteh, by William H. McMillan and David P. Parker for plaintiff appellant-cross appellees.

Hedrick, Feerick, Eatman, Gardner & Kincheloe by James F. Wood, III, for defendant appellee-cross appellants.

BRASWELL, Judge.

DEFENDANTS' APPEAL

[1] Defendants first argue that the Commission erred in its calculation of decedent's average weekly wage. The Commission based its computations upon a stipulated Form 22 Wage Chart for decedent, who had worked for defendant-employer for only five weeks. Based on this evidence, the Commission found that decedent's average weekly wage was $228.97, with a compensation rate of $152.65. Defendants argue that the Commission should have calculated the average weekly wage based on the stipulated Form 22 of Larry Sigmon, who worked in a comparable job during the previous year.

The method for calculating average weekly wage is set forth in G.S. 97-2(5), which provides in pertinent part:

> ". . . '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; . . . Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community."

Defendants contend that an unfair and unjust result was reached by using the short-term wage record of decedent since decedent was working on a new second shift recently begun by defendant-employer, and since decedent had worked more overtime than usual during this period in an effort to get the stockroom more fully stocked. Defendants contend that the form which should have been used was Sigmon's, which indicates wages earned in a comparable job during the 52 weeks prior to decedent's injury. This method of computing wages is, of course, provided for in G.S. 97-2(5). However, the method used by the Commission, dividing the earnings by the shorter number of weeks, also is authorized "provided, results fair and just to both parties will be thereby obtained." The Commission specifically found as a fact that the wage chart of decedent's actual wages for weeks worked was fair and just. The Commission's findings of fact are conclusive on appeal if there was any competent evidence to support them. *Jackson v. Highway Commission,* 272 N.C. 697, 700, 158 S.E. 2d 865, 867 (1968); *Locklear v. Robeson County,* 55 N.C. App. 96, 284 S.E. 2d 540 (1981). The findings are thus binding on this Court, even though the evidence presented could possibly have supported findings to the contrary. *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175 (1960).

The facts found by the Commissioner and adopted by the Full Commission support the conclusion that decedent's average weekly wage was $228.97. The second shift had been under production for a very short time and therefore the only relevant evidence of wages earned in this particular job on the newly-created second shift was decedent's record of wages actually earned. We therefore overrule this assignment of error.

Defendants next argue that the Commission erred in admitting plaintiffs' Exhibit 1 (a certified copy of the OSHA investigative file) as substantive evidence. While defendants do not contend that the OSHA record of investigation and the citation were improperly authenticated or that they were not admissible for any purpose, defendants argue that the OSHA file was not competent evidence on which to determine whether defendant-employer should be fined a 10% penalty for willful violation of OSHA safety regulations. Since we hold in the second part of this opinion that the Commission correctly concluded that there was no evidence of willful failure to comply with OSHA regulations,

error in admitting the OSHA file, if any, was harmless. We overrule this assignment of error.

PLAINTIFFS' APPEAL

[2] Plaintiffs have appealed on the issue of whether plaintiffs' evidence before the Commission established that defendant-employer willfully failed to comply with OSHA safety regulations and that therefore the Commission should have assessed a 10% penalty against defendants. G.S. 97-12 provides in part that: "[w]hen the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%)."

Pursuant to the adoption procedure in G.S. 95-131(a), all federal occupational safety and health standards also constitute the standards in this State, unless alternative regulations are promulgated by the Commissioner of Labor. The relevant safety standard which applies to this action is 29 C.F.R. § 1910.178(m)(3) (1982): "Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized." By virtue of G.S. 95-129(2)[1] the prohibition of employees riding on machinery such as the forklift involved here is a "statutory requirement" so as to bring this employee's death within the purview of G.S. 97-12.

Defendant-employer Clark admitted that it was aware of the prohibition of unsafe riding on powered industrial trucks. The crucial issue here is whether Clark's noncompliance was "willful." In his 18 March 1981 Opinion and Award Commissioner Vance found that:

> "5. There were forklifts available to employees in the area. If supervision saw any employee riding a forklift anyplace but on the seat, they were instructed to have the employee remove himself from the forklift.
>
> 6. It was a practice by some employees to place a pallet on the forks of the forklift and raise themselves up to the

1. "Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article."

proper height to get material from the bins, rather than use a ladder. If they were seen doing this by their supervisor, they were instructed to come down and use a ladder.

* * * *

8. There is no evidence in this record that defendant employer has willfully failed to comply with any statutory requirement or any lawful order of the Commission."

Based upon these findings, the Commissioner concluded as a matter of law that:

"5. Plaintiffs' claim for a ten per cent penalty for defendant employer's willful failure to comply with any statutory requirement or any lawful order of the Commission is hereby DENIED."

Plaintiffs argue that Clark's payment of the citation and penalty imposed by the North Carolina Department of Labor and its failure to post written prohibitions and to impose sanctions for employees' violation of the safety requirement indicate Clark's willful failure to comply with the statutory requirements. We disagree. The citation from the Department of Labor assessed a civil penalty against Clark for a "serious," rather than a "willful," violation, pursuant to G.S. 95-138(a). "An act is wilful when there exists 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another,' a duty assumed by contract or imposed by law." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383-84, 291 S.E. 2d 897, 903 (1982), citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971).

There was competent evidence from which the Commission could find that Clark's actions did not constitute a "willful" failure to comply with the safety regulations. Otis Snow and Paul Chamberlain, two of decedent's supervisors at Clark, testified that they had instructed employees not to ride on the forklift platforms and that when they had seen this occurring, they had stopped the riding. Decedent chose to disregard the supervisor's warning by riding on the unprotected platform. There was competent evidence to support the findings of fact and conclusions of law on this issue. Therefore, the findings are conclusive on appeal. *Jackson v. Highway Commission, supra.* G.S. 97-12 places

the burden of proof on the issue of willful disobedience of the safety regulation upon the party who claims a forfeiture. Since plaintiffs' evidence did not show that Clark violated the statute intentionally and willfully, plaintiffs failed to meet their burden of proof. We hold that the Commission did not err in denying imposition of the penalty against defendants.

For the foregoing reasons, the Opinion and Award appealed from is

Affirmed.

Judges WEBB and WHICHARD concur.

DAVID WALSH RUDDER v. MIKE LOUIS LAWTON

No. 8210SC281

(Filed 17 May 1983)

1. Appeal and Error § 6.2— partial new trial—motion in limine—no immediate right to appeal

A trial court's orders granting plaintiff's motion *in limine* and awarding a partial new trial on the issue of damages were interlocutory orders, and defendant had no immediate right to appeal from them.

2. Automobiles and Other Vehicles § 43.2— motion in limine—preventing mention of consumption of beer

In an action in which plaintiff sued defendant for injuries sustained in an automobile accident, the trial court did not err in allowing plaintiff's motion *in limine* in which plaintiff sought to have the court instruct defendant's counsel not to mention consumption of beer at trial since evidence of consumption of alcohol was at variance with the language in defendant's answer to the complaint, and since defendant's misleading answers to plaintiff's interrogatories concerning alcohol consumption and his late motion to amend his answer concerning alcohol consumption had the effect of surprising the plaintiff and leaving the plaintiff unprepared to rebut defendant's affirmative defense that plaintiff was contributorily negligent because he voluntarily rode with defendant, knowing or having reason to know defendant was under the influence of alcohol.

3. Pleadings § 32— denial of motion to amend answer—no error

The trial court did not err in failing to allow defendant to amend his answer where the denial stemmed from defendant's undue delay in making the motion.

4. Rules of Civil Procedure § 59— granting partial new trial—no error

The trial court did not abuse its discretion in granting plaintiff's motion for a partial new trial on the issue of damages.

APPEAL by defendant from *Preston, Judge.* Judgment entered 19 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 21 January 1983.

Plaintiff filed suit against defendant for injuries sustained in an automobile accident on 5 August 1979 after plaintiff and defendant left a party at which defendant and others had been consuming beer. Plaintiff's complaint alleged that plaintiff was injured when defendant negligently drove a vehicle, in which plaintiff was a passenger, off the highway into a telephone pole. Defendant allegedly was negligent in failing to keep a proper lookout, to pay proper attention to his driving, and to keep his vehicle under control.

In his Answer, the defendant denied negligence and alleged that plaintiff was contributorily negligent:

> "in entering into and continuing to ride as a passenger in the said vehicle; that the Plaintiff did acquiesce and concur in the way and manner in which said vehicle was being operated and made no remonstrance or protest in regard thereto, and did not ask to be let out of or undertake to leave the vehicle when it was reasonable and prudent to do so . . . ."

On 14 April 1981, defendant answered Interrogatories filed by plaintiff. To Interrogatory No. 9, which inquired as to whether he was under the influence of alcohol or drugs at the time of the accident, the defendant asserted his Fifth Amendment rights. Plaintiff later submitted additional Interrogatories which were directed toward discovery of the basis for defendant's affirmative defense of contributory negligence. The answers to those Interrogatories which are pertinent to this appeal are contained in a discussion of one of the assignments of error below.

When the case was tried in November 1981, the court allowed a motion *in limine* in which plaintiff sought to have the court instruct defendant's counsel not to mention consumption of beer at trial. On the second day of trial, defendant filed a supplemental answer to Interrogatory No. 9, waiving his right to ob-

ject under the Fifth Amendment and admitting he was under the influence of alcohol both at the time of, and immediately before, the collision. During the presentation of evidence, defendant moved to amend his Answer to allege specifically that plaintiff was contributorily negligent because he voluntarily rode with defendant even though he knew or had reason to know that the defendant was under the influence of alcohol. The motion was denied, and no evidence of alcohol consumption was admitted during the trial.

Before submitting the case to the jury, the court dismissed defendant's claim of contributory negligence. The jury returned a verdict for plaintiff of $3,200. Upon motion by plaintiff, the court set aside the verdict on damages as being inadequate and awarded a new trial on that issue. Defendant appealed.

Blanchard, Tucker, Twiggs, Denson and Earls, by Charles F. Blanchard, for plaintiff appellee.

Ragsdale and Liggett, by William Woodard Webb and John Hutson, Jr., for defendant appellant.

WEBB, Judge.

[1] By this appeal, defendant seeks appellate review of the trial court's orders granting plaintiff's motion *in limine* and awarding a partial new trial on the issue of damages. Defendant has no immediate right to appeal from these interlocutory orders. Although the orders may affect a substantial right of the defendant, this possibility does not make the orders appealable unless they "will work injury to . . . [him] if not corrected before an appeal from the final judgment." *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E. 2d 443, 447 (1979). This is not such a case. Nevertheless, in our discretion we have chosen to treat this appeal as a petition for writ of certiorari under Appellate Rule 21 and have decided to allow it.

[2] In his first assignment of error defendant contends the court erred in granting plaintiff's motion *in limine*. From the record, it appears that the trial judge allowed this motion because he believed evidence of consumption of alcohol was at variance with the language in defendant's answer to the complaint. The answer generally alleged that plaintiff was contributorily negligent because he voluntarily rode in the vehicle with defendant. Under

our system of "notice pleading," this answer, standing alone, may have been sufficient to apprise plaintiff of defendant's specific defense concerning consumption of alcohol.

Assuming, *arguendo*, that the Answer was adequate, we believe that defendant's subsequent actions effectively negated notice of this defense. In April 1981, defendant objected to plaintiff's interrogatory No. 9 which asked whether defendant was under the influence of alcohol or drugs. Several months later, defendant answered the following interrogatory:

> 11. Reference is made to Paragraph 6 of your [A]nswer [pleading affirmative defense of contributory negligence] . . . . Please state in detail the way and manner in which the said vehicle was being operated in which you contend required remonstrance or protest on the part of the plaintiff.
>
> . . . .
>
> The way and manner Defendant refers to in his Answer is the same way and manner Plaintiff alleges Defendant was negligent in . . . his Complaint, which is again denied.

It is important to note that the Complaint, however, did not allege, as a basis for negligence, that defendant had been driving under the influence of alcohol. Hence, the answer to this Interrogatory was totally misleading if defendant intended to rely on an affirmative defense of contributory negligence based on consumption of alcohol. Furthermore, in answering a question from that same set of interrogatories, the defendant also denied that he was "under any type of impairment or physical disability" prior to the collision.

Although the statute of limitations had run on 5 August 1981 on any possible charge against defendant for driving under the influence of alcohol, the defendant waited until his November trial to file a supplemental answer to interrogatory No. 9. At that time, he admitted that he was under the influence of alcohol. The defendant further delayed moving to amend his answer to the complaint until evidence had been presented at trial. His proposed amendment clearly alleged that plaintiff was contributorily negligent because he voluntarily rode with defendant, knowing or having reason to know defendant was under the influence of alcohol.

Under all these circumstances, it was not unreasonable for plaintiff to assume that defendant did not intend to present evidence of plaintiff's knowledge that defendant was under the influence of alcohol. Plaintiff made diligent efforts to obtain discovery concerning defendant's defense. The defendant's misleading answers to plaintiff's interrogatories, his dilatory filing of the supplemental answer to plaintiff's interrogatory No. 9, and his late motion to amend his answer had the effect of surprising the plaintiff and leaving him unprepared to rebut defendant's affirmative defense. For these reasons, we hold it was not error for the court to grant plaintiff's motion *in limine.*

[3] Defendant also argues under his first assignment of error that the court erred in denying his motion to amend his answer. A motion to amend, made after the beginning of trial, is addressed to the sound discretion of the trial judge. *Moore v. Insurance Co.,* 266 N.C. 440, 146 S.E. 2d 492 (1966). Unless there is an apparent or declared reason for denying a motion to amend a pleading, leave to amend under Rule 15(a) "shall be freely given when justice so requires." *Public Relations, Inc. v. Enterprises, Inc.,* 36 N.C. App. 673, 678, 245 S.E. 2d 782, 785 (1978). In excluding evidence of consumption of alcohol in the present case, the court specifically stated, "[T]he reason that I am not letting this in is the fact that you waited until this morning to open up this can of worms when you had over 100 days to open it up." Clearly, the court's reason for denying defendant's motion to amend was defendant's undue delay in making that motion after the statute of limitations had run on 5 August 1981. No abuse of discretion has been shown.

[4] In defendant's second assignment of error he argues that the court abused its discretion in granting plaintiff's motion for a partial new trial on the issue of damages. Defendant submits that the jury's verdict of $3,200 was "*clearly* within the reasonable range of possible verdicts" based on the fact that plaintiff presented evidence that he had $2,298.50 in medical expenses and had lost wages of $900.00. The use of a rigid test to measure whether a verdict is " 'clearly within the maximum limits of a reasonable range' " was rejected by the court in *Worthington v. Bynum and Cogdell v. Bynum,* 305 N.C. 478, 485, 290 S.E. 2d 599, 604 (1982), quoting the Court of Appeals' opinion which it reversed at 53 N.C. App. 409, 414, 281 S.E. 2d 166, 171 (1981). In *Worthington,*

the court stated that a Rule 59 discretionary order should not be disturbed on appeal unless it "probably amounted to a substantial miscarriage of justice." *Worthington, supra,* at 487, 290 S.E. 2d at 605. We have reviewed the evidence and find no such abuse of discretion.

Affirmed.

Judges BECTON and PHILLIPS concur.

JACK E. BIESECKER v. MARY LOU BIESECKER

No. 8222SC462

(Filed 17 May 1983)

1. Husband and Wife § 4— conveyance from wife to husband—absence of counsel for wife

The wife's deed conveying to the husband all of her rights in the marital home which the parties had purchased as tenants by the entirety was not invalid because the wife was not represented by counsel when she signed the deed. G.S. 39-13.3(c) and (e) and former G.S. 52-6.

2. Husband and Wife § 4— wife's conveyance to husband—absence of understanding of legal rights

A deed from the wife to the husband was not invalid because the wife was not aware of and did not understand her legal rights when she signed the deed, since a person signing a written instrument is under a duty to read it for his own protection and ordinarily is charged with knowledge of its contents.

3. Husband and Wife § 4— conveyance from wife to husband—consideration—love and affection

Natural love and affection constituted good consideration for the wife's conveyance to the husband of her interest in the marital home which the parties had purchased as tenants by the entirety.

4. Duress § 1— statute of limitations

The 3-year statute of limitations of G.S. 1-52(9) barred defendant wife from claiming that her deed to plaintiff husband was signed as a result of duress and undue influence where she was aware of plaintiff's alleged threats of physical violence more than three years before the claim was filed. G.S. 52-10.

5. Husband and Wife § 12— wife's conveyance to husband upon separation—reconciliation of the parties

Where defendant wife conveyed to plaintiff husband upon their separation her interest in property which the parties had held as tenants by the entirety, the fact that plaintiff and defendant thereafter resumed the marital relationship was no basis for rescinding the deed or imposing a constructive trust on the property.

6. Quasi Contracts § 2.1— wife's payments on property held by husband—unjust enrichment

Defendant stated a claim for unjust enrichment where she alleged that, pursuant to a separation agreement, she conveyed to plaintiff in May 1976 her interest in a marital home which plaintiff and defendant had purchased as tenants by the entirety; plaintiff and defendant thereafter resumed living together in February 1977 but again separated on 1 September 1981; and during such period of reconciliation defendant contributed her earnings to the payment of the loans which constituted liens on the home in the good faith belief that plaintiff was going to execute a deed to plaintiff and defendant as tenants by the entirety.

APPEAL by defendant from *Collier, Judge.* Judgment entered 19 February 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 14 March 1983.

Plaintiff, Jack E. Biesecker, and defendant, Mary Lou Biesecker, were married on 3 March 1968. On 29 July 1970, plaintiff and defendant purchased, as tenants by the entirety, a house and lot. On 17 May 1976 the parties separated. At that time defendant signed a deed conveying to plaintiff all her rights in the marital home which plaintiff and defendant had purchased as tenants by the entirety. Plaintiff and defendant resumed living together in February 1977, but again separated 1 September 1981. Plaintiff did not, at any time after the reconciliation, reconvey an ownership interest in the house and lot to defendant.

This appeal arose out of an action filed by plaintiff on 16 October 1981 for divorce from bed and board. Defendant's answer contained two counterclaims which are presently at issue. In her fourth defense and second counterclaim defendant requested rescission of the 17 May 1976 deed by which she gave up her interest in the house and lot previously owned by plaintiff and defendant as tenants by the entirety. The basis for rescission was stated in paragraph 5 of defendant's fourth defense and second counterclaim:

5. At the time of the execution of the Deed of Separation and the Deed referred to in the preceding paragraph, plaintiff was represented by counsel and defendant was not represented by counsel and defendant was not appraised (sic) of her legal rights and did not understand her legal rights; that defendant received no consideration for the execution of said deed and executed said deed only because of threats made against her by plaintiff and because of her fear of plaintiff; that at the time of execution of said deed the parties had a considerable equity in the property described in said deed and defendant received no value or consideration for her attempted transfer of said equity to plaintiff, and said deed by its very terms is grossly inequitable, unreasonable and unfair to this defendant; that following execution of the deed and separation agreement referred to, plaintiff and defendant resumed the marital relationship in February, 1977 and lived together as husband and wife until September 1, 1981; that during said period of time defendant contributed her earnings and income to the payment of loans which constituted liens upon the house and land above referred to and during said period of time, plaintiff promised on numerous occasions, to execute a deed placing said house and land in the names of plaintiff and defendant as tenants by the entirety; that plaintiff never fulfilled said promises and has never executed such a deed to the knowledge of this defendant.

Defendant's fifth defense and third counterclaim requested, in the alternative, that the court find that plaintiff held the disputed real property in a constructive trust for the benefit of defendant.

The trial court granted plaintiff's summary judgment motion as to defendant's fourth defense and second counterclaim and defendant's fifth defense and third counterclaim. From this summary judgment defendant appeals.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker for plaintiff-appellee.

Stoner, Bowers and Gray, by Bob W. Bowers for defendant-appellant.

EAGLES, Judge.

In her fourth defense and second counterclaim, at paragraph five, defendant set out several reasons supporting her request for rescission of the 17 May 1976 deed or imposition of a constructive trust. While we hold that defendant's arguments do not present a valid basis for rescission of the deed, or for imposition of a constructive trust, we must still hold that the trial court improperly granted plaintiff's summary judgment motion. Defendant's answer alleged facts which, if proven, could support a finding of unjust enrichment, allowing imposition of an equitable lien in favor of defendant upon the property she deeded to plaintiff.

[1] Defendant first argues that the deed should be rescinded because she was not represented by counsel when she signed the deed. It is well established that the absence of counsel will not defeat an otherwise valid family agreement. *Beck v. Beck*, 36 N.C. App. 774, 245 S.E. 2d 199 (1978). There is no question that this was a valid family agreement. G.S. 39-13.3(c) and (e) expressly allow the type of transaction which occurred between plaintiff and defendant on 17 May 1976. The parties properly followed the requirement of G.S. 52-6, then in effect, that the deed be "acknowledged before a certifying officer who shall make a private examination of the wife" to assure that the conveyance would not be unreasonable or injurious to the wife.

[2] Defendant also argues that the deed should be invalidated because she was not aware of, nor understood, her legal rights when she signed the deed, but "[a] person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms." 6 N.C. Index 3d, Fraud § 5; *Pierce v. Bierman*, 202 N.C. 275, 162 S.E. 566 (1932).

[3] Defendant next suggests that the 17 May 1976 conveyance should not be given legal effect since defendant received no consideration from plaintiff for the execution of that deed. We reject this argument on the basis that under G.S. 52-10 "natural love and affection" constitutes good consideration for the conveyance of land. *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924).

[4] Defendant also argues that the deed should not be given effect since she signed it under duress. Under G.S. 1-52(9) defendant

had three years, from the time she discovered or should have discovered the fraud, in which to challenge the validity of the deed. Defendant is barred from raising the issue of duress or undue influence at this late date, since she signed the deed 17 May 1976, and was aware of plaintiff's alleged threats of physical violence at that time.

[5] Furthermore, the fact that plaintiff and defendant resumed the marital relationship is no basis for rescinding the deed or imposing a constructive trust since "where the agreement for separation includes a division of property which might have been made if no separation had taken place, the reconciliation does not abrogate this division." *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E. 2d 547, 549 (1955).

[6] While none of the above arguments presented by defendant justifies granting her request to rescind the deed or impose a constructive trust on the property, defendant's answer does set forth a claim for unjust enrichment. Upon a finding of unjust enrichment the trial court could then impose an equitable lien, "a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists." *Fulp v. Fulp*, 264 N.C. 20, 24, 140 S.E. 2d 708, 712 (1965).

Defendant's fourth defense and second counterclaim, paragraph 5, stated that

> [T]hat following execution of the deed and separation agreement referred to, plaintiff and defendant resumed the marital relationship in February, 1977 and lived together as husband and wife until September 1, 1981; that during said period of time defendant contributed her earnings and income to the payment of loans which constituted liens upon the house and land above referred to and during said period of time, plaintiff promised on numerous occasions, to execute a deed placing said house and land in the names of plaintiff and defendant as tenants by the entirety; that plaintiff never fulfilled said promises and has never executed such a deed to the knowledge of this defendant.

Defendant's fifth defense and third counterclaim, paragraph 3, stated that

> Since July 29, 1970, defendant has used her separate monies and income for the purchase of said house and land, and for the payment of taxes and insurance upon said house and lands, and for the payment of installment notes secured by Deeds of Trust upon said house and land and over said period of time defendant has invested more than Twenty Thousand Dollars ($20,000.00) for [sic] separate monies and earnings in said house and lands.

These allegations are similar to those in *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980), in which this Court held that where the husband possessed a good faith belief that he owned or would own an interest in the value of the improvements he made on his wife's property and those improvements inured to the wife's benefit, the husband had a claim sufficient to support an equitable lien under the unjust enrichment doctrine. In that case, the husband and wife had divorced and the husband sought to recover the value of improvements he had made to the wife's property during the marriage.

This court has recently considered the same question in the case of *Richardson v. Carolina Bank*, 59 N.C. App. 494, --- S.E. 2d --- (1982). There plaintiff and defendant obtained a divorce but later resumed living together without remarrying. Plaintiff thereafter contributed funds to build a home on land titled in defendant's name only. This Court held that under the doctrine of unjust enrichment, plaintiff should be given the chance to prove that she did so under a good faith belief that she owned or would own an interest in the value of the improvements made by plaintiff to defendant's property, thereby entitling her to an equitable lien on defendant's property in the amount of her contribution to the cost of those improvements.

Under the unjust enrichment doctrine, the defendant here should be given the opportunity to show how much she invested in the property after she deeded it to plaintiff on 17 May 1976, and whether she invested her funds with a good faith belief that plaintiff was going to execute a deed to the plaintiff and defendant as tenants by the entirety.

For the above reasons we find error in the trial court's entry of summary judgment for plaintiff.

Reversed and remanded.

Chief Judge VAUGHN and Judge WEBB concur.

ANN H. GAY v. JAMES W. GAY

No. 8210DC584

(Filed 17 May 1983)

1. **Appeal and Error § 49— exclusion of evidence—no prejudicial error**

In a civil action for assault, the trial court erred in failing to allow the defendant to offer testimony that plaintiff was intoxicated on the date of one of the assaults; however, the error was not prejudicial since defendant had previously testified without objection that plaintiff had had four or five drinks just prior to the time of her injury.

2. **Assault and Battery § 3.1; Rules of Civil Procedure § 15— awarding damages upon "numerous assaults"—only two assaults pleaded—implied consent of parties**

The trial court did not commit error in its findings and awarding damages based upon "numerous assaults and batteries" even though plaintiff alleged only two assaults in her complaint since any assaults not specifically pleaded in the complaint were tried with the implied consent of the parties and without objection at the time. G.S. 1A-1, Rule 15(b).

APPEAL by defendant from *Redwine, Judge.* Judgment entered 5 February 1982 in District Court, WAKE County. Heard in the Court of Appeals 19 April 1983.

This action was commenced on 10 April 1981 by the filing of a complaint by plaintiff alleging an assault on her by her husband, the defendant, on 14 December 1980, which resulted in the fracture of plaintiff's left leg and ankle. The complaint also alleged that defendant had again assaulted the plaintiff approximately one hour after the first assault choking and threatening to kill her. Finally, the complaint alleged that the defendant had verbally threatened plaintiff with physical harm repeatedly since 14 December 1980, causing plaintiff to live in constant fear for her physical safety. Defendant's answer generally denied plaintiff's allegations of assault.

After a non-jury trial, the court made extensive findings of fact and concluded that defendant had committed "numerous

assaults and batteries" upon the plaintiff from 14 December 1980 through March 1981. From a judgment entered awarding compensatory and punitive damages, defendant appeals.

John M. Rich, for plaintiff-appellee.

Purser, Cheshire, Manning and Parker, by Earle R. Purser and Barbara A. Smith, for defendant-appellant.

EAGLES, Judge.

[1] In support of his general denial to plaintiff's claim of assault, defendant offered testimony to show at trial that the plaintiff was intoxicated on 14 December 1980 and that as a result of her intoxication, she stumbled and accidentally fell injuring her left leg. Defendant first assigns as error the trial court's refusal to allow defendant to testify as to plaintiff's state of intoxication on 14 December 1980. While we think that the court erred in sustaining plaintiff's objection to the defendant's testimony that plaintiff was under the influence of alcohol at the time her injury occurred, we hold that the error was not prejudicial since defendant had previously testified without objection, that plaintiff had had four or five drinks just prior to the time of her injury.

This court has previously held that a defendant is not prejudiced by the exclusion of evidence where similar evidence was admitted both before and after the exclusion in question. *Industries, Inc. v. Tharpe,* 47 N.C. App. 754, 268 S.E. 2d 824 (1980). Since the defendant in the case *sub judice* had previously been allowed to testify as to the amount of alcohol which plaintiff consumed on 14 December 1980, we find defendant's first assignment of error to be without merit.

[2] Defendant's second assignment of error questions the trial court's entry of judgment against the defendant for "numerous assaults and batteries" upon the plaintiff when the pertinent portions of the complaint alleged only

> 7. That on the evening of 14 December 1980 in the home of Plaintiff and Defendant, the Defendant violently assaulted the Plaintiff by striking at her, falling on her and knocking her to the floor.

8. That as a result of the assault of the Defendant in knocking the Plaintiff to the floor, the Plaintiff suffered a fracture of the left ankle and leg.

9. That as a result of said assault and injuries the Plaintiff was in great pain and was disabled.

10. That after said assault the Plaintiff begged the Defendant to obtain medical assistance for her, and the Defendant willfully refused.

11. That during this time the Defendant refused to allow the Plaintiff to use the telephone to seek medical assistance her [sic] herself.

12. That approximately one hour after the assault the Plaintiff received a telephone call from a friend, and while the Plaintiff was talking on the phone to the friend the Defendant placed his hands around her throat and threatened to kill the Plaintiff if the Plaintiff divulged that she was in pain and needed medical attention.

13. That the Defendant willfully assaulted the Plaintiff in placing his hands around the Plaintiff's throat at that time and in threatening to kill the Plaintiff.

14. That approximately two hours after the second assault the Defendant carried the Plaintiff to Northern Wake Hospital in Wake Forest, North Carolina; and that subsequently the Plaintiff was carried to Raleigh Community Hospital by ambulance.

15. That since 14 December 1980 the Defendant has repeatedly threatened the Plaintiff with bodily harm.

The defendant challenges the award of compensatory and punitive damages to plaintiff on the basis that the complaint alleged only two assaults occurring on the same day and does not allege "numerous assaults and batteries" for which plaintiff recovered compensatory damages in the amount of $13,619.85, and punitive damages in the amount of $10,000.00.

We find that the trial court committed no error in its finding and awarding damages based upon "numerous assaults and batteries." Any assaults not specifically pleaded in the complaint

were tried with the implied consent of the parties and without objection at the time. "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), North Carolina Rules of Civil Procedure. The effect of this rule is to permit amendment of the pleadings by implied consent and alteration of the legal theory of the cause of action, when evidence is offered without objection, so long as the opposing party is provided a fair opportunity to defend his case. *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

Here defendant did not object to plaintiff's presentation of evidence tending to show that defendant had assaulted plaintiff on more than two occasions. The plaintiff, without objection, presented evidence tending to show that defendant had threatened, on numerous separate occasions on 14 December 1980 and thereafter, that he would kill plaintiff if she told anyone that he had caused plaintiff's injury. Defendant never contended that he was unprepared to litigate the allegations of additional assaults. Defendant did not present any evidence showing that he was unduly prejudiced by the admission of testimony concerning alleged threats he made upon plaintiff's life after the alleged assaults and batteries of 14 December 1980. For these reasons we find no merit in defendant's second assignment of error.

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

Affirmed.

Judges WELLS and BECTON concur.

WOODROW H. MYERS v. PATRICIA LYON MYERS

No. 824DC586

(Filed 17 May 1983)

1. Divorce and Alimony § 13.1— divorce based on year's separation—proof of separation date

In an action for divorce based on one year's separation instituted on 15 July 1981, plaintiff did not have to prove that the separation occurred on 14 June 1980 as alleged in the complaint but only that the parties had lived

separate and apart for one year prior to the institution of the suit. Furthermore, testimony by defendant that the parties and their daughter held a family conference on 27 July 1980 at which plaintiff stated he did not want a legal separation or divorce was not an admission by plaintiff that he did not intend to separate on 14 June 1980.

2. **Trial § 16— objections sustained—presumption jury disregarded questions**

It is presumed that the jury in a divorce action disregarded questions concerning defendant's alleged alcoholism where the trial court sustained defendant's objections thereto.

3. **Divorce and Alimony § 13.5— no intent to resume marital relationship—competency of testimony**

The plaintiff in a divorce action could properly testify that he had not resumed the marital relationship and had not formed an intent to resume the marital relationship.

4. **Abatement and Revival § 3— divorce action—defendant's subsequent action for divorce and equitable distribution—no stay of plaintiff's action**

The trial court did not err in denying defendant's motion to stay plaintiff's action for divorce filed prior to the effective date of the Equitable Distribution of Marital Property Act until trial and entry of final judgment in defendant's action for divorce and an equitable distribution of the marital property filed in another county after the effective date of the Act. G.S. 50-20.

APPEAL by defendant from *Erwin, Judge.* Judgment entered 14 January 1982 in District Court, ONSLOW County. Heard in the Court of Appeals 20 April 1983.

Suit for divorce based on one year's separation. Defendant contends that a variance in the allegations, proof, and charges mandate reversal of the judgment of divorce.

Ellis, Hooper, Warlick, Waters & Morgan, by Lana S. Warlick, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Charles E. Nichols, William W. Jordan and Harold W. Beavers; Hamilton & Sandlin, by Billy G. Sandlin, for defendant-appellant.

HILL, Judge.

Plaintiff in his complaint filed 15 July 1981 alleged the parties separated on 14 June 1980 and have lived continuously separate and apart since then. The defendant denied this allegation. At trial, plaintiff's evidence conformed to his pleadings. The jury returned a verdict in favor of plaintiff, granting him an absolute divorce from defendant based on one year's separation.

[1] The essential question raised on this appeal is whether the plaintiff had to prove that separation occurred specifically on 14 June 1980. Defendant contends that if separation occurred on any other date, even if that date was before 15 July 1980, then plaintiff's prayer for relief should be denied. Plaintiff contends that because he and defendant lived separate and apart for one year before institution of suit as required by G.S. 50-6, he is entitled to an absolute divorce based on one year's separation. We find that this question, as well as the others raised by defendant, are properly resolved in favor of plaintiff. We therefore find no error in the trial of this case.

By her first assignment of error, defendant contends the trial court erred in instructing the jury and in submitting the issue of one year's separation. The trial court instructed in pertinent part:

> There now arises for your consideration and answer one issue, and that issue is: Have the plaintiff, Woodrow H. Myers, and the defendant, Patricia Lyon Myers, lived separate and apart for one year prior to the bringing of this action on July 15, 1981?

Defendant contends the instruction and issue submitted to the jury were erroneous because they allowed the jury to find a date of separation different from the one plaintiff alleged and attempted to prove. We disagree.

The jury instruction is consistent with the requirements of G.S. 50-6, which provides:

> *Divorce after separation of one year on application of either party.*—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months . . . .

The material aspect of this statute is the requirement that parties have lived separate and apart for one year prior to institution of the suit. Certainly, the complaint must state a date of separation to establish the general time frame for divorce based on a year's separation. The court correctly charged:

> There is evidence for the plaintiff which tends to show that the parties separated on the 14th day of June, 1980. There is evidence for the defendant which tends to show that the parties separated after the 27th day of July 1980.

The jury chose to believe so much of the plaintiff's evidence as to establish the parties had been separated for one year prior to the bringing of the suit. This assignment of error is overruled.

Defendant moved for a directed verdict, judgment n.o.v. and, in the alternative, a new trial. The trial court denied the motions. We conclude that denial of the motions was proper.

When a motion for a directed verdict is made at the close of plaintiff's evidence under Rule 50 of the Rules of Civil Procedure, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving to it the benefit of every inference which can be drawn therefrom, was sufficient to withstand defendant's motion for directed verdict. *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E. 2d 305 (1970). The test for judgment n.o.v. is the same as that applied in considering a motion for directed verdict. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

In support of her motion for directed verdict, defendant argued plaintiff failed to prove a separation had occurred at the pertinent time. The words "separate and apart," as used in G.S. 50-6, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation. *Mallard v. Mallard*, 234 N.C. 654, 68 S.E. 2d 247 (1951); *Earles v. Earles*, 29 N.C. App. 348, 224 S.E. 2d 284 (1976). Defendant argues that plaintiff returned to the marital household after 14 June 1980, spending at least one night on the weekend of 4 July 1980. Testimony of defendant tends to show that the parties and their daughters held a family conference on 27 July 1980 at which plaintiff said he did not want a legal separation or divorce. While such testimony does go to the weight of plaintiff's evidence, it is not an admission that he did not intend to separate on 14 June 1980. Many married people intentionally separate and remain apart for some time before deciding to seek a divorce or legal separation. The jury properly considered the evidence offered by both parties and obviously believed the plaintiff.

The court's ruling on a motion for a new trial will be reversed on appeal only when there is a showing of abuse of discretion. *City of Winston-Salem v. Rice*, 16 N.C. App. 294, 192 S.E. 2d 9, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972). Similarly, a motion for judgment n.o.v. as against the weight of the evidence is addressed to the sound discretion of the presiding judge whose decision must be upheld absent a showing of abuse of discretion. This rule applies even where the evidence involved is conflicting. *King v. Byrd*, 229 N.C. 177, 47 S.E. 2d 856 (1948). The defendant has failed to persuade us that the trial judge abused his discretion.

[2] Defendant next argues the trial court erred in failing to grant her motions for a mistrial or a new trial and in failing to instruct the jury "not to consider the implication raised by questions concerning recriminatory matters." Plaintiff's counsel posed questions concerning defendant's alleged alcoholism and involvement in Alcoholics Anonymous. The trial judge sustained defendant's objections. Defendant contends such questions were highly inflammatory and prejudicial, and her motion for mistrial should have been granted. We find no request by the defendant to the trial judge to give special instructions to the jury. The court properly sustained defendant's objection. It is presumed the jury disregarded the questions. The assignment is overruled.

[3] We find no error in the trial judge's permitting plaintiff to testify whether he had resumed the marital relationship and whether he had formed an intent to resume the marital relationship. Defendant contends answers to these questions are inadmissible conclusions. We disagree. The issue involved in these questions is the intent to remain separated. Whether plaintiff resumed the marital relationship is a question of fact. Whether plaintiff formed an intent to resume the marital relationship was answered not only by his assertion that he never intended to resume the marital relationship, but by other evidence of actions evincing this intent.

[4] Defendant contends the trial court erred in denying her motion to stay plaintiff's action until trial and entry of final judgment in her separate action for divorce on grounds that proceeding on plaintiff's suit would result in a denial of defendant's right to equitable distribution. We find no error.

Plaintiff filed the suit *sub judice* in Onslow County on 15 July 1981. Defendant filed a separate action seeking divorce and an equitable distribution of the marital property as provided in G.S. 50-20 in Pender County on 8 October 1981. On 9 December 1981, defendant filed a motion to stay the action in Onslow County on grounds that it would destroy defendant's right to an equitable distribution of the marital property.

Section 7 of the Act for the Equitable Distribution of Marital Property (c. 815, Sess. Laws 1981) became effective in actions for absolute divorce filed on and after 1 October 1981. Defendant could not obtain an equitable distribution in this action before the court. The plaintiff filed suit before the defendant and the plaintiff's action was calendared and heard first. The trial judge properly denied the motion to stay.

In the trial of the case, we find

No error.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. BUDDY FARRELL CALLICUTT

No. 8219SC982

(Filed 17 May 1983)

1. Burglary and Unlawful Breakings § 5.8— felonious breaking or entering and felonious larceny—sufficiency of evidence

The evidence was sufficient to find defendant guilty of felonious breaking or entering and felonious larceny where it tended to show that the night before the breaking or entering, the defendant spent the night at the home of his grandmother; that his grandmother twice found unlocked windows in her grandson's room and instructed him to relock them; that approximately five minutes after she had taken defendant to a convenience store on her way to work, defendant was seen back in the vicinity of his grandmother's house; that defendant was later found under a bed in a friend's house in a room which contained a gun similar to the one taken from his grandmother's house and that the serial numbers had been sanded; that a search of defendant's pockets revealed a piece of sandpaper with dark color scrapings; and that subsequent efforts by the SBI to produce the serial numbers on the pistol produced a letter and a number in the same sequence as the serial numbers on his grandmother's gun.

2. Criminal Law § 138— Fair Sentencing Act—prior conviction as aggravating factor—inability to consider

Where the trial court found as one of the aggravating factors in defendant's sentencing hearing that the defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement, but where there was no evidence to determine whether defendant was indigent at the time of this prior conviction and if so, whether he was represented by counsel, the aggravating factor could not be considered.

Chief Judge VAUGHN concurring in part and dissenting in part.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 22 June 1982 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 14 March 1983.

Defendant was convicted of felonious breaking or entering and felonious larceny. From imposition of an active prison term, he appeals.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Charles H. Dorsett for defendant appellant.

EAGLES, Judge.

Defendant's sole argument on appeal is that the trial judge erred in denying his motion for nonsuit at the close of all the evidence. He contends that the circumstantial evidence presented by the State was insufficient to prove that he committed the crimes for which he was on trial. We do not agree.

On a motion for nonsuit the test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both. *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975).

> "When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." (Citations omitted.) In passing on the motion, evidence favorable to the State is to be considered as a whole

> in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt.

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117-118 (1979). The evidence is considered in the light most favorable to the State, giving every reasonable intendment and inference to be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). It is not required that the evidence exclude every reasonable hypothesis of innocence before denying a motion for nonsuit. *State v. Powell*, *supra*.

[1] Applying these principles to the case before us, we find no error in the denial of defendant's motion for nonsuit. The evidence reveals that on the night before, the defendant spent the night at the home of his grandmother, Mrs. Esther Callicutt. The next morning Mrs. Callicutt twice found unlocked windows in her grandson's room. She relocked them and explained to him that she wanted them kept locked out of fear of thieves. She later took defendant to a Quick Check convenience market, located toward town, on her way to work. Approximately five minutes later, defendant was seen back in the vicinity of his grandmother's house. Upon returning from work, Mrs. Callicutt found that her house had been broken into and a .25 caliber pistol and some money had been stolen. Carl Maness, a pawn shop owner, testified that he had sold to Mrs. Callicutt a Targa automatic pistol, GT27, .25 caliber, serial number G74442. The day after the larceny, defendant was arrested at a friend's house by a police officer who found him under a bed in a room which contained a Targa .25 caliber automatic pistol. The serial numbers had been sanded or scraped off the pistol and a later search of defendant's pockets revealed a piece of sandpaper with dark color scrapings. Subsequent efforts by the SBI to reproduce the sanded-down serial numbers on the pistol produced a possible letter "G" followed by the number "7".

We hold that this circumstantial evidence is sufficient to raise a reasonable inference that defendant broke into his grandmother's house and stole her pistol which was recovered by the police. The defendant's motion for nonsuit was properly denied.

[2] Although there is no error in defendant's trial, we do find error in the sentencing procedure. Following a hearing pursuant to

the Fair Sentencing Act, the court found as one of the aggravating factors that the defendant had a prior conviction for a criminal offense punishable by more than 60 days confinement. Since there is no evidence as to whether the defendant was indigent at the time of this prior conviction and if so, whether he was represented by counsel, this aggravating factor may not be considered. *See, State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983). Because of this error committed in the sentencing phase of defendant's trial, we remand this case for resentencing. *See, State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

No error in defendant's trial.

Remanded for resentencing.

Judge WEBB concurs.

Chief Judge VAUGHN concurs in part and dissents in part.

Chief Judge VAUGHN concurring in part and dissenting in part.

I concur in the majority opinion holding that the evidence was sufficient to take the case to the jury.

For the reasons stated in my dissent in *State v. Massey*, No. 8221SC938, filed 3 May 1983, I dissent from that part of the opinion remanding the case for resentencing. In addition to the reasons I set out in *Massey*, I must also observe that the question is not even before us in this case. As the majority correctly notes at the outset, the only question raised on appeal is the question of whether the judge erred in denying defendant's motion for nonsuit. Our scope of review in this case is confined to consideration of exceptions set out and made the basis of assignment of error in the record on appeal. Rule 10(a), Rules of Appellate Procedure.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF JOHN M. CONNOLLY, AND WIFE MARGIE H. CONNOLLY, GRANTORS v. JACK H. POTTS, TRUSTEE FOR FRANK A. MOODY AND WIFE, CHARLOTTE O. MOODY, AS RECORDED IN BOOK 102, PAGE 140, OF THE TRANSYLVANIA COUNTY REGISTRY

No. 8229SC512

(Filed 17 May 1983)

Mortgages and Deeds of Trust § 25— beneficiaries not in possession of note—no right to foreclose deed of trust

The beneficiaries of a deed of trust were not holders of the note secured by the deed of trust and thus were not entitled to foreclose the deed of trust where the note had been assigned by the beneficiaries to a bank as security for a loan and they were not in possession of the note at the time of trial. The decision in *Furst v. Loftin*, 29 N.C. App. 248 (1976) is overruled to the extent that it may represent a holding that possession at trial is not necessary to establish that the mortgagee is the holder of the instrument which constitutes the debt secured by the mortgage. G.S. 25-1-201(20).

APPEAL by petitioners from *Freeman, Judge.* Judgment entered 16 February 1982 in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 18 March 1983.

Petitioners Frank A. Moody and wife, as beneficiaries (mortgagees), brought this special proceeding to foreclose under a power of sale in a deed of trust in which Potts was the trustee and respondents John M. Connolly and wife were the grantors (mortgagors). The Clerk of Superior Court denied the petition. Upon appeal *de novo*, Judge Freeman entered the following order.

> THIS CAUSE, coming on to be heard and being heard before the undersigned Judge Presiding, without a jury, during the February 8, 1982 Term of Superior Court for Transylvania County, and the Court upon reviewing the record and hearing evidence and testimony makes the following findings of fact:
>
> 1. That this is a Special Proceeding by Frank A. Moody and wife, Charlotte O. Moody, mortgagees, hereinafter called petitioners, seeking the foreclosure of a certain deed of trust recorded in Deed of Trust Book 102, page 140, Transylvania County Registry and executed by John M. Connolly and wife,

Margie H. Connolly, mortgagors, hereinafter called respondents.

2. That from the order of the Clerk of Superior Court of Transylvania County denying the petition for foreclosure, petitioners gave notice of appeal for a hearing *de novo.*

3. That in open court, counsel for petitioners and counsel for respondents stipulated and agreed: (a) that respondents executed and delivered to petitioners a certain note and deed of trust dated October 14, 1975, and recorded in Deed of Trust Book 102, page 140, Transylvania County Registry; (b) that a valid debt existed at the time this Special Proceeding was instituted; (c) that the deed of trust contains a power of sale and (d) the respondents were properly served with copies of the Notice of Hearing and Notice of Trustee's Sale of Real Property.

4. That on February 23, 1978, petitioners executed and delivered to First Citizens Bank and Trust Company a negotiable promissory note in the amount of twelve thousand five hundred dollars ($12,500.00) and a Security Agreement giving to the bank as collateral for the twelve thousand five hundred dollar ($12,500.00) note an assignment of the note and deed of trust dated October 14, 1975 in the amount of two hundred sixty thousand dollars ($260,000.00) from John M. Connolly and wife, Margie H. Connolly to Frank A. Moody and wife, Charlotte O. Moody; that at the time of the execution and delivery of the said twelve thousand five hundred ($12,500.00) note by petitioners to First Citizens Bank and Trust Company, said petitioners delivered to First Citizens Bank and Trust Company the original note and deed of trust executed by respondents which is the subject matter of this Special Proceeding; that at the time of the institution of this Special Proceeding, the promissory note of petitioners to First Citizens Bank and Trust Company had not yet been paid and satisfied and that the said bank was in physical possession of the original note and deed of trust which is the subject matter of this foreclosure proceeding.

THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW AS FOLLOWS:

1. That the deed of trust has a valid power of sale.

2. That respondents were properly served with copies of the Notice of Hearing and Notice of Trustee's Sale of Real Property.

3. That a valid debt existed at the time this Special Proceeding was instituted.

4. That petitioners were not the holders of the note and deed of trust which is the subject matter of this foreclosure proceeding at the time this Special Proceeding was instituted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Foreclosure of the deed of trust recorded in Deed of Trust Book 102, page 140, Transylvania County Registry is denied and that the Trustee shall not sell the property at foreclosure sale.

From the entry of Judge Freeman's order, petitioners have appealed.

Ramsey & Cilley, by Robert S. Cilley, for petitioners.

Ramsey, Smart, Ramsey & Hunt, P.A., by Margaret M. Hunt, for respondents.

WELLS, Judge.

The issues presented in this appeal relate to the burden upon a party seeking to foreclose under the terms of a deed of trust securing payment of a promissory note to establish that he is the holder of the note.

A party seeking to go forward with foreclosure under a power of sale must establish, *inter alia*, by competent evidence, the existence of a valid debt *of which he is the holder.* G.S. 45-21.16(d), *In re Foreclosure of Burgess,* 47 N.C. App. 599, 267 S.E. 2d 915 (1980). The Uniform Commercial Code, G.S. 25-1-201(20) defines a "holder" to be "a person who is in possession of . . . an instrument . . . issued or indorsed to him or to his order . . . ." *See Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.,* 301 N.C. 200, 271 S.E. 2d 54 (1980). It is the fact of possession which is significant in determining whether a person is a

holder, and the absence of possession defeats that status. *See Liles v. Myers,* 38 N.C. App. 525, 248 S.E. 2d 385 (1978). *See also* 1 Anderson, Uniform Commercial Code § 1-201: 105 through 116.

The trial court's finding of the existence of a valid debt was not determinative of petitioner's right to foreclose. In the case now before us, petitioners were not able to show the trial court that they were in possession of the note which the mortgage secured. The note was not introduced into evidence, and petitioner Frank A. Moody's testimony showed that at the time of trial, the note was in the possession of a third party, as found by the trial court. Petitioner cites *Furst v. Loftin,* 29 N.C. App. 248, 224 S.E. 2d 641 (1976) for the proposition that where a mortgagee's note has been pledged to another to secure a debt smaller than the debt securing the deed of trust sought to be foreclosed, the mortgagee has such an interest as will entitle him to foreclose the mortgage. To the extent that *Furst* may represent a holding that possession at trial is not necessary to establish that the mortgagee is the holder of the instrument that constitutes the debt which the mortgage secures, *Furst* is expressly overruled.

Judge Freeman's order appears to indicate that he was under the misapprehension that petitioner's status as a holder *at the time of the institution of the action* was controlling. The matter being before Judge Freeman *de novo,* the evidence at trial was determinative of the question. It is clear that *on the evidence,* Judge Freeman reached the correct result.

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

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DANNY RAY THOMAS

No. 8228SC1136

(Filed 17 May 1983)

Criminal Law § 90— State's witness improperly declared hostile

In an armed robbery prosecution, the trial court erred in declaring the State's witness hostile and allowing the State to impeach him with a prior inconsistent statement since the judge did not determine after voir dire that the State had been misled, surprised or entrapped to its prejudice but rather the record disclosed that the trial judge declared the witness hostile because of the witness's inability to "stick by his story one way or the other." G.S. 15A-1443.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 27 May 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 April 1983.

Defendant was indicted for attempted armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Both charges arose out of an attempted robbery of Jordan's Food Store in Buncombe County on 16 January 1982. Defendant was convicted by a jury of attempted armed robbery, for which he received a sentence of twenty years, and assault with a deadly weapon inflicting serious injury, for which he received a consecutive sentence of five years. Defendant appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Michael Rivers Morgan for the State.

Public Defender J. Robert Hufstader for defendant appellant.

BRASWELL, Judge.

Defendant first argues that the court committed reversible error by declaring one of State's witnesses a hostile witness and subsequently allowing the State to impeach and cross-examine its own witness. We agree with defendant on this issue; therefore, he is awarded a new trial.

State's witness James B. Carpenter testified that he had seen the two codefendants on the morning of the robbery of Jordan's Food Store. During their conversation, the two defendants asked Carpenter if he had any money they could borrow. Carpenter

went on to state that he had gone to Jordan's Store shortly after it had been robbed that night and had talked to Deputy Randy Moss. Carpenter stated that all he told Deputy Moss was that he had seen the two defendants that morning and run them off from his house. After the District Attorney, Mr. Freeman, made several attempts to get Carpenter to elaborate on what he had told Deputy Moss, Freeman reminded Carpenter that Moss had made a written report of the conversation. Carpenter looked at the written report but stated that only parts of it were true. At this point the judge conducted a *voir dire* hearing which began as follows:

> "COURT: Now, what's the problem, Mr. Freeman?
>
> MR. FREEMAN: If Your Honor please, that statement given to Randy Moss contains additional statements which this Defendant related—excuse me—which this witness related the two Defendants told him; more specifically, that the two subjects told him that they needed money and wanted to know if the place where he worked held any money there. He told them no, and then they told him that they were going to have to hit a store to get some money. I talked with him yesterday afternoon in the presence of several officers, after he was brought in after failing to appear as subpoenaed Monday morning. At that time he indicated in my presence and in the presence of the other officers that those statements were true and correct. And then I learned before lunch that he has lost his memory. I'm trying to refresh it."

In response to questioning from the court and counsel, Carpenter stated that he had been told by Deputy Moss and another officer before lunch that day that "if I didn't start remembering what they had wrote down here, that I could be in the same cell with [the two defendants] tonight." Mr. Freeman read Moss's written report to Carpenter, and Carpenter told the court that he did not remember the defendants asking him if the place where he worked had any money or their stating that they would have to hit a store to get some money.

The Court then concluded the *voir dire* as follows:

> "COURT: I'm going to find this man is a hostile witness and let the State cross-examine him about his earlier statement.

> It seems to me that he approached the police on the very night that this happened when the events were fresh in his memory and related to the police a series of circumstances that I find no reason to—for the police to alter, and it is my finding that the information he gave to the police on January 16, 1982, was fresh at the time he gave it, and for reasons known only to himself, he doesn't wish to substantiate that statement at the present time, and I feel he is a hostile witness to the State and failed to honor a subpoena. He had to be sent for. He admitted that the statement was correct as late as yesterday, and he has denied or repudiated the statement as late as today. *So with this particular witness not being able to stick by his story one way or the other,* I'm going to let the State cross-examine him about the information he gave to the police earlier." (Emphasis added.)

The State then proceeded to cross-examine Carpenter and impeach him by using the statement written by Officer Moss.

"Although not without criticism, it remains the rule *in criminal cases* in North Carolina that the district attorney may not impeach a State's witness by evidence that his character is bad or that he has made prior statements inconsistent with or contradictory to his testimony." *State v. Smith,* 289 N.C. 143, 156, 221 S.E. 2d 247, 255 (1976). The exception to this rule is that the State may impeach its own witness when it has been misled, surprised or entrapped to its prejudice. *State v. Moore,* 300 N.C. 694, 698, 268 S.E. 2d 196, 200 (1980).

District Attorney Freeman stated during *voir dire* that he had learned before lunch and before Carpenter was called to testify that Carpenter had "lost his memory." Therefore, there can be no doubt that prior to calling him as a witness, Freeman had substantial reason to believe that Carpenter would repudiate part of his previous statement to Moss or claim loss of memory if called to testify.

> "Where the prosecuting attorney knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called upon to testify, he will not be permitted to impeach the witness. He must first show that he has been genuinely 'surprised or taken unawares' by testimony which differed in

> material respects from the witness's prior statements, which he had no reason to assume the witness would repudiate." (Citations omitted.)

State v. Pope, 287 N.C. 505, 514, 215 S.E. 2d 139, 146 (1975).

Here, the trial judge declared Carpenter a hostile witness and allowed the State to impeach him with the prior inconsistent statement written down by Deputy Moss. The judge did not determine after *voir dire* that the State had been misled, surprised or entrapped to its prejudice. The record discloses that the trial judge declared Carpenter a hostile witness because of Carpenter's inability to "stick by his story one way or the other." Under these circumstances, it was error for the court to declare Carpenter a hostile witness in violation of the anti-impeachment rule as set forth in *Smith* and *Pope*.

We hold that this error was prejudicial to defendant, considering the nature of the identification testimony of the one eyewitness to the robbery, Mary Jo Holcombe. The record discloses that there were several factors which may have tended to discredit Ms. Holcombe's identification of defendants: the impairment of her vision due to the blood running from her head injury into her eyes; her failure to wear prescription eyeglasses; and her vague description of the two men immediately following the robbery and assault. Therefore, since Carpenter's statement to Deputy Moss concerning defendant's alleged plan to rob a store tended to corroborate Ms. Holcombe's identification and to establish defendant's intent to commit a robbery, there is a reasonable possibility that without this testimony a different result would have been reached at trial. *See State v. Moore, supra;* G.S. 15A-1443. For this reason, we hold that defendant is entitled to a new trial.

Defendant's remaining arguments concern errors allegedly made by the court in the sentencing hearing. These assignments need not be discussed since they are unlikely to recur upon retrial in light of the Fair Sentencing Act guidelines set out in the recent North Carolina Supreme Court case, *State v. Ahearn*, --- N.C. ---, 300 S.E. 2d 689 (1983).

New trial.

Judges WEBB and WHICHARD concur.

JEWEL MEDFORD, GUARDIAN AD LITEM FOR SHERRI RENAE HEATHERLY v. WENDELL ALAN DAVIS, EDNA HOLLINGSWORTH DAVIS AND HAZEL C. HOLLINGSWORTH

No. 8230SC385

(Filed 17 May 1983)

1. **Criminal Law §§ 101.4, 122— additional instructions in jury room—consent by parties**

The trial judge did not err when he entered the jury room to answer questions and gave the jurors further instructions in the absence of the parties and their attorneys where the trial judge was informed that the jury had some questions after it had deliberated for over an hour, a public meeting was being held in the courtroom at that time, and the parties and counsel agreed to permit the judge, reporter and bailiff to enter the jury room for the questions.

2. **Automobiles and Other Vehicles § 46; Evidence § 42.1— manner of driving car—reasonable speed—shorthand statement of fact**

A witness's testimony that defendant was driving "normal" and at a "reasonable speed" at the time of an accident was competent as a shorthand statement of fact and did not invade the province of the jury.

3. **Evidence § 42.1— driving "too fast"—exclusion of testimony—harmless error**

Any error in the exclusion of testimony that defendant "was driving too fast" was cured when the witness subsequently testified without objection that "the car was going fast."

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 4 September 1981 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 16 February 1983.

This is a negligence action arising out of an automobile accident which occurred on 15 October 1976. At the time of the accident, Sherri Heatherly, Melody Powell, and Dan Medford were passengers in a vehicle operated by defendant Wendell Alan Davis. The complaint alleged that Davis negligently failed to reduce speed and keep the automobile under proper control, that he operated the vehicle at a dangerous and reckless speed, and that he operated it without due care and caution.

At trial, plaintiff's evidence tended to show that Wendell Alan Davis was traveling on a gravel road, Rural Road #1188, when his vehicle went off the roadway, into a fence two feet to three feet away, and down a steep embankment. At the point of the accident, there was a 10% uphill grade. An investigating of-

ficer estimated the speed of the vehicle at 15 m.p.h. at the time of impact with the fence. There were marks on the road, consisting of little piles of gravel, which apparently were made by tires spinning in a forward motion. Melody Powell testified that the car had been going fast, that it had been slinging gravel, and that she had asked Davis to slow down. Sherri Heatherly was thrown from the vehicle, sustaining numerous injuries which have left her 75% permanently and totally disabled.

Davis testified that the vehicle was traveling 15 m.p.h. when he felt the earth give way and the vehicle go down the bank. Davis's operation of the vehicle was described by Dan Medford as "[n]ormal" and "fine." Medford also testified that the speed of the vehicle was "reasonable."

The jury returned a verdict, finding that Wendell Davis was not negligent. From judgment entered on the verdict, plaintiff appeals.

Russell L. McLean, III, for plaintiff appellant.

Roberts, Cogburn, McClure and Williams, by Max O. Cogburn and Issac N. Northup, Jr.; and Van Winkle, Buck, Wall, Starnes and Davis, by O. E. Starnes, Jr., for defendant appellee.

WEBB, Judge.

[1] In her first argument, plaintiff contends the trial judge committed reversible error when he entered the jury room and gave the jurors further instructions in the absence of the parties and their attorneys. From the record, it appears that after the jurors had retired and deliberated for over an hour, the judge was informed that they had some questions. There were people in the courtroom who had gathered for a public meeting and the parties and their counsel agreed to allow the judge, reporter, and bailiff to enter the jury room for the questions. Additional instructions were thereafter given by the judge in the jury room. Plaintiff does not contend that these instructions were erroneous or prejudicial. Rather, she urges this Court to adopt a per se rule which would require a new trial whenever a judge communicates with the jury in the jury room in the absence of counsel and the parties, regardless of whether prejudice has been shown.

Our research has disclosed no North Carolina cases on point, and there is no North Carolina rule of civil procedure or practice which directly addresses this issue. On the facts presented here, we do not believe we should hold there was prejudicial error. The trial judge's conduct was expressly consented to by the parties and their counsel before he went into the jury room. The consent of plaintiff and her counsel either caused or joined in causing any error committed by the court, and "[i]nvited error is not ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E. 2d 101, 102 (1971); *see Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349 (1963).

[2] Next, plaintiff argues that defense witness Dan Medford should not have been allowed to testify about the manner in which Davis operated the vehicle. When he was asked "How was Alan [Davis] driving?", Medford responded, "Normal, to me, it was fine." At this point, plaintiff's counsel objected "as to what is normal." The objection was overruled, and Medford testified, "It was a reasonable speed." Plaintiff's motion to strike this testimony was denied.

At the outset, we note that plaintiff's objection may have been untimely since it was not made until after Medford had already answered the question calling for a description of Davis's driving. *Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973). Assuming, *arguendo*, that the objection was taken in apt time, we hold Medford's testimony concerning the operation of the vehicle to be admissible. A witness is permitted to give opinion evidence in the form of a "shorthand statement of the facts" when it is impractical to describe the facts in detail. *State v. Brown*, 26 N.C. App. 314, 215 S.E. 2d 802 (1975); *see* 1 Brandis on N.C. Evidence § 125 (1982). Contrary to plaintiff's contention, Medford's testimony as to how defendant was driving did not invade the province of the jury since it was not an opinion on the ultimate issue to be decided by the jury. The ultimate issue was whether defendant was negligent at the time of the accident. This assignment of error is overruled.

[3] Plaintiff also assigns error to the exclusion of testimony from Melody Powell that "He [Davis] was driving too fast." Plaintiff contends this testimony was admissible as a shorthand statement of fact concerning the witness's observation that defendant was

traveling at an excessive rate of speed. We believe error, if any, in the exclusion of this evidence was cured when Ms. Powell subsequently testified, without objection, that "the car was going fast." Error in the exclusion of evidence is harmless when other evidence of the same import is admitted. *State v. Edmondson*, 283 N.C. 533, 196 S.E. 2d 505 (1973).

Plaintiff further assigns error to the court's refusal to let the investigating officer testify about what he observed inside Davis's vehicle as well as his observations of Davis. Assuming, without deciding, that the questions asked of the investigating officer were competent, the record does not show what his answers would have been. Therefore, we cannot determine whether plaintiff was prejudiced by their exclusion. *See State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977). The appellant has the burden of showing not only that error was committed but also that it was prejudicial. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972). This assignment of error is overruled.

Finally, plaintiff argues that the court erred in failing to grant her motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Inasmuch as we have found no error in the trial, we conclude that the court did not abuse its discretion in denying plaintiff's motions.

No error.

Chief Judge VAUGHN and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. STEVE ALLEN STEELMAN

No. 8223SC817

(Filed 17 May 1983)

Automobiles and Other Vehicles § 119.1— reckless driving—speeding while attempting to elude arrest—sufficiency of evidence of identity of driver

There was sufficient evidence of the identity of the driver of a vehicle involved in a prosecution for reckless driving and speeding while attempting to elude arrest even though there was apparently a period of time when no one saw the car involved in the offenses where an officer and a highway patrolman both described the driver as male and the passenger as female and the patrolman identified defendant as the driver.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 18 March 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 9 February 1983.

Defendant was tried for several traffic violations, including reckless driving and speeding while attempting to elude arrest. The State's evidence tended to show that on 10 June 1981, at about 8:45 p.m., Wilkesboro police officer Gary Parsons observed a red 1972 Toyota traveling at a high rate of speed on U.S. 421. The driver, who was male, did not appear to be wearing a shirt. There was a female passenger in the vehicle. The vehicle turned right at a traffic light without stopping and then failed to stop at a stop sign. Parsons turned on the blue light and siren in his patrol car and pursued the Toyota down U.S. 421. Parsons was traveling 85 m.p.h. and was not gaining on the vehicle. The Toyota then turned down another road, ran onto a traffic island, and hit a sign. While traveling approximately 75 m.p.h., it passed several cars in a no passing 35 m.p.h. zone. The officer lost sight of the vehicle when it turned again onto a logging road. He was unable to follow the vehicle down that road, due to brush and a pine tree which was lying across the road. He drove on to where the logging road came out, just off Country Club Road, which by way of the logging road would have been about a ¾ mile drive. Meanwhile, a highway patrolman spotted the Toyota on Country Club Road about 9:00 p.m. and followed it to where it pulled off onto a private drive and wrecked in a garden. The driver, who was not wearing a shirt, and a female passenger got out of the car and ran off. The patrolman identified defendant as the driver. Officer Parsons arrived at the scene about 9:05 p.m., after defendant had fled and some five to ten minutes after Parsons last saw the Toyota.

Defendant presented alibi evidence.

Defendant was convicted of reckless driving and speeding while attempting to elude arrest. From a consolidated judgment imposing a two-year prison sentence, defendant appealed.

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

Vannoy, Moore and Colvard, by J. Gary Vannoy, for defendant appellant.

WEBB, Judge.

The only question brought forward in this appeal is whether the court erred in denying defendant's motion to dismiss at the close of all the evidence. Defendant does not argue that the evidence was insufficient to show that the crimes were in fact committed. His sole contention is that the State failed to offer sufficient evidence to prove his identity as the driver of the vehicle at the time the offenses were committed. We do not agree.

We believe *State v. Newton*, 207 N.C. 323, 177 S.E. 184 (1934), supports the trial court's denial of defendant's motion. In *Newton*, two men, traveling toward Farmville in a Ford roadster with yellow wheels, struck and injured some children on the shoulder of the road and then drove on. A Ford roadster, with yellow wheels, was subsequently seen by a witness about ¼ mile away. Between the time the children were struck and the time this witness arrived at their location, no other cars passed. Apparently about ten minutes later, a Ford roadster, headed toward Farmville, was found wrecked on the same highway. The two defendants, who were near the car, indicated that they had been drinking and that they had had another wreck. The court found this evidence sufficient to go to the jury on the issue of whether the car which struck the children was under the control of the defendants.

In the present case, as in *Newton*, there was apparently a period of time when no one saw the car involved in the offenses. The defendant in this case theorizes that during that interval, the driver and passenger could have switched positions. This argument ignores the incontroverted fact that Officer Parsons and the highway patrolman both described the driver as male and the passenger as female. The defendant also submits that some unknown third person could have got out from behind the wheel and let defendant drive. We recognize that there are numerous possibilities as to what might have happened on the logging road that night. For circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not, however, point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). The evidence is sufficient to go to the jury if it gives rise to "a reasonable inference of defendant's guilt." *State v. Rowland*, 263

N.C. 353, 358, 139 S.E. 2d 661, 665 (1965). We have reviewed the evidence in the light most favorable to the State and find it sufficient to support a reasonable inference of defendant's guilt and hence withstand defendant's motion to dismiss.

Defendant also contends his motion to dismiss should have been allowed because the highway patrolman's testimony which identified defendant as the driver of the wrecked car was "inherently incredible as a matter of law." The highway patrolman, who had never seen defendant before, testified that he was approximately 30 feet away when the car doors opened and the driver and passenger ran. Although the sun had gone down, it was still light. The patrolman made his identification as he ran toward the side of the fleeing driver, and he was able to give other officers a description of this man. We believe there is a reasonable possibility that the patrolman had sufficient observation of the driver to permit him to subsequently identify the defendant. The credibility of his testimony was thus a matter for jury determination. *State v. Miller,* 270 N.C. 726, 154 S.E. 2d 902 (1967).

No error.

Judges BECTON and PHILLIPS concur.

JERRY MOORE v. UPCHURCH REALTY CO., INC. AND NATIONWIDE INSURANCE COMPANY

No. 8210IC518

(Filed 17 May 1983)

1. **Master and Servant § 81— workers' compensation coverage—no estoppel of carrier to deny**

Defendant insurance carrier was not estopped to deny workers' compensation coverage for plaintiff painter where the carrier received no premium for workers' compensation coverage for plaintiff and took no action which could have misled plaintiff.

2. **Master and Servant § 49— workers' compensation coverage—estoppel of employer to deny—necessity for findings**

Where the evidence showed that plaintiff contracted to paint houses for defendant realty company and that defendant's president discussed workers'

compensation coverage with plaintiff and deducted from the sum owed plaintiff an amount for workers' compensation premiums for plaintiff's employees but not for plaintiff, the Industrial Commission should have determined whether defendant was estopped to deny workers' compensation coverage to plaintiff upon the basis of findings as to whether the action of defendant's president misled plaintiff as to the status of his workers' compensation insurance, whether this caused plaintiff not to procure coverage for himself, and whether plaintiff was misled by his own lack of care and circumspection.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 15 February 1982. Heard in the Court of Appeals 12 April 1983.

The plaintiff appeals from an Industrial Commission order denying him workers' compensation benefits. The evidence before the Deputy Commissioner was that the plaintiff had an oral agreement with Upchurch Realty Co., a housing construction firm, under the terms of which the plaintiff painted houses which were built by Upchurch. The plaintiff hired workers to help him do the painting. He did not procure workers' compensation insurance for himself or for those who helped him.

Bryan Upchurch, the president of Upchurch Realty Co., testified that he had a discussion with the plaintiff in regard to workers' compensation insurance and the plaintiff told him he did not have such insurance. Mr. Upchurch testified further: "I then told him that until he got workmen's compensation, I was going to take out either three or four percent of the gross payment." Mr. Upchurch testified at one point that the deductions were for labor done by the plaintiff's employees and not for the plaintiff. Mr. Upchurch testified he made the deductions "to cover anything that I might have to pay." The plaintiff testified he talked to Mr. Upchurch in regard to the insurance and Mr. Upchurch told him he would have to procure workers' compensation insurance. The plaintiff also testified that he thought the three percent deducted from the amount paid to him was for workers' compensation insurance and that he was covered. None of the money withheld from the plaintiff was delivered to the defendant Nationwide.

The plaintiff's hand was injured by accident while the plaintiff was painting a house for defendant Upchurch Realty Co.

The Deputy Commissioner who heard the case found among other facts that plaintiff was never told by Mr. Upchurch that

he was covered by insurance, and that since plaintiff had not obtained coverage, Mr. Upchurch advised him that until he obtained coverage, he would deduct three percent from the gross amount owed to the plaintiff to provide workers' compensation for plaintiff's employees. The Deputy Commissioner also found as a fact that Mr. Upchurch calculated the percentage to be deducted "by estimating the portion of the total amount he paid plaintiff which was attributable to plaintiff's helpers." The Deputy Commissioner concluded that plaintiff was not an employee of Upchurch Realty Co., and the defendants were not estopped to deny workers' compensation coverage to plaintiff. The Deputy Commissioner denied the plaintiff's claim.

The full Commission affirmed the opinion of the Deputy Commissioner. The plaintiff appealed.

Morgan, Bryan, Jones and Johnson, by Robert C. Bryan, for plaintiff appellant.

Young, Moore, Henderson and Alvis, by George M. Teague, for defendant appellees.

WEBB, Judge.

The plaintiff does not argue that the Industrial Commission was in error in finding he was not an employee of Upchurch Realty Co. He argues that the defendants are estopped to deny workers' compensation coverage.

[1] It has been held in this state if an insurance carrier accepts workers' compensation insurance premiums for a person, it cannot deny liability for coverage. *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964); *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942); *Garrett v. Garrett and Garrett Farms*, 39 N.C. App. 210, 249 S.E. 2d 808 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979); and *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977). There is no evidence in this case that the insurance carrier received any premiums for the workers' compensation coverage for the plaintiff. We do not believe the defendant insurance carrier is liable under the above cited cases or any other theory of estoppel. Equitable estoppel requires proof that the party to be estopped must have misled the party asserting the estoppel either by some words or some action or by

silence. The person asserting the estoppel must have taken some action or failed to take some action to his detriment relying on the words, action or silence, and the injured party must not have been misled by his own lack of care or circumspection. *See Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329 (1968); *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745 (1955); and *Conner Co. v. Spanish Inns,* 34 N.C. App. 341, 238 S.E. 2d 525 (1977), *aff'd,* 294 N.C. 661, 242 S.E. 2d 785 (1978). There is no evidence in this case that Nationwide Insurance Company took any action which could have misled the plaintiff. We affirm the order of the Industrial Commission as to Nationwide.

[2] As to the defendant Upchurch Realty Co., we do not believe the Industrial Commission made findings of fact which are sufficient for us to determine whether the conclusions of law were proper. The Industrial Commission found as a fact that the deductions by Upchurch from what was paid to the plaintiff were for workers' compensation insurance premiums for plaintiff's employees. This is in effect a finding that no premiums were deducted for plaintiff. This finding of fact is supported by the evidence. We do not believe, however, that this finding of fact is sufficient to support the conclusion that the defendant Upchurch is not estopped from denying compensation coverage for the plaintiff. Although the evidence is that Mr. Upchurch did not tell the plaintiff he was covered, he did discuss coverage with the plaintiff and deduct from what was paid to him an amount of money based on compensation premiums. The plaintiff testified that he thought he was covered.

We believe there should be findings of fact as to whether by his action Mr. Upchurch misled plaintiff as to the status of his workers' compensation insurance, whether this caused the plaintiff not to procure coverage for himself, and whether the plaintiff was misled by his own lack of care and circumspection.

We affirm as to Nationwide Insurance Company. We reverse and remand as to Upchurch Realty Co. for additonal findings of fact. The Industrial Commission may take further evidence if it so desires.

Affirmed in part; reversed and remanded in part.

Judges WHICHARD and BRASWELL concur.

BETTY DAUGHERTY v. FREDERICK DAUGHERTY

No. 8228DC421

(Filed 17 May 1983)

Divorce and Alimony § 24.4— failure to pay child support—civil contempt proceedings—failure to find whether defendant able to employ counsel—no error

The trial court did not err in failing to find whether defendant desired and was able to employ counsel in a civil contempt proceeding where defendant was found to be in arrears in child support payments since (1) the proceeding was simple and uncomplicated, (2) defendant had an opportunity to carefully explain his position, and where (3) the record clearly showed the defendant's earnings were somewhat above the poverty level and that he had been before the court on several prior occasions because of his delinquencies in making the payments.

APPEAL by defendant from *Israel, Judge.* Order entered 11 December 1981 in District Court, BUNCOMBE County. Heard in the Court of Appeals 8 March 1983.

In this reciprocal child support, civil contempt proceeding, the defendant was ordered to show cause why he should not be held in contempt for disobeying a previous order to pay $80 a month toward the support of his minor child by his first marriage. At the hearing, upon defendant's admission that he had been regularly employed at wages of $835 a month, but had made no support payment at all for five months, and only partial payments many other months, the judge found him in contempt and entered an order confining him to jail for thirty days, unless the defendant purged himself before then by paying the arrearage due.

Attorney General Edmisten, by Associate Attorney John W. Lassiter, for the State.

Whalen, Hay & Cash, by Gary S. Cash, for defendant appellant.

PHILLIPS, Judge.

Defendant, who appeared at the contempt hearing without counsel, first cites as error the court's failure to ascertain and find whether defendant desired and was able to employ counsel, and whether the assistance of counsel was necessary for a proper presentation of his case. According to the record, the defendant's

possible indigency and possible need of and desire for court-appointed counsel were not mentioned by defendant or anyone else. The contention is that the court's failure to initiate inquiries about and resolve these matters was manifest prejudicial error as a matter of law. We disagree.

Though due process does require appointment of counsel for indigents in *some* nonsupport, civil contempt proceedings, in other such proceedings counsel need not be supplied. Counsel must be furnished indigents only in those proceedings "where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness." *Jolly v. Wright,* 300 N.C. 83, 93, 265 S.E. 2d 135, 143 (1980). This was not such a proceeding. Instead, it was about as simple a proceeding of this kind as ever arises. The District Attorney did not participate in it; the failure to pay as directed could not be disputed; no formal evidentiary processes, complicated or otherwise, were involved; no witness appeared against the defendant, who was afforded the opportunity to present any information that he wanted to to the judge, and did so without interference. Had a lawyer been there he would have had no occasion to cross-examine anyone or object to anything. The only thing that the situation permitted or required was for the defendant to explain his failure to pay. The record shows that he did that about as well as anyone could have under the circumstances that existed. What his explanation amounted to was that: His gross monthly earnings of $835 were all needed by his subsequently-acquired family, which included a wife, two new children, and his wife's child by a former marriage, and he was therefore unable to pay $80 a month toward the support of the child of his first marriage as the court had directed. Neither the record not appellant's brief contains anything that causes us to even suspect that this old, familiar, and unavailing story could have been improved upon, or presented any better, if the defendant had had counsel. Thus, the court's failure to determine whether he needed, wanted, or could afford to employ counsel was neither erroneous nor legally harmful to the defendant.

But even if the proceeding had been more complex and defendant needed the assistance of counsel in connection with it, under the circumstances that existed here, the judge's failure to raise and answer the ability to employ counsel question on his

own initiative would not have been error, in our opinion. Since the defendant's earnings were somewhat above the poverty level and he had been before the court on several prior occasions because of his delinquencies in making the payments, the judge had a right to assume, we think, that if the defendant thought he was eligible for the court's assistance in obtaining counsel and wanted it, that he would inform the court accordingly. Relative thereto, it is perhaps not without significance that in appealing to this Court, defendant obtained counsel on his own initiative and that the appeal is not in forma pauperis.

The defendant's other contention, that the Court erred by failing to explicitly find that the defendant was capable of complying with the order, is likewise without merit. Though, in matters of this kind, such a finding is always appropriate and under some circumstances necessary, *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966), when the evidence plainly shows, as it does here, that the defendant was capable of complying with the order, the absence of such a finding is immaterial. *Lee v. Lee*, 37 N.C. App. 371, 246 S.E. 2d 49 (1978). The defendant's capacity to comply with the order was clearly established by his own evidence, which showed that his gross monthly earnings were ten times the amount of the small payments required of him and that he had no legally acceptable excuse for not making them. Thus, the conclusion that defendant's failure to comply with the order was wilful was not only justified, it was inevitable.

The order appealed from is therefore

Affirmed.

Judges ARNOLD and BECTON concur.

BEAUFORT COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. MARGARET KING v. WILLIAM E. HOPKINS

No. 822DC608

(Filed 17 May 1983)

Parent and Child § 7 — voluntary child support agreement — no relitigation of paternity issue

A voluntary child support agreement could not be modified or vacated on the basis of relitigation of the paternity issue in a proceeding related solely to the support agreement which, by virtue of the court's approval, had the effect of an order for support. G.S. 110-132(b). G.S. 1A-1, Rule 60(b)(6).

APPEAL by plaintiff from *Ward, Judge.* Order entered 17 November 1981 in District Court, BEAUFORT County. Heard in the Court of Appeals 21 April 1983.

Plaintiff appeals from an order, pursuant to G.S. 1A-1, Rule 60(b)(6), vacating a voluntary support agreement and striking an order for payment of child support arrearages.

Rodman, Rodman, Holscher & Francisco, by Christopher B. McLendon, for plaintiff appellant.

No brief filed for defendant appellee.

WHICHARD, Judge.

I.

On 8 August 1978 Margaret L. King executed a sworn affirmation of paternity which stated that she was the mother and defendant was the father of a minor child. On the same date defendant executed a sworn acknowledgment of paternity declaring that he was in fact the father of the child. On the basis of these documents the trial court entered an Order of Paternity, which had the force and effect of a judgment. G.S. 110-132(a) (Cum. Supp. 1981).

On 12 September 1978 defendant executed a sworn voluntary support agreement consenting to pay support for the child. On 19 September 1978 the court entered an order, which had the force and effect of a court order of support, approving this agreement. G.S. 110-133 (Cum. Supp. 1981).

Defendant made some payments, but failed to make others. The court issued several show cause and contempt orders.

On 28 September 1981, through counsel, defendant filed a motion "pursuant to Rule 60(b)(2), (3) and (6)" seeking relief from the voluntary support agreement. At a hearing on the motion both defendant and the mother testified that defendant was not the child's father. Defendant testified, in pertinent part, as follows:

> I have never had sexual intercourse with [the mother] and am not the father of her child . . . . The only reason I signed an Acknowledgment of Paternity and Voluntary Support Agreement was because I was forced to do so by an employee of the Beaufort County Department of Social Services. He told me I had to sign the papers.

The mother testified: "I signed an Affirmation of Paternity on August 8, 1978 saying that [defendant] was the father of my child . . ., but I was wrong. No, he is not the father . . . . At one time I thought maybe he was the father, but he's not."

The court found as a fact that defendant was not the father of the child. Pursuant to G.S. 1A-1, Rule 60(b)(6), it vacated the voluntary support agreement and struck an order for payment of child support arrearages.

Plaintiff appeals.

II.

The voluntary support agreement indicates that the child is receiving public assistance. Plaintiff-county thus had an interest in the support order, and had standing to resist defendant's motion. *See Cox v. Cox*, 44 N.C. App. 339, 260 S.E. 2d 812 (1979).

III.

The order appealed from was grounded upon a finding of fact that defendant was not the father of the child. It thus appears entered under a misapprehension of the applicable law.

G.S. 110-132(b) (Cum. Supp. 1981), which relates to child support orders such as the one here, in pertinent part provides: "The prior judgment as to paternity shall be res judicata as to that issue *and shall not be reconsidered by the court.*" (Emphasis supplied.) *See also Tidwell v. Booker*, 290 N.C. 98, 107, 225 S.E. 2d

816, 822 (1976); *State v. Ellis*, 262 N.C. 446, 449, 137 S.E. 2d 840, 843 (1964); *State v. Green*, 8 N.C. App. 234, 237, 174 S.E. 2d 8, 10, *aff'd*, 277 N.C. 188, 176 S.E. 2d 756 (1970); *State v. Coffey*, 3 N.C. App. 133, 136, 164 S.E. 2d 39, 41-42 (1968).

Defendant's motion related solely to the support agreement which, by virtue of the court's approval, had the effect of an order for support. It did not seek relief from the acknowledgment of paternity which, by virtue of the court's approval, had the effect of a judgment. G.S. 110-132(b) (Cum. Supp. 1981) expressly prohibited relitigation of the paternity issue in a proceeding related solely to the order for support.

IV.

The voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time. G.S. 50-13.7, 110-133 (Cum. Supp. 1981). It cannot, however, be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue. That issue is *res judicata* and "shall not be reconsidered by the court" in such a proceeding.

V.

The order is thus vacated. The cause is remanded for such further proceedings, consistent with this opinion, as the parties may desire.

Vacated and remanded.

Judges WEBB and BRASWELL concur.

IN THE MATTER OF TONYA RENEE RUMLEY AND GARY DEAN RUMLEY, SHERRY HUTCHENS DOBZENSKI, PETITIONER v. EDWARD R. INMAN, DIRECTOR ALAMANCE COUNTY DEPARTMENT OF SOCIAL SERVICES; ROBIN PEACOCK, SUPERVISOR OF ADOPTIONS, DIVISION OF SOCIAL SERVICES, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; BOBBY RAY RUMLEY, AND WIFE, VICTORIA RUMLEY, RESPONDENTS

No. 8215SC658

(Filed 17 May 1983)

Appeal and Error § 28.1— failure to except to findings of fact and conclusions— judgment affirmed

In an appeal from orders denying plaintiff's motion for an order requiring the opening of an adoption record where plaintiff failed to except to the findings of fact and conclusions drawn to support the judgment, the judgment is affirmed.

APPEAL by petitioner from *Braswell, Judge.* Orders entered 1 March 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 May 1983.

Loretta A. Cecil, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General Steven Mansfield Shaber, for respondent appellee, Robin Peacock, Supervisor of Adoptions.

Vernon, Vernon, Wooten, Brown and Andrews, by E. Lawson Brown, Jr., and T. Randall Sandifer, for respondent appellees, Bobby Ray Rumley and Victoria Rumley.

VAUGHN, Chief Judge.

This is an appeal from orders denying plaintiff's motion for an order requiring the opening of an adoption record.

The only exceptions brought forward are to the signing of the order. These exceptions only bring forward the question of whether the facts found and conclusions drawn support the judgment. Rule 10(a), Rules of Appellate Procedure. The questions of whether the findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law are not presented. Furthermore, there is no exception to the failure of the court to make the positive findings that would have been essential to an order granting the relief sought. For example,

there must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order can be entered requiring disclosure of the information. *In re Spinks*, 32 N.C. App. 422, 232 S.E. 2d 479 (1977). The order contains no such finding.

Affirmed.

Judges HEDRICK and ARNOLD concur.

IN THE MATTER OF THE WILL OF MARIA KERR JONES

No. 824SC606

(Filed 17 May 1983)

Wills § 9.4— probate of will—later attempted probate of codicil as collateral attack

Where the last will of the testatrix dated 14 December 1967 with a codicil dated 18 February 1980 had been probated in common form, petitioners' attempt in May 1981 to have a paper writing dated 13 October 1977 admitted to probate in solemn form as a second codicil constituted an impermissible collateral attack on the validity of the probated will.

APPEAL by petitioners from *Bruce, Judge.* Judgment entered 25 February 1982 in Superior Court, SAMPSON County. Heard in the Court of Appeals 20 April 1983.

This is a civil action wherein the petitioners sought to have admitted to probate in "solemn form" a paper writing purporting to be a holographic "codicil to the Last Will and Testament of Maria Kerr Jones, deceased," allegedly probated in common form on 2 November 1978.

The record before us discloses the following uncontroverted facts: (1) Maria Kerr Jones died in Sampson County on 30 October 1978; (2) A paper writing purporting to be her Last Will and Testament, executed on 14 December 1967 with an attached codicil dated 18 February 1970, was admitted to probate in common form by the Clerk of Superior Court in Sampson County on 2 November 1978; (3) The petitioners filed a petition on 21 May 1981 in the office of the Clerk of Superior Court, Sampson County seeking to have a holographic "second codicil" allegedly dated 13

October 1977 admitted to probate in solemn form; (4) On 24 February 1982 the respondent filed a motion for summary judgment and on 25 February 1982 the petitioners filed a counter-motion for summary judgment; (5) On 25 February 1982 Judge Bruce entered an order denying petitioners' motion for summary judgment, allowing the respondent's motion for summary judgment and dismissing the petition with prejudice. Petitioners appealed.

Joseph B. Chambliss for the petitioners, appellants.

Rose, Rand, Ray, Winfrey & Gregory, by Ronald E. Winfrey for the respondent, appellee.

HEDRICK, Judge.

In *In Re Will of Puett,* 229 N.C. 8, 13, 47 S.E. 2d 488, 492-493 (1948) (citation omitted), our Supreme Court held:

> [W]here a will has been duly probated, the record affords conclusive evidence of its validity, until vacated by appeal, or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose, and that the offer of proof of a will alleged to have been subsequently executed, without more, is not a direct but a collateral attack on the validity of the will. It is only by a caveat or proceeding in that nature that the validity of a properly probated will, and one without 'inherent or fatal defect appearing on its face' . . . may be brought in question.

See also In Re Will of Charles, 263 N.C. 411, 139 S.E. 2d 588 (1965). In the present case, the trial court correctly allowed the respondent's motion for summary judgment and dismissed the petition with prejudice. The petition discloses on its face an insurmountable bar to the relief sought.

The record discloses that the Last Will and Testament of Maria Kerr Jones, dated 14 December 1967 with a codicil attached and dated 18 February 1970, has been probated in common form. The petition in the present case asking that a paper writing dated 13 October 1977 be probated in solemn form as a second codicil, does not constitute a caveat proceeding to the will of

Maria Kerr Jones, dated 14 December 1967 and already probated in common form.

Affirmed.

Chief Judge VAUGHN and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 MAY 1983

BAKER v. PINERO No. 823SC633	Pitt (81CVS591)	Reversed
BELK v. ALISA INC. No. 8210IC577	Industrial Commission (H-6711)	Affirmed
FOUR SEASONS HOME- OWNERS ASSOC. INC. v. JORDAN No. 8226DC603	Mecklenburg (81CVD12543) (81CVD12545)	Affirmed
GERALD v. CITY OF LUMBERTON No. 8216SC632	Robeson (80CVS220) (80CVS221)	Affirmed
GRINGLE v. EPPS No. 8214SC267	Durham (78CVS1617)	Dismissed
IN RE TOY No. 8219DC581	Cabarrus (80J68)	Affirmed
LEE v. SIMPSON No. 8220SC682	Union (80CV360)	Affirmed
McDONAL v. McDONAL No. 824DC536	Onslow (80CVD742)	Affirmed in Part; Vacated & Re- manded in Part
NCNB v. JOWDY No. 8218SC200	Guilford (80CVS5040)	Affirmed
SMITH v. HOBSON FARM SERVICES, INC. No. 8223SC583	Yadkin (80CVS195)	No Error
STATE v. BOWERS No. 8223SC1127	Wilkes (81CRS9554) (81CRS9555) (81CRS9564) (81CRS9565)	No Error
STATE v. HAMILTON No. 8216SC1088	Robeson (81CRS11633)	Reversed
STATE v. WISE No. 823SC1121	Craven (82CRS3443) (82CRS3444) (82CRS3445) (82CRS3446)	No Error
TAYLOR-STEWART ENTER- PRISES, INC. v. NIXON No. 8226SC565	Mecklenburg (80CVS1043)	No Error

ASHEVILLE CONTRACTING COMPANY, INC., TAYLOR CONTRACTING COMPANY, INC. v. CITY OF WILSON, A NORTH CAROLINA MUNICIPAL CORPORATION v. L. E. WOOTEN AND COMPANY, A NORTH CAROLINA CORPORATION

No. 827SC576

(Filed 7 June 1983)

1. **Courts § 9.4; Rules of Civil Procedure § 56— summary judgment on contract claim—ruling by another judge on tort claim**

   Where one superior court judge ruled on defendant's summary judgment motion only as to plaintiffs' contract claim and specifically declined to rule on plaintiffs' tort claim, it was proper for a second superior court judge thereafter to rule on defendant's motion for summary judgment as to the tort claim. G.S. 1A-1, Rule 56(c).

2. **Negligence § 2— breach of duty arising from contract—no action in tort**

   An alleged breach of duty by defendant city to keep plaintiff contractor's work site free of flooding during plaintiff's performance of a contract to provide grading work for a city reservoir arose under the contract and did not give rise to an action in tort.

APPEAL by plaintiff from *Brown, Judge.* Summary judgment entered 4 March 1982 in WILSON County Superior Court. Heard in the Court of Appeals 19 April 1983.

This action was commenced 23 September 1977 when plaintiff Asheville Contracting (hereinafter Asheville) filed a complaint seeking to recover from defendant City of Wilson damages incurred during plaintiff's performance of work under a contract with the City to grade city land in connection with the City's Buckhorn Reservoir project on Contentnea Creek. In November of 1977 defendant Wilson answered asserting, *inter alia,* that plaintiff Asheville's complaint failed to state a claim for relief. Defendant Wilson then filed a third party complaint against L. E. Wooten and Company, Wilson's consulting engineer, alleging that if anyone is liable to plaintiff Asheville, it is Wooten. On 8 August 1979, an amended complaint was filed, adding as a party plaintiff Taylor Contracting Company (Taylor). Plaintiffs maintain that their amended complaint states claims in tort as well as in contract. Wilson filed an answer to the amended complaint and an amended third party complaint against Wooten.

After extensive discovery and preparation of evidentiary materials, on 25 November 1981 Wilson moved for summary judg-

ment as to its liability to plaintiffs. On 14 December 1981, Wilson's motion was heard by Judge Reid. Finding that there was no genuine issue of material fact "with respect to the claim for relief asserted by Taylor Contracting Company for breach of contract by the City of Wilson," Judge Reid granted summary judgment for Wilson against Taylor on Taylor's contract claim. Judge Reid further found no just reason for delaying entry of final judgment on that claim pending disposition of other claims for relief included in the action. In his judgment, Judge Reid further stated that "if the complaint . . . states any claim for relief arising in tort such claim is not dismissed by this judgment." Judge Reid denied Wilson's motion for summary judgment against Asheville. No appeal from or exception to this judgment was taken.

On 10 February 1982, defendant Wilson moved for a dismissal, pursuant to Rule 12(b)(6), and for summary judgment, pursuant to Rule 56, as to plaintiffs' claims in negligence or tort. In support of its motions, defendant submitted, *inter alia*, answers to interrogatories, depositions and affidavits. On 4 March 1982, Judge Brown heard defendant's motions and, after considering "the record" found that the complaint "fails to state a claim upon which relief can be granted for negligence of the City of Wilson and there is no genuine issue as to any material fact . . . with respect to any claim for negligence on the part of the City." Judge Brown then entered judgment in favor of the City, dismissing plaintiffs' tort claims with prejudice, finding "no just reason for delay." Plaintiff excepted to Judge Brown's judgment and appealed.

Lee, Reece & Oettinger and Adams, Hendon, Carson & Crow, P.A., by George Ward Hendon, for plaintiff-appellants.

Rose, Jones, Rand & Orcutt, P.A., by Z. Hardy Rose and L. P. Fleming, Jr., for defendant-appellee.

WELLS, Judge.

The question before us central to the disposition of this appeal is whether either plaintiff is entitled to go to trial on their claims in negligence against defendant Wilson. Before reaching that question we must dispose of two preliminary procedural questions.

[1] First we must decide whether Judge Brown could properly consider defendant's motion, Judge Reid having already ruled on a prior motion by defendant for summary judgment. In *Biddix v. Construction Corp.*, 32 N.C. App. 120, 230 S.E. 2d 796 (1977), relying on the ordinary rule that one superior court judge may not overrule the judgment of another superior court judge in the same action, this Court held that it was error for the trial judge to grant summary judgment for the defendants where in doing so he reversed another judge's previous denial of the defendants' motion for summary judgment. In the present case, Judge Reid made clear that he was not considering the question of whether the materials before him showed that plaintiffs had a claim in tort. During oral argument of this case it became clear that neither defendant nor the trial judge had actually anticipated that plaintiffs would rely on a tort theory in support of their claim and that plaintiffs never revealed that they intended to rely on a tort theory until defendant's motion came on for hearing before Judge Reid. Under these circumstances, it was not error for Judge Reid to decline to rule on defendant's motion with respect to plaintiffs' tort claim. Defendant Wilson notified plaintiffs that it was making a second motion and plaintiffs presumably were at the hearing before Judge Brown. The record does not show that plaintiffs raised any objection to Judge Brown's hearing of the second motion until after summary judgment as to their tort claims was entered. When Judge Brown heard defendant's second motion for summary judgment, he dealt only with the matter Judge Reid had specifically declined to rule on and, thus, he in no way changed the effect of Judge Reid's ruling. While it may have been the better practice for defendant to request that Judge Reid defer his judgment on plaintiffs' contract claim until such time as he was prepared to rule also on their tort claim, since his ruling on defendant's motion effectively disposed of only part of the questions raised, defendant was entitled to have the remaining question decided and Judge Brown did not err in hearing defendant's second motion for summary judgment.

Second, we note that while defendant's second motion was designated as both a Rule 12(b)(6) motion and a Rule 56(b) motion, Judge Brown considered "the record" in the action in addition to plaintiffs' amended complaint and he found that there existed no genuine issue as to any material fact. As the record before Judge Brown contained evidentiary materials going beyond the plead-

ings, the judgment before us must be treated as a grant of defendant's motion for summary judgment and not as a dismissal pursuant to Rule 12(b)(6). G.S. 1A-1, Rule 12(b); *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E. 2d 399 (1980), *cert. denied*, --- N.C. ---, 276 S.E. 2d 283 (1981).

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of 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."

> The purpose of the rule is to eliminate formal trials where only questions of law are involved. The procedure under the rule is designed to allow a preview or forecast of the proof of the parties in order to determine whether a jury trial is necessary. Put another way, the rule allows the trial court "to pierce the pleadings" to determine whether any genuine factual controversy exists. . . .
>
> 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. . . . 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. . . . The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial.

Lowe v. Bradford, 305 N.C. 366, 289 S.E. 2d 363 (1982) (cites omitted).

The essential allegations in plaintiffs' amended complaint are as follows:

> . . .
>
> 3. On or about November 1, 1974 plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., and defendant entered into a contract under the terms and conditions of which said plaintiff agreed to perform the clearing and grubbing portion of

the construction of Buckhorn Reservoir in Wilson County, North Carolina; and defendant agreed to pay said plaintiff for the work the sum of $248,000.00, which contract price was subsequently revised by defendant to $279,137.00 on account of extra work performed by said plaintiff.

4. On or about November 1, 1974 the defendant, City of Wilson, contracted with Blythe Brothers Company for the construction of a dam across Contentnea Creek and for the grubbing and clearing of the area adjacent to the construction site of the dam. Both the dam and the site that Blythe Brothers Company contracted to grub and clear were downstream of Contentnea Creek from the area that plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., had contracted with the defendant to grub and clear.

4A. That at the time of the matters and things hereinafter complained of and at the time the defendant, THE CITY OF WILSON, entered into the aforesaid contract with the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., it was agreed between the plaintiffs that Taylor Contracting Company would perform the contract between the ASHEVILLE CONTRACTING COMPANY, INC., and THE CITY OF WILSON, NORTH CAROLINA, and that Taylor Contracting Company would be entitled to all the rights and benefits under the said contract the same as if it were the named contracting party, or as a sub-contractor of ASHEVILLE CONTRACTING COMPANY INC., with full assignment of ASHEVILLE CONTRACTING COMPANY, INC.'s rights under said contract.

This arrangement was fully understood by all the parties including the defendant, THE CITY OF WILSON, and defendant's agent and representative, L. E. WOOTEN AND COMPANY.

5. At the time of the matters and things hereinafter complained of L. E. WOOTEN AND COMPANY, a North Carolina corporation, performed the engineering services for the defendant for the construction of the Buckhorn Reservoir and at all times referred to herein, the said L. E. WOOTEN AND COMPANY was the agent and representative of the defendant in the performing of its engineering services for the construction of the Buckhorn Reservoir.

6. At the time the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., and the defendant entered into the contract for the plaintiffs to grub and clear the area referred to herein, it was in the contemplation of all parties that the waters of Contentnea Creek would continue to flow and the water flow of the creek would not be obstructed so as to raise the water table or flood the area that the plaintiffs had contracted to grub and clear until after the plaintiffs had completed their work under the contract.

Further, the defendant promised either expressly, constructively, or impliedly in its contract with the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., that it would not do any act either directly or indirectly which would cause the plaintiffs' work under the contract to be more difficult, time-consuming or costly without compensating the plaintiffs therefor in accordance with the contract.

The defendant owed the plaintiffs the duty to keep the stream of Contentnea Creek open and free and not to obstruct the flow of the waters of the creek in a manner that would elevate the water table or flood the plaintiffs' work area.

7. Soon after the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., had entered into the contract with the defendant, the plaintiffs undertook to perform the contract and plaintiffs have completed the contract except such portions thereof as they have been precluded from completing by the wrongful acts of the defendant as hereinafter set forth.

The defendant has not paid the plaintiffs the sum agreed to be paid for their work under the contract; and the defendant notified the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., on June 29, 1977 that it was refusing payment to the plaintiffs for the balance of the contract as revised.

8. In the early stages of the plaintiffs' work in the performance of their contract with the defendant, the defendant caused, authorized, or allowed Contentnea Creek to be dammed up and the natural flow thereof obstructed and the stream of the creek diverted into an artificial or diversion channel.

The diversion channel through which the stream of Contentnea Creek was diverted was adjacent to the dam site and downstream from the plaintiffs' construction area. The said artificial or diversion channel was constructed in such a manner as to obstruct the flow of the waters of Contentnea Creek, raise the water table, and at times flood the plaintiffs' construction area.

The said diversion channel in the manner it was authorized, permitted, and constructed obstructed the flow of the waters of Contentnea Creek, precluded the drainage of the plaintiffs' construction area, raised the water table in the plaintiffs' construction area, and at times caused extensive flooding in the plaintiffs' construction area, all in violation of the rights of the plaintiffs and in breach of the duties that the defendant owed to the plaintiffs under the circumstances of the parties and the contract between them.

9. The aforesaid diversion channel that the defendant caused, authorized or allowed to be constructed to carry the flow of the waters of the stream of Contentnea Creek was either inadequately designed or improperly constructed. The manner in which it was designed and constructed caused the waters of Contentnea Creek to be impeded and backed up to the great damage of the plaintiffs in the carrying on of their work in the plaintiffs' construction area.

The said diversion channel was of insufficient width and depth and was constructed with excessive angularity so that it was not adequate to carry the flow of the waters of Contentnea Creek without causing the water flow to be impeded, backed up and to accumulate in the plaintiffs' construction work area where plaintiffs were attempting to perform their work under their contract with the defendant.

10. The elevation of the water table in the plaintiffs' construction area and the partial flooding of the same after the construction of the aforesaid diversion channel persisted in varying degrees throughout the remainder of the plaintiffs' work under their contract with the defendant. These conditions made the plaintiffs' performance of their contract with the defendant more difficult, time-consuming and costly.

The raising of the water table in the plaintiffs' construction area by the defendant by the manner it authorized, permitted, and allowed the said diversion channel to be constructed was a breach of duties owed the plaintiffs by the defendant and was a constructive change in the contract between the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., and the defendant.

11. That as a direct and proximate result of the defendant's breach of duty owed to the plaintiffs and the defendant's constructive change of its contract with the plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., the plaintiffs sustained direct increases in the cost to complete their contract in the amount of SEVEN HUNDRED FOUR THOUSAND, ONE HUNDRED, FOURTEEN AND NO/100 DOLLARS ($704,114.00).

12. The defendant has refused to pay the plaintiffs the remaining sums owed them under the contract as revised and after notice has denied plaintiffs' claim for damages that is the subject of this action.

On July 1, 1977 plaintiff, ASHEVILLE CONTRACTING COMPANY, INC., made formal demand on the defendant, THE CITY OF WILSON, for payment of the claim sued on in this action and the defendant has denied the same and refused to pay the plaintiffs' claim.

13. That at a direct and proximate cause of the defendant's breach of its duties to the plaintiffs, the plaintiffs have been damaged in the sum of SEVEN HUNDRED TWENTY THOUSAND, NINE AND 68/100 DOLLARS ($720,009.68).

Wilson's forecast of the evidence showed, in part, the following. On 1 November 1974, plaintiff Asheville Contracting and defendant City entered into a written agreement that provided, in pertinent part, as follows.

This agreement, made this the 1st day of November 1974, between The City of Wilson . . ., "Owner," and Asheville Contracting Company, Inc. . . ., "Contractor,".

WITNESSETH: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the Owner, the Contractor hereby agrees with the Owner to commence and complete:

Buckhorn Reservoir—Clearing and Grubbing hereinafter called the project, for the sum of Two Hundred & Forty-Eight Thousand Dollars (248,000.00) and all extra work in connection therewith, under the terms as stated in the General and Special Conditions of the Contract; and at its own proper cost and expense to furnish all the materials, supplies, machinery, equipment, tools, superintendents, labor, insurance, and other accessories and services necessary to complete the said project in accordance with the conditions and prices stated in the Proposal, the General Conditions and Special Conditions of the Contract, the plans, which include all maps, plats, blue prints, and other drawings and printed or written explanatory matter thereof, the specifications and contract documents therefor as prepared by L. E. Wooten and Company, herein entitled the Engineer, and as enumerated in the Special Conditions, all of which are made a part hereof and collectively evidence and constitute the contract.

The Contractor hereby agrees to commence work under this contract on or before a date to be specified in a written "Notice to Proceed" of the Owner and to fully complete the project within 450 consecutive calendar days thereafter. The Contractor further agrees to pay, as liquidated damages, the sum of $100.00 for each consecutive calendar day thereafter as hereinafter provided in Paragraph titled "Time of Completion" of the General Conditions.

The Owner agrees to pay the Contractor in current funds for the performance of the contract, subject to additions and deductions, as provided in the General Conditions of the Contract, and to make payments on account thereof as provided in Paragraph titled "Payments to Contractor," of the general conditions.

The General Conditions of the contract contained the following.

Section 2.2 *Definitions.*

. . .

(b) "Subcontractor": A person, firm or corporation supplying labor and materials or only labor for work at the site of the project for, and under separate contract or agreement with, the Contractor.

. . .

Section 2.12 *Weather Conditions.*

In the event of temporary suspension of work, or during inclement weather, or whenever the Engineer shall direct, the Contractor will, and will cause his subcontractors to protect carefully his and their work and materials against damage or injury from the weather. If, in the opinion of the Engineer, any work or materials shall have been damaged or injured by reason of failure on the part of the Contractor or any of his subcontractors so to protect his work, such materials shall be removed and replaced at the expense of the Contractor.

. . .

Section 2.18 *Extras.*

Without invalidating the contract, the Engineer may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly, and the consent of the Surety being first obtained where necessary or desirable. All the work of the kind bid upon shall be paid for at the price stipulated in the proposal, and no claims for any extra work or materials shall be allowed unless the work is ordered in writing by the Engineer, acting officially for the Owner, and the price is stated in such order.

Section 2.19 *Time for Completion and Liquidated Damages.*

. . .

(b) The Contractor agrees that said work shall be prosecuted regularly, diligently, and uninterruptedly at such rate of progress as will insure full completion thereof within the time specified. It is expressly understood and agreed, by and between the Contractor and the Owner, that the time for the completion of the work described herein is a reasonable time for the completion of the same, taking into consideration the average climatic range and usual industrial conditions prevailing in this locality.

. . .

(e) It is further agreed that time is of the essence of each and every portion of this contract and of the specifications

wherein a definite and certain length of time is fixed for the performance of any act whatsoever; and where under the contract an additional time is allowed for the completion of any work, the new time limit fixed by such extension shall be of the essence of this contract. Provided, that the Contractor shall not be charged with liquidated damages or any excess cost when the delay in completion of the work is due:

. . .

(2) To unforeseeable cause beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Owner, acts of another Contractor in the performance of a contract with the Owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.

. . .

Provided, further, that the Contractor shall, within ten (10) days from the beginning of such delay, unless the Owner shall grant a further period of time prior to the date of final settlement of the contract, notify the Owner, in writing, of the causes of the delay, who shall ascertain the facts and extent of the delay and notify the Contractor within a reasonable time of its decision in the matter.

. . .

Section 2.22 *Claims for Extra Costs.*

No claim for extra work or cost shall be allowed unless the same was done in pursuance of a written order of the Engineer approved by the Owner, as aforesaid, and the claim presented with the first estimate after the changed or extra work is done. . . .

. . .

Section 2.31 *Assignments.*

The Contractor shall not assign the whole or any part of this contract or any moneys due or to become due hereunder without written consent of the Owner. . . .

. . .

Section 2.34 *Subcontracting.*

. . .

(b) The Contractor shall not award any work to any subcontractor without prior written approval of the Owner, which approval will not be given until the Contractor submits to the Owner a written statement concerning the proposed award to the subcontractor, which statement shall contain such information as the Owner may require.

(c) The Contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractors, and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

(d) The Contractor shall cause appropriate provisions to be inserted in all subcontracts relative to the work to bind subcontractors to the Contractor by the terms of the General Conditions and other contract documents insofar as applicable to the work of subcontractors and to give the Contractor the same power as regards terminating any subcontract that the Owner may exercise over the Contractor under any provision of the contract documents.

(e) Nothing contained in this contract shall create any contractual relation between any subcontractor and the Owner.

Wilson offered the affidavit of J. M. Wells, Jr., a custodian of records for the North Carolina Licensing Board for General Contractors. Mr. Wells stated that Taylor was not licensed as a general contractor in North Carolina during the time period pertinent to this case except for between 22 May 1975 and 31 December 1975.

Defendant's finance officer Charles W. Pittman's affidavit showed that while Wilson had notice that Taylor had possibly furnished personnel on the project, that Wilson made all the payments for work performed to Asheville; that Wilson had not been notified that any part of the work had been subcontracted to Taylor; and that William B. Taylor, the president of Taylor and a vice-president of Asheville, had corresponded with the City with

regard to the project in his capacity as vice-president for Asheville. Attached to Pittman's affidavit was an invoice from Asheville to Wilson dated 29 September 1975, as follows:

PROGRESS ESTIMATE NO. FIFTEEN, BUCKHORN DAM AND RESERVOIR CLEARING AND GRUBBING, FOR PERIOD ENDING SEPTEMBER 20, 1976, WILSON, N.C.

Total Contract Price	$248,000.00
Extra Clearing & Grubbing Work, 807 – 710 = 97 Acres @ 321.00 =	31,137.00
Total Revised Contract Price	$279,137.00
Total Amount Due Based On Project Being 99.5% Complete = 99.5% × $279,137.00 =	277,741.32
Less Previous Payments	245,640.56
Amount Not Paid	$ 32,100.76

Defendant also presented the affidavit of Marl Ray, an employee of L. E. Wooten, the City's consulting engineer. Ray stated that the City gave Asheville notice to begin work on 30 December 1974, that work was actually commenced on or about that date, that all correspondence concerning the project was with Asheville, and that the performance bond and payment bond on the project was in the name of Asheville.

Plaintiffs offered the affidavit of William B. Taylor, president of Taylor, and a vice-president for Asheville. Taylor stated that in bidding on the project, he submitted two bids: one in the name of Taylor for $247,500.00 and one in the name of Asheville for $248,000.00. This was done because Mr. Ray of L. E. Wooten and Company had informed Mr. Taylor that Taylor's bid may not be accepted because Taylor was not licensed in North Carolina as a general contractor. The bid of Asheville was accepted and Asheville and the City entered into the contract. Mr. Taylor's affidavit further tended to show that L. E. Wooten and Company and the City were aware that Taylor was performing the work. According to Mr. Taylor, there was an "understanding or agreement" between Taylor and Asheville that Taylor would do all the work and make all profits or sustain all losses in connection with the

job. Asheville's only function was to receive payments from the City and turn them over to Taylor.

Defendant deposed Taylor and the deposition was before Judge Brown. Taylor testified that the work was done by Taylor Contracting in the name of Asheville Contracting. Taylor further testified that Taylor had no subcontract with Asheville, but that Taylor performed the work as if the job was Taylor's, and that all payments eventually went to Taylor.

Asheville's Claim.

[2] Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort. Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties. *See* 86 C.J.S. Torts, Secs. 1-3; *see also Pinnex v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893 (1955).

The allegations in plaintiffs' complaint and the materials before the trial court clearly show that Asheville's claim is for Wilson's failure to keep the work site free of flooding and for Asheville's damages caused by such failure. While we may assume, but need not decide in this case, that Wilson had an implied duty to Asheville to keep the job site open and available to Asheville, such a duty arose under the contract, not by operation of law independent of the contract, and the asserted breach of such duty by Wilson does not give rise to an action in tort. *Compare Ports Authority v. Roofing Co.,* 294 N.C. 73, 240 S.E. 2d 345 (1978).

Taylor's Claim.

The materials before the trial court clearly show that Taylor's rights, if any, against Wilson are limited to the same degree as Asheville's. At most, the arrangement between Asheville and Taylor was an attempt to substitute Taylor for Asheville's duties and obligations under the contract, and Taylor had no rights as to Wilson independent of the contract. Wilson's duties, if any, to Taylor were limited to those contemplated under the contract.

Plaintiffs' own forecast of evidence shows that plaintiffs' asserted claims in tort against defendant City of Wilson are unfounded and cannot be supported. *Lowe v. Bradford, supra,* and therefore, summary judgment entered by Judge Brown as to plaintiffs' tort claims must be affirmed.

Affirmed.

Judges BECTON and EAGLES concur.

IN THE MATTER OF: D. MONTGOMERY, A MINOR FEMALE CHILD; S. MAXWELL, A MINOR FEMALE CHILD; A. MAXWELL, A MINOR FEMALE CHILD; AND D. MAXWELL, A MINOR MALE CHILD

No. 8211DC596

(Filed 7 June 1983)

1. Parent and Child § 1— termination of parental rights—not supported by evidence

In a proceeding to terminate parental rights, the trial court erred in terminating parental rights due to neglect where the evidence tended to show that the parents kept most of the scheduled visits with their children after they were placed in foster care; that any failures were due to legitimate transportation problems and were usually accompanied by a long-distance telephone call to inform the Department of Social Services of their problem; that the parents have made efforts to use their meager financial resources, with guidance of the Department of Social Services, to improve their physical environment, despite the lack of any showing that it was inadequate or detrimental; that the children are healthy and emotionally well-adjusted, evidence of the parents' ability to provide them with adequate physical, emotional and psychological nurturing; and that the family unit, though not legitimate, was held together in the face of abject poverty by bonds of love and affection that can neither be created nor buttressed by wealth or the legal act of marriage. There are two aspects of the parent-child relationship that are important in any proceeding to terminate: (1) the economic aspect of providing for the physical needs of the child, and (2) the intangible aspect of providing for the emotional and psychological needs of a child. The above evidence fell short of satisfying the "clear, cogent, and convincing evidence" standard of proof required by *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982) and G.S. 7A-289.30(e), in that it failed to show that the physical and economic needs of the children were not adequately met and it failed to show that the intangible non-economic needs of the children were not met.

2. Parent and Child § 1— termination of parental rights—finding that father failed to pay reasonable portion of cost of support of children and had ability to do so—not supported by evidence

The trial judge erred in finding that respondent failed to pay a reasonable portion of the amount of child care and that he had the ability to pay that amount where the judge's conclusion was supported by simple findings of fact which disclosed: (1) the amount that was to be paid, (2) the amount of the respondent-appellant's earnings and the fact that he was employed, and (3) that the payments were not made. Such findings did not establish what the needs of the children were.

APPEAL by respondents from *Greene (Edward), Judge.* Judgment entered 8 January 1982 in District Court, HARNETT County. Heard in the Court of Appeals 20 April 1983.

These four actions involve a petition for termination of parental rights of respondent-appellants in their four minor children pursuant to Article 24B, Chapter 7A, North Carolina General Statutes. From an order granting the petition to terminate parental rights in each case, guardian ad litem appealed.

Edward H. McCormick, for petitioner-appellee.

O. Henry Willis, Jr., for respondent-appellants.

HILL, Judge.

These petitions to terminate parental rights were brought by the Harnett County Department of Social Services. Guardians ad litem were appointed for each of the minor children and the parents. At the hearing on termination, the judge, from the admissions in the pleadings and the evidence, made findings of fact which he states are based on clear, cogent, and convincing evidence.

Evidence at the hearing in this matter tended to show the following:

Geraldine Montgomery is the mother of the children and David Maxwell is the father. The parents are not married. Each child is in the custody of the Harnett County Department of Social Services. At the time of the termination hearing, the children were 10, 9, 7 and 5 years old.

The children lived with the parents until they were removed by the Harnett County Department of Social Services in Septem-

ber 1980. During the period between 12 October 1979 and 14 August 1980, the family lived in a three room house with a bathroom and running water, but very little furniture. There was one bed in the house and a mattress on the floor. The parents separated in August 1980, but have since resumed living together in the family home.

The father, at the time of the hearing, had been employed as a welder and general handyman on a farm, and earned about $120.00 per week. The mother kept house but had been ill and was suffering from mental problems which caused her to see things and to become upset when she failed to take her medicine. She has had a hysterectomy, but felt as if she was pregnant. Both parents are moderately retarded.

The children are physically healthy and emotionally well-adjusted. The children were fed and clothed by the parents, who also attended to their medical needs. The family home was clean, the mattress on which the children slept was supplied with sheets, blankets and pillows.

Those children of school age had poor school attendance records during the 1979-80 school year and earned unsatisfactory grades. After being placed in the custody of the Department of Social Services their attendance and performance in school showed improvement.

On 5 December 1980, the court adjudged the children neglected and placed them in the custody of the Harnett County Department of Social Services. The neglect case was reviewed on 6 March 1981 and again on 16 October 1981. The parents had not responded to requests by the Department of Social Services to improve the family living quarters. The father, under order of the court to pay $30.00 per week for the support of his children, had paid only $90.00 from 6 March 1981 to 8 January 1982, or three of 45 payments. He lost a considerable amount of money on a failed attempt at hog farming.

While the children were in foster care, the parents attempted to attend every scheduled visit at the Department of Social Services. Failure to attend scheduled visits was due to lack of transportation.

At the time of the termination hearing, some progress had been made. The mother was accepting the help of the Department of Social Services to improve her homemaking skills and was attending counseling sessions for her mental problems. Additional beds had been provided for the children.

Respondent-appellants' several assignments of error ask us to consider, first, whether the findings of fact made by the trial judge are supported by "clear, cogent, and convincing evidence" and, second, whether those findings of fact support the conclusions of law on which the trial judge's order terminating respondent-appellants' parental rights in their children is based.

G.S. 7A-289.32 provides that, upon a finding of one or more of the grounds listed therein, the court shall terminate parental rights. The trial court in this case based its order on the following statutory grounds:

(1) that the children were neglected within the meaning of 7A-278(4) (now 7A-517(21)). G.S. 7A-289.32(2).

(2) that the children were in the custody of a county department of social services for the six months preceding the filing of the petition and the parents have refused to pay a reasonable portion of the child care expenses. G.S. 7A-289.32(4).

In the case before us, G.S. 7A-289.32(2) was the sole basis for the trial court's order terminating the parental rights of the mother and G.S. 7A-289.32(2) and (4) were the basis for the termination of the father's parental rights.

The conclusion of neglect with respect to both parents is based on findings which are summarized as follows: (1) poor school attendance and poor scholastic performance; (2) inadequate and crowded living conditions and failure of the parents to improve them; (3) moderate retardation of both parents contributing to an inability to properly care and provide for the children, including sending them to school.

With respect to the mother, the court's findings of fact are summarized as follows:

(1) she believes that someone or something is trying to get inside her; (2) she believes she has been pregnant for 14 months,

despite the fact that she has had a hysterectomy; (3) she gets nervous and angry at her children when she forgets to take her prescribed medicine.

With respect to the father, the court found the following (summarized): that he made only three of 45 scheduled payments to the Department of Social Services at the time the petition was filed, despite the fact that he has been gainfully employed during the time.

I. a.

In our consideration of this case, we take note of the due process evolution that has taken place in the area of parental rights. This evolution began with the case of *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). *Stanley* concerned the rights of a father in his illegitimate children by a mother who had since died. The Court's consideration of these rights involved an extensive exploration of the interest of parents in their children generally. The *Stanley* Court found that interest to be far more important and substantial than " 'liberties which derive merely from shifting economic arrangements.' " *Id.* at 651, 92 S.Ct. 1208, 31 L.Ed. 2d 551, *quoting Kovacs v. Cooper*, 336 U.S. 77 at 95, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring). The right to conceive and raise one's children was found to be essential and, as such, to warrant deference and protection under the due process clause of the Constitution. *Id.* A later Supreme Court case, *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed. 2d 323 (1979), considered the function of the evidentiary standard of proof in relation to due process. The Court there found that due process required the "clear and convincing" standard of proof when the interest was, as with parental rights, particularly important and more substantial than an economic interest. *Id.* at 424, 99 S.Ct. 1804, 60 L.Ed. 2d 323.

b.

Professor Lee notes that the North Carolina statutes on parental rights termination, which govern the action before us, were rewritten to satisfy the constitutional requirements of *Stanley*. Lee, N.C. Family Law § 292 (1981). In 1979, the North Carolina Legislature amended G.S. 7A-289.30(e) to require, consistent with *Stanley* and *Addington*, that "[a]ll findings of fact be

based on clear, cogent and convincing evidence." G.S. 7A-289.30(e) (Cum. Supp. 1979). The foresight of the State Legislature was borne out when, in *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982), the United States Supreme Court found the "clear and convincing evidence" standard of proof to be required in proceedings to terminate parental rights.

c.

North Carolina courts have had reference to *Santosky* in at least two cases reviewed for the sufficiency of evidence under the "clear, cogent, and convincing" standard of proof. *In re Moore,* 306 N.C. 394, 293 S.E. 2d 127 (Carlton, J., dissenting), *reh. denied,* 306 N.C. 565, --- S.E. 2d --- (1982), *appeal dismissed sub nom. Moore v. Dept. of Social Services,* 103 S.Ct. 776, 74 L.Ed. 2d 897, --- U.S. --- (1983); *In re Allen,* 58 N.C. App. 322, 293 S.E. 2d 607 (1982). In those cases, the courts affirmed the finding of neglect with little comment on the due process implications of *Santosky. But see In re Moore, supra* (Carlton, J., dissenting). The matter now before us provides the first opportunity we have had to give full consideration to the *Santosky* decision and its implications for our trial courts.

II. a.

The United States Supreme Court cases, discussed *supra,* limit their consideration to matters of procedural due process. However, the procedural protection and deference accorded by *Santosky* to parental rights in children belie their substantive importance and compel us to emphasize and clarify that importance in the present context. *Santosky* did not attempt to state specifically what must be shown and what quantum of proof must exist to justify a termination of parental rights. Nevertheless, the Court appeared to endorse an approach that would take into account more than physical or economic factors; an approach that would reflect some consideration by the trial judge of all the circumstances of the parent-child relationship in each individual case. The Court noted that termination proceedings "often required the fact finder to . . . decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress." *Id.* at 769, 102 S.Ct. 1388, 81 L.Ed. 2d 599. *Santosky* implicitly demands serious consideration

of the unquantifiable attributes of the parent-child relationship that warrant its protected status under the Due Process clause.

This begs the question of what those unquantifiable attributes are and how their existence is to be shown or disproved to the level of certainty required by *Santosky.* North Carolina defines a neglected child as:

> A juvenile who does not receive proper care, supervision, or discipline from his parent . . .; or who has been abandoned; or who is not provided necessary medical care or other remedial care as recognized under State Law, or who lives in an environment injurious to his welfare . . . .

G.S. 7A-516(21). This definition comports with the majority view. *See* C.J.S., Infants § 37. The terminology of the statute is sufficiently broad to allow interpretation by the courts and the engrafting of some requirement that due consideration be given to non-economic or non-physical indicia. Courts in other jurisdictions have interpreted similar definitions of neglect to include denial of affection, guidance, and parental consideration. *See id.* North Carolina courts, however, have had little experience with the statutory definition of neglect and consequently have not broadened it in that direction. *See, e.g., In re McMillan,* 30 N.C. App. 235, 226 S.E. 2d 693 (1976).

Our courts have had only three opportunities to consider the definition of neglect under the recently elevated standard of proof. *In re Moore,* 306 N.C. 394, 293 S.E. 2d 127, *reh. denied,* 306 N.C. 565, --- S.E. 2d --- (1982); *appeal dismissed sub nom. Moore v. Dept. of Social Services,* 103 S.Ct. 776, 74 L.Ed. 2d 897, --- U.S. --- (1983). *In re Smith,* 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied,* 306 N.C. 385, 294 S.E. 2d 212 (1982); *In re Allen,* 58 N.C. App. 322, 293 S.E. 2d 607 (1982). Of these cases, only *Allen* and *Moore* were apparently cognizant of *Santosky.* Without reciting the facts, it was clear in each case that the conclusion of neglect was supported by evidence tending to show that the parents' action or inaction had resulted in obvious physical or emotional damage to the child, that the parents did not have a sufficient understanding of the needs of the children to care for them adequately, or that the family relationship, where one existed, was unstable at best. *But see In re Moore, supra* (Carlton, J., dissenting).

b.

[1] We do not dispute the importance of such outward manifestations of neglect. The cases cited above are testament to the fact that such evidence can be dispositive and we do not question the holdings in them. Rather, we seek to call attention, consistent with our reading of *Santosky v. Kramer*, to the additional implications that such evidence, or the lack of it, has with respect to the parent-child relationship and proceedings to sever it.

Evidence that tends to indicate that the child's ascertainable physical needs are neglected can also be of such clarity and degree as to permit the inference that the parents' relationship with that child lacks the essential ingredients of love, affection, and parental regard that distinguish the relationship from and raise it above an economic transaction. There are thus two aspects of the parent-child relationship that are important in any proceeding to terminate it: (1) the economic aspect of providing for the physical needs of a child, and (2) the intangible aspect of providing for the emotional and psychological needs of a child. A child may be dependent on his parents as much for the former as for the latter. Commentators have noted that, in addition to being responsible for minimal care, the best interest of the child demands the provision of an environment of love, affection and consideration. Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 958 at 990 (1975).

The parent has a fundamental interest in conceiving and raising his or her children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). This interest is attended by the parent's common law obligation of providing for the welfare of the child during its dependency to the extent that he is able to do so. *See generally*, Lee, N.C. Family Law § 229 (1981) & n.1. This obligation consists not only of meeting the child's economic needs but has more recently also come to include providing for the intangible emotional and psychological needs as well. *Wald, supra* at 990. The interest of the State, as *parens patriae*, is in promoting and preserving the welfare of the child. *Santosky v. Kramer*, 455 U.S. at 766, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982); *see also*, G.S. 7A-289.22 *and Lee, supra* at § 229. Since a large part of a child's welfare involves the meeting of intangible needs,

the scope of the State's interest is not limited to enforcing the parents' obligation for economic support, but logically extends to the non-economic aspects of the parent-child relationship as well. North Carolina courts have recognized this interest, albeit not in the context of parental rights termination proceedings. *See In re Peal*, 305 N.C. 640, 290 S.E. 2d 664 (1982); *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). In this regard, we note that the option of not terminating the parent-child relationship is expressly reserved to the court, even where sufficient legal grounds exist for doing so. G.S. 7A-289.31(b).

It follows from all of this that the child has a powerful interest in receiving the benefits of both aspects of the parent-child relationship. The range of the non-economic benefits to be derived from that relationship can vary on a case by case basis. Cases and commentators, however, emphasize the importance of the family environment for the provision of these intangibles. *See Wald, supra, and* C.J.S., Infants § 37 and cases cited therein. Such benefits include, but are not limited to: religious education, Am. Jur. 2d, Infants § 50, the provision of an environment that allows for the development of emotional maturity as well as the formulation of social and moral values, *Wald, supra*, and love, affection and parental consideration, C.J.S., Infants § 37.

Providing for the non-economic needs of a child as an essential ingredient of the parent-child relationship is more difficult to mandate legally than the provision of economic and physical necessities. Likewise, the neglect of this aspect is more difficult to prove. Its importance, however, is not thereby diminished and it warrants serious consideration by the courts when the question of neglect is before them. In cases like *Moore, Allen,* and *Smith,* cited above, the neglect of the non-economic, intangible needs of the children is evidenced by the degree of economic and physical neglect actually shown. While this is often the case, a finding of physical neglect does not perforce entail the inference that the non-economic aspects of the parent-child relationship are also lacking.

III.

The case now before us invites comparison with *Moore, Allen,* and *Smith.* Even if the evidence tends to show that the

physical and economic needs of the children were not adequately met, and we are not sure that it does, to infer from this evidence alone that the intangible non-economic needs of the children were not met falls short of satisfying the "clear, cogent, and convincing evidence" standard of proof required by *Santosky v. Kramer* and our statute. Not only is the evidence insufficient under the required standard of proof to show neglect to the same degree as in the cases mentioned above, there is ample evidence to support contrary findings. Respondent-appellant Maxwell testified that he built fires in the morning to warm the house for his family and that he borrowed money and walked to the store to put food on the table. He testified that he recognized the value of education for his children and wanted them to attend school. Maxwell did not abuse his children; his discipline consisted of admonitory words with no resort to violence. The poverty of the respondent-appellants is at least partially due to a desire to be self-reliant and not dependent on public assistance. Respondent-appellant Maxwell's failed venture into hog farming, while it indicated a lack of business judgment, was nonetheless rooted in a desire to better provide for his family.

Testimony from respondent-appellant Montgomery, the mother, indicated no inability to properly look to the needs of her children. She knew to call for medical help when her son cut his foot. She cooked for her family, washed the clothes, and dressed the children. Her failure to compel their regular attendance at school, which we do not condone, was at least partially attributable to her illness and not due to any failure to recognize the value of education. Ms. Montgomery has accepted help from the Department of Social Services to improve her skills as a homemaker and has attended counseling sessions for her mental problems, with the hope of having her children returned.

The respondent-appellants kept most of the scheduled visits with their children after they were placed in foster care; any failures were due to legitimate transportation problems and were usually accompanied by a long distance telephone call to inform the Department of Social Services of their problem. The parents have made efforts to use their meager financial resources, with the guidance of the Department of Social Services, to improve their physical environment, despite the lack of any showing that it was inadequate or detrimental. The children are healthy and

emotionally well-adjusted, evidence of the parents' ability to provide them with adequate physical, emotional and psychological nurturing. Lastly, the family unit, though not legitimate, is held together in the face of abject poverty by bonds of love and affection that can neither be created nor buttressed by wealth or the legal act of marriage.

It is this evidence, considered in the light of *Santosky v. Kramer* and aided by the able argument of counsel for respondent-appellants, that persuades us to the result in this case. As *Santosky* teaches, termination of parental rights is an extreme remedy. 455 U.S. at 759, 102 S.Ct. 1388, 71 L.Ed. 2d 599. One commentator has recommended invocation of termination only in those cases where the child has suffered or is likely to suffer serious physical or emotional damage. *Wald, supra* at 1008. The facts on which the trial court's conclusion of neglect was based are supported in part by psychological tests and statistical inferences tending to show that moderately retarded adults, like respondent-appellants here, lack the fundamental capacity to care and provide for others. Such evidence has its value, but that value is significantly reduced in the face of respondent-appellants' evidence tending to show the direct opposite. We cannot say what quantum of proof would be sufficient in all cases to meet the "clear, cogent, and convincing" standard but the evidence here emphatically does not. To say that the facts here were supported by sufficient evidence and, on that basis, to terminate respondent-appellants' parental rights, flies in the face of due process and brooks an intolerable intrusion by the government into the private affairs of citizens whose rights it exists to protect.

Evidence of physical and financial neglect is certainly germane and may be controlling. It must be kept in mind, however, that the State has an interest in promoting and preserving all aspects of the welfare of a particular child. Hence, it is incumbent upon the court to determine whether love, affection, and the other intangible qualities to be found in a family relationship actually exist, along with the findings otherwise required. Where there is no evidence that the child's intangible needs are met, the court should so find. Where there is such evidence, it must be clear from the findings of fact that the court gave the evidence serious consideration. In an order terminating parental rights, it must be clear that the court considered all of the competent

evidence but determined in its discretion that the child's needs were so insufficiently addressed in the family situation that the total welfare of the child would best be served by legal severance of the parent-child relationship. We conclude that the trial court's order in this case, insofar as it is based on a conclusion of neglect, must be vacated.

IV.

[2] Respondent-appellant Maxwell, the father, next challenges the trial judge's conclusion that he has not paid a reasonable portion of the costs of caring for the children and that he had the ability to pay that amount. Petitioner-appellee correctly points out that the real question presented by respondent-appellant's argument is whether the conclusion is supported by the findings. We hold that it is not.

In re Biggers, 50 N.C. App. 332, 274 S.E. 2d 236 (1981), likened the determination of the amount to be paid for the support of children in foster care to one for the proper amount of child support in divorce cases. *Id.* at 341, 274 S.E. 2d at 242. As such, *Biggers*, relying on *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980), held that the "determination 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.' " *In re Biggers, supra*, at 341, 274 S.E. 2d at 242, quoting *Coble v. Coble, supra*, at 712, 268 S.E. 2d at 189. *Coble* held that the trial judge's conclusions as to the amount required for support and the ability to pay it must be based upon "factual findings specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions [and] accustomed standard of living' of both the child and the parents." *Coble v. Coble*, 300 N.C. at 712, 268 S.E. 2d at 189.

Our careful review of the record on appeal reveals that the trial judge's conclusion is supported by a single finding of fact which discloses: (1) the amount that was to be paid, (2) the amount of the respondent-appellant's earnings and the fact that he was employed, and (3) that the payments were not made. This is not sufficient to indicate to us that due regard was taken of the particular items specified in *Coble, supra.* Specifically, the findings do not establish what the needs of the children are. Without this

information, it is impossible to determine what a reasonable portion of the amount needed for their support would be. The trial judge's conclusion that respondent-appellant failed to pay a reasonable portion of the amount of child care and that he had the ability to pay that amount is therefore vacated.

The judgment entered in this case is vacated and the cause remanded for further consideration and disposition in accordance with the guidelines set forth herein.

Vacated and remanded.

Judges JOHNSON and PHILLIPS concur.

NORTH CAROLINA STATE BAR v. WESLEY F. TALMAN, JR.

No. 8210NCSB499

(Filed 7 June 1983)

1. Evidence § 22.1— testimony from former proceeding—admissibility

The Disciplinary Hearing Commission of the North Carolina State Bar did not err in receiving into evidence the testimony of two witnesses given in a Florida lawsuit brought by the personal representative of an estate where the former suit involved much of the same subject matter as that of the disciplinary hearing and where defendant had an opportunity and similar motive to cross-examine the two witnesses at the Florida trial.

2. Evidence § 22.1— copies of final orders from previous proceedings—properly admitted into evidence

The Disciplinary Hearing Commission of the State Bar properly considered final orders from previous proceedings where the Commission admitted the judgments for the limited purpose of showing that the proceedings did occur and for the limited purpose of showing who filed a previous petition, when it was filed, and the grounds listed on the petition.

3. Attorneys at Law § 11— disciplinary hearing—questions by Commission members proper

The members of a Disciplinary Hearing Commission properly questioned defendant since it was within the Commission's discretion to ask questions of the witnesses for the purpose of clarifying matters material to the issues.

4. Attorneys at Law § 12— findings and conclusions of Disciplinary Hearing Commission supported by evidence

The findings and conclusions by the Disciplinary Hearing Commission of the State Bar that defendant had violated certain disciplinary rules by his con-

duct in (1) fraudently obtaining stock certificates and procuring a power of attorney for their transfer, (2) knowingly making a false statement when testifying he had paid estate taxes which had not been paid, (3) counseling his clients in illegal conduct in procuring stock certificates and resisting efforts of a guardian in another state to have them returned, (4) knowingly using his false testimony about having paid estate taxes to acquire set-off in the amount due, (5) failing to maintain records of a former client's property coming into his possession and in failing to render appropriate accounting to her personal representative, and (6) falsely testifying before a Florida court regarding estate taxes and thus perpetrating a fraud upon that court were supported by substantial and competent evidence.

APPEAL by defendant from the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar (hereinafter Commission). Notice of disbarment entered 16 October 1981. Heard in the Court of Appeals 17 March 1983.

The North Carolina State Bar (hereinafter Bar) received a complaint about the actions of defendant, a member of the North Carolina State Bar, related to his representation of two sisters, Elizabeth Campbell Gage and Lottie Jean Campbell Fletcher. As a result, the Bar filed this disciplinary action against defendant.

Following a hearing under G.S. 84-28 *et seq.*, an order was entered disbarring defendant from further practice of law.

Defendant appealed.

A. Root Edmonson for The North Carolina State Bar.

Wesley F. Talman, Jr., pro se.

BRASWELL, Judge.

The issues on appeal raised by defendant's 25 assignments of error involve whether the Commission erred in considering certain evidence, in questioning defendant during the hearing, in making many of the findings of fact and conclusions of law included in the order, and in entering its order of disbarment. We have considered each of the errors assigned and, for the reasons that follow, we affirm the Commission's decision.

Evidence presented by stipulation of the parties and at the disciplinary hearing tended to show the following:

Defendant was admitted to the North Carolina State Bar in 1973 and maintained a law office in Asheville. He was retained

prior to November 1975 by Mrs. Fletcher and Mrs. Gage to handle various legal matters for them. Defendant was advised about problems his two clients were having in caring for their 96-year-old aunt, Mrs. Etta Houston, a resident of Florida. In November 1975, without defendant's knowledge, Mrs. Fletcher commenced a proceeding in Florida to determine the competency of her aunt.

In late November 1975, defendant travelled at the request of Mrs. Fletcher and Mrs. Gage to the St. Petersburg, Florida, home of Mrs. Houston. Defendant knew that Mrs. Houston was very old, was hard of hearing, and had poor eyesight. During this visit, defendant obtained from Mrs. Houston stock certificates she owned, valued at more than $100,000.00, which she had signed on the back. Defendant returned to Asheville with the certificates and deposited them for safekeeping with an Asheville brokerage.

Defendant returned to St. Petersburg in December 1975 at his clients' request, accompanied by his secretary. During this visit in Mrs. Houston's home, she executed to defendant a power of attorney for transfer of the stock certificates, and her signature was acknowledged before defendant's secretary, a notary public in Florida. The stocks later were transferred in equal shares to Mrs. Fletcher and her husband, Carl Fletcher, and to Mrs. Gage and Russell Campbell, brother of Mrs. Gage and Mrs. Fletcher. They transferred the stocks into two Clifford trusts for the benefit of Mrs. Houston, with the stocks to revert back in trust to the donors upon Mrs. Houston's death. By the time of this visit, the defendant considered Mrs. Houston to be his client also by virtue of the preparation and execution of the two trusts created from her property.

At the hearing before the Commission, defendant denied any knowledge of the Florida competency proceedings against Mrs. Houston before January 1976 and was adamant that he had had no indication of "any problem with this lady at all" before that date. Defendant testified that upon learning of the question surrounding Mrs. Houston's mental condition, he urged Mrs. Gage and Mrs. Fletcher to return the stock certificates. He agreed, however, to work for retention of the certificates when his clients agreed to indemnify him.

Mrs. Houston was adjudged incompetent at the Florida competency proceedings in January 1976.

Dr. Whitman H. McConnell, the Florida psychiatrist who diagnosed Mrs. Houston's condition, testified that he examined her in November 1975 and found her suffering from senility due to acute cerebroarteriosclerosis and from terminal rectal cancer. Mrs. Houston showed signs of mental confusion, memory defects, and disorientation as to time and place. The psychiatrist's opinion was that Mrs. Houston was incapable of caring for herself and that she was incompetent to make a judgment for disposition of her property or execution of her power of attorney. Dr. E. I. Biddison, the Florida physician who examined Mrs. Houston in December 1975, testified at one of the Florida trials that he found Mrs. Houston to be incompetent and that her condition had most likely existed for some months prior to his first examination of her on 12 December 1975.

In March 1976 Mrs. Houston was removed from a Florida nursing home by Mrs. Fletcher and brought to Asheville. She died two weeks later, on 17 March 1976.

Following Mrs. Houston's death, a civil lawsuit was instituted in Florida against defendant, both individually and as trustee, and against Mrs. Fletcher and Mrs. Gage by the personal representative of Mrs. Houston's estate, seeking recovery of the stocks. During that trial defendant testified he had prepared an estate tax form in June 1977 and had written a check for $10,638.30 out of his trust account for payment of federal estate taxes of Mrs. Houston's estate. When final judgment was rendered in the Florida lawsuit in October 1977, defendant was given a $10,638.30 credit. The Internal Revenue Service, however, had no record of any estate taxes being paid or of any estate tax forms being received. Defendant was unable to produce any evidence at the hearing before the Commission of having mailed the estate taxes and produced no cancelled check showing payment as claimed.

Mrs. Houston's personal representative instituted a civil action against defendant in Florida in November 1978 seeking recovery of the $10,638.30 credit, after it was learned that the federal estate tax return had not been filed. When interrogatories served on defendant's Florida attorney were never answered, default judgment in the amount of the estate taxes was entered against defendant in October 1979 as a discovery sanction.

Defendant received a Letter of Notice from the Grievance Committee of the Bar on 17 October 1978 regarding complaints about his failure to pay the estate taxes. The letter requested that he answer within 15 days. After defendant received an extension of time to respond, a response was received by the Bar on 9 January 1979. Further information requested by the Bar on 2 February 1979 was provided by defendant by letter of 10 April 1979. A second Letter of Notice was sent to defendant by registered mail in November 1979 concerning defendant's conduct in obtaining the stock certificates and power of attorney from Mrs. Houston and in assisting his clients in fraudulent conduct. A follow-up letter received by defendant on 19 May 1980 requested a response to the second Letter of Notice. However, no written response was ever received by the Bar on the second Letter of Notice, although defendant delivered affidavits from Mrs. Gage and Mrs. Fletcher to the Bar. At the hearing before the Commission, defendant offered as explanation for his tardy responses and his failure to respond that he had been ill and that his law office had relocated.

The Commission made findings of fact and concluded that defendant had violated the following disciplinary rules by his conduct as set out below: DR 1-102(A)(4) by fraudulently obtaining the stock certificates and in procuring a power of attorney for their transfer; DR 7-102(A)(5) by knowingly making a false statement when testifying he had paid estate taxes which had not been paid; DR 7-102(A)(7) by counseling his clients in illegal conduct in procuring the stock certificates and resisting efforts of the guardian in Florida to have them returned; DR 7-102(A)(4) by knowingly using his false testimony about having paid the estate taxes to acquire set-off in the amount due; DR 9-102(B)(3) and (4) by failing to maintain records of Mrs. Houston's property coming into his possession and in failing to render appropriate accounting to her personal representative; DR 7-102(B)(1) by falsely testifying before a Florida court regarding the estate taxes and thus perpetrating a fraud upon that court. The Commission also concluded that defendant violated G.S. 84-28(b)(3) in failing to answer the second Letter of Notice sent to him.

I

Defendant's assignments of error 1 through 6 relate to several evidentiary questions.

[1] Defendant first argues that the Commission erred in receiving into evidence the testimony of Fred Bryson and Margaret Brady from the Florida proceeding against defendant. Defendant's contention is that the Commission failed to show the witnesses were incapacitated or were unavailable to testify at the disciplinary hearing.

The testimony of a witness at a former trial or judicial hearing may be given in evidence at a subsequent trial:

> "(2) If the proceeding at which he testified was a former trial of the same cause, or a preliminary stage of the same trial, or the trial of another cause involving the same issue and subject matter as the one to which his evidence is directed at the present trial. [or]
>
> (3) If the parties at the former trial were the same as those at the present trial, or in privity with them, or if the situation was such that the party against whom the evidence was then offered had the same opportunity and motive to cross-examine the witness as the party against whom it is now offered has at the present trial."

1 Stansbury's N.C. Evidence § 145 (Brandis rev. 1973), quoted in *State Bar v. Frazier*, 269 N.C. 625, 632, 153 S.E. 2d 367, 371-72, *cert. denied*, 389 U.S. 826, 19 L.Ed. 2d 81, 88 S.Ct. 69 (1967).

The lawsuit brought against defendant by the personal representative of Mrs. Houston's estate clearly involved much of the same subject matter as that of the disciplinary hearing. Defendant had an opportunity and similar motive to cross-examine both Judge Bryson and Mrs. Brady at the Florida trial. Thus, we hold that the criteria set out in *State Bar v. Frazier*, *supra*, are met and that the testimony was admissible at the hearing.

Further, the record discloses that Bryson was a judge in St. Petersburg, Florida, and that Mrs. Brady's address was unknown, demonstrating their unavailability for the hearing in North Carolina. Defendant had had notice since at least 17 August 1981 that the Commission intended to submit the testimony of these two witnesses at trial, yet he apparently made no attempt to depose them in Florida. He cannot now complain about admission of their testimony.

[2] Defendant next argues that the Commission improperly admitted into evidence certified copies of the final orders from the incompetency proceedings of Mrs. Houston, from the 1977 Florida trial in which the estate recovered the transferred stocks, and from the 1979 Florida trial in which the estate obtained a judgment against defendant for the estate taxes. Defendant also contends that it was error for the Commission to receive into evidence discovery documents from the 1978 Florida trial.

We find that all of these documents were properly considered by the Commission. Testimony from the incompetency proceeding was excluded by the Commission's pretrial order, and none of the testimony was introduced at the hearing. The Bar introduced the final judgment from the incompetency proceeding for limited purposes of showing who filed the petition, when it was filed, and the grounds listed. The final judgments from the two Florida trials were not introduced as evidence of the facts found in the judgments, although plenary competent evidence was presented by the Bar to support these findings. The Commission clearly stated that the judgments were admitted for the limited purpose of showing that the proceedings did occur. No prejudice resulted from the admission of these judgments. Even if their admission was error, it is presumed that a court—in this case, the Commission—sitting as both judge and jury, did not consider the incompetent evidence. *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966).

We have considered defendant's remaining two assignments of error dealing with evidentiary matters and find them to have no merit.

II

[3] Defendant further contends that the questions of the Commission members to him amounted to a "vigorous cross examination . . . [with] the effect of converting the proceedings into a general inquisition." He maintains that the "rapid fire" manner in which these questions were directed to him denied him the right to a fair and impartial hearing.

The Commission sat as both judge and jury in this proceeding, much as a trial judge in Superior Court hears nonjury trials. It was within the Commission's discretion to ask questions

of the witnesses for the purpose of clarifying matters material to the issues. *Andrews v. Andrews*, 243 N.C. 779, 92 S.E. 2d 180 (1956). It is the trial judge's privilege as well as his duty to ask questions of witnesses when necessary for the purpose of clarification and to ascertain the truth. *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). Under the circumstances of this case, we find no prejudicial error in the Commission's questioning of defendant.

III

Defendant contends in his next six arguments that the Commission erred in making the following findings of fact:

> "3. Mrs. Houston, during the Defendant's visits with her during November and December of 1975, was suffering from carcinoma of the rectum and had reached a progressive state of senility and was not capable of lucid intervals.
>
> 4. From November 24, 1975 until her death in March, 1976, the Defendant considered himself to be Mrs. Houston's attorney as well as attorney for her nieces, Mrs. Gage and Mrs. Fletcher. At the time the Defendant took the shares of stock from Mrs. Houston to Asheville, North Carolina, Defendant made no attempt to inquire as to the relative portion of Mrs. Houston's estate represented by the stock. The Defendant made no attempt to determine whether or not Mrs. Houston had a current will in effect at that time or the persons to whom property would be distributed under Mrs. Houston's will. The Defendant was aware of controversy in Mrs. Houston's family between his clients, Mrs. Houston's nieces, and Mrs. Houston's stepdaughter. The Defendant did not contact the attorney that represented Mrs. Houston prior to November of 1975.
>
> . . . .
>
> 7. The Defendant testified both before this Committee and in the trial in Pinnellas County, Florida that his first knowledge of the competency proceeding involving Mrs. Houston was in January of 1976 when he received a telephone call from a representative of a bank which had been appointed as Mrs. Houston's guardian. Before this Committee the Defendant vigorously denied having made the telephone

call which is described in the testimony of Margaret E. Brady, Plaintiff's Exhibit E-4. The Defendant was a party to the action in which the testimony was given and was represented by counsel, such testimony was admitted without objection or cross-examination of the witness, and the subject matter of the action obviously involved the pending matters before this Committee. Notwithstanding the Defendant's vigorous denial before this Committee that he made the telephone call to Margaret E. Brady, the Defendant admitted that he actually became aware of the incompetency proceedings against Mrs. Houston during late January of 1976 and, at that time, advised his clients, Mrs. Gage and Mrs. Fletcher, that the stock certificates should be returned to Florida to the guardian. The Defendant further testified in Florida that had he known of the competency proceedings in November of 1975, he would never have been at the subsequent trial in Florida, his explanation being 'Well, there would have been much more done, more investigation done, or I wouldn't have become involved if I had any question in my mind that there was any problem with this lady at all.' We find the evidence to be clear, cogent and convincing—indeed overwhelming—proof that the defendant was aware that there were 'problems with this lady.' Defendant then stated before the Committee that upon receiving indemnity from Mrs. Gage and Mrs. Fletcher he agreed to resist efforts to have the stocks delivered to the Florida guardian.

8. We find the evidence to be clear, cogent and convincing proof of the fact that the Defendant knew or should have known of Mrs. Houston's mental condition at the time he obtained the transfer of the stock certificates from her in November and December of 1975 to the benefit of her nieces and thereafter persisted in a course of conduct in perfecting the transfer of said stocks for the beneficial use of his clients, Mrs. Gage and Mrs. Fletcher. In this regard we note that the Defendant testified that the transfer of stocks had not been completed in accordance with the oral instructions given to him by Mrs. Houston in November, 1975 even at the time of Mrs. Houston's death in March of 1976. We find the defendant to be impaled upon the horns of his own testimony in that he stated had he known there was any problem with this

lady he would not have become involved. He was obviously aware of a problem in November of 1975 and made no investigation. When confronted with the claim of the guardian for delivery of the stock he resisted the return upon receiving indemnity from Mrs. Gage and Mrs. Fletcher—in spite of an acknowledged sense of duty to return the same. As the triers of fact we do not believe the Defendant's explanation relative to knowledge of the competency proceeding in Florida during November and December of 1975 and find that he was aware of the same; however, even giving credence to his claim of lack of knowledge, we find other evidence of conduct of the Defendant to be clear, cogent and convincing proof of the fact that he was engaging in conduct involving dishonesty, fraud, deceit and misrepresentation and further counseled and assisted his clients, Mrs. Gage and Mrs. Fletcher, in conduct that the Defendant knew to be illegal or fraudulent.

9. We find the evidence to be clear, cogent and convincing proof of the fact that at the time the Defendant testified to the Circuit Court of Pinnellas County, Florida in Civil Action 76-3578-11 that he had not filed a Federal Estate Tax Return for the estate of Mrs. Houston and had not paid Federal Estate Tax shown on the return filed.

The Defendant's testimony before the Circuit Court of Pinnellas County, Florida was unequivocal as to the filing of the return and payment of the taxes shown due thereupon. In this regard we note the Defendant's testimony at the hearing which was offered in explanation of non-receipt of the return by the Internal Revenue Service was non-persuasive and, even viewed in the light most favorable to the Defendant, shows the Defendant to be guilty of gross negligence amounting to willful misconduct in that the return to which he testified was erroneous on its face; the Defendant was unable to produce any letter of transmittal, registered mail receipt, or affidavit of mailing; and, moreover, we take judicial notice of the regulations of the Internal Revenue Service which provide that the Defendant was not the proper party to file the return and that certain documents required to be filed with the return were not included by the Defendant.

10. We further note that the Defendant admitted that after he became aware of the fact that the testimony in Pin-

nellas County, Florida in Civil Action No. 76-3578-11 as to the filing of the Federal Estate Tax Return had been discovered to have been false, he persisted in resisting the imposition of the liability for restoring the sum of $10,638.37 which his clients had gained by virtue of such testimony, causing the personal representatives of the estate of Mrs. Houston to bring suit against the Defendant and his clients on the Judgment in the Superior Court of Buncombe County, North Carolina for that and other sums still due by virtue of the Judgment entered in Civil Action No. 76-3578-11 in Pinnellas County, Florida. Defendant's explanation for such conduct was that forcing the suit on the Judgment in Buncombe County was designed to give his clients, Mrs. Gage and Mrs. Fletcher, the opportunity to again assert in North Carolina, claims that they had asserted unsuccessfully in the probate courts of Florida for certain services allegedly rendered to Mrs. Houston prior to her death. The Defendant took such position only upon the agreement of said clients to indemnity him from loss in the matter. As triers of the facts, we find the explanation of the Defendant non-persuasive and, even if true, it would be a clear violation of Disciplinary Rule 7-102(B)(2). The fraud upon the Florida Court in this particular instance was perpetrated by the Defendant himself through his testimony that he paid estate taxes.

11. The Defendant, from November of 1975 until Mrs. Houston's death in March of 1976, was Mrs. Houston's attorney. Defendant failed to render appropriate account to Mrs. Houston's guardian during her lifetime and to her personal representative after her death for the stock certificates coming into his possession as her attorney. Moreover, the Defendant did not promptly pay and deliver to Mrs. Houston's guardian during her lifetime or her personal representative after her death the stock certificates in his possession that such personal representative and guardian were entitled to receive. In this regard we note the Defendant testified that he refused to render such accounting and make delivery upon receipt of indemnity from Mrs. Gage and Mrs. Fletcher."

Defendant also assigns error, in the eight following arguments, to the Commission's conclusions of law that he was in

violation of Disciplinary Rules 1-102(A)(4); 7-102(A)(4), (5), and (7); 7-102(B)(1); 9-102(B)(3) and (4) and G.S. 84-28(b)(3).

In *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982), our Supreme Court established that the "whole record" test was the principle standard of judicial review of disciplinary hearing decisions of the Commission.

> "In applying the whole record test to the facts disclosed by the record, a reviewing court must consider the evidence which in and of itself justifies or supports the administrative findings and must also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. [Citations omitted.] Under the whole record test there must be substantial evidence to support the findings, conclusions and result. G.S. § 150A-51(5). The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion."

Id. at 643, 286 S.E. 2d at 98-99.

[4] After a careful review of the record and numerous exhibits before us, we hold that the findings and conclusions made by the Commission are fully supported by substantial evidence. We find no merit in defendant's argument that the Commission made improper inferences from the testimony or considered incompetent evidence in reaching its findings and conclusions.

Defendant's final contention is that the Committee erred in entering an order of disbarment. We find the Commission's conclusions that defendant violated numerous disciplinary rules governing his professional conduct fully supportive of this order.

"[F]or the protection of the public, the courts and the legal profession," 4A N.C.G.S. Appendix VI, The North Carolina State Bar, 1981 Cum. Supp. Article IX, § 1, p. 353, discipline by disbarment for misconduct sometimes, as in this case, becomes the required remedy. The task and duty of expelling one from the legal profession for deviation from the path of professional responsibility has its standards fully set out in the Rules, Regulations and Organization of the North Carolina State Bar and in the Code of Professional Responsibility of the North Carolina State Bar. 4A N.C.G.S. Appendix VI and VII, 1981 Cum. Supp. The Hearing

Committee of the Disciplinary Hearing Commission is shown by the record to have fulfilled its responsibilities to the defendant and to the public.

Affirmed.

Judges HEDRICK and WHICHARD concur.

FIGURE EIGHT BEACH HOMEOWNERS' ASSOCIATION, INC. v. RAYMOND CLIFTON PARKER

FIGURE EIGHT BEACH HOMEOWNERS' ASSOCIATION, INC. v. H. P. LAING AND WIFE, K. G. LAING

No. 825DC738

(Filed 7 June 1983)

Deeds § 20— assessment covenants—definiteness—enforceability

Assessment covenants in a declaration of restrictive covenants recorded by a developer were sufficiently certain and definite to be enforceable in that they provided a standard against which to measure a property owner's liability for assessments and sufficiently described the properties and facilities to be maintained and improved with revenues from the assessments.

APPEAL by defendants from *Rice, Judge.* Judgment entered 10 March 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 13 May 1983.

Plaintiff seeks payment of assessments which it alleges are owed to it by defendants, property owners on Figure Eight Island, New Hanover County. Plaintiff and both defendants filed motions for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. The hearings on the motions in both cases were consolidated and held on 8 March 1982. At the hearing, both parties presented documents, affidavits, stipulations and exhibits which show the following:

Figure Eight Island is a coastal barrier island in New Hanover County. It is approximately two and one-half to three miles long. In the mid-1960's, Island Development Co. began resort

and residential development of Figure Eight Island. Sales of individual lots were subject to certain restrictive covenants recorded by the developer in the New Hanover County Registry.

In 1972, Island Development Co. conveyed all of its unsold land on Figure Eight Island to the Figure Eight Island Co. Figure Eight Island Co. also recorded certain restrictive covenants in the New Hanover County Registry as amendments to those originally recorded by Island Development Co. All conveyances by Figure Eight Island Co. were subject to the restrictions as amended.

In 1975, Figure Eight Island Co. filed for relief under the Bankruptcy Act. Pursuant to the order of the Bankruptcy Court of the Eastern District of North Carolina, the trustee in bankruptcy for Figure Eight Island Co. conveyed by deed and assignment to Continental Illinois Realty (hereinafter CIR) all development rights to Figure Eight Island. This conveyance included rights affecting lands already sold as well as those held by CIR by virtue of its purchase of them after foreclosure on the Deeds of Trust to land held by Figure Eight Island Co. At the time of the hearing on this matter, CIR was the owner/developer of Figure Eight Island.

Plaintiff, Figure Eight Beach Homeowners' Association, Inc. (hereinafter HOA), is a non-profit corporation formed under the laws of North Carolina and doing business in New Hanover County. Formed in 1966, the purposes of HOA are set forth below:

> (a) To bring together property owners of that area of New Hanover County and Pender County, North Carolina, known as Figure "8" Beach.
>
> (b) In furtherance of the purposes hereinabove act (sic) forth this corporation may engage in any lawful activity including, but not limited to operating parks and playgrounds, fire and police departments and contracts for services which might be from time to time deemed desirable by the Directors of this corporation.

The By-laws of HOA empowered its Board of Directors to set the amount of dues and assessments to be paid by its members. By the express terms of the restrictive covenants recorded in the New Hanover County Registry, purchasers of property on Figure Eight Island had to be approved as members of the HOA. By the

recording of the deed, purchasers agreed to be bound by the restrictions, the Charter, and the By-laws of the HOA.

From its creation in 1966 until 1975, HOA levied and collected assessments and dues from its members, the property owners on Figure Eight Island. Although never expressly authorized, this practice was condoned and acquiesced in by the property owners and developers. In its amendments to the original Declaration of Restrictive Covenants, Figure Eight Island Co. contemplated that the HOA might be assigned the right to levy and collect the assessments.

After its acquisition of property and development rights in 1975, CIR, a California based real estate investment trust, hired Figure Eight Development, Inc., to manage the development on Figure Eight Island. At the same time, CIR orally assigned to HOA the right to levy and collect assessments from property owners. A written assignment to the same effect was executed in 1977 by Figure Eight Island Co. In its Declaration of Restrictive Covenants, recorded in the New Hanover County Registry in 1978, the HOA was designated as the party responsible for the levying, collection, and expenditure of assessments. In May and June 1979, both CIR and Figure Eight Development, Inc. assigned in writing to HOA the rights to levy, collect, and expend annual and special assessments.

These last assignments were executed in apparent response to an unpublished decision of this Court which held that plaintiff HOA had to prove the assignment to it of those rights before the trial court could find, on plaintiff's motion for summary judgment, that defendants-property owners were liable to plaintiff for such assessments. That case, in addition to involving this plaintiff, also involved defendants Laing. In a later case involving the same parties and issue, also unpublished, plaintiff HOA submitted the above-mentioned written assignments in support of its motion for summary judgment and this Court upheld the trial court's grant of that motion.

Defendants here own three properties on Figure Eight Island. Defendants Laing acquired their lot in 1976 and defendant Parker acquired his lots in 1972. The deeds in both conveyances contained the following language:

SUBJECT to all terms and conditions contained in the restrictive covenants recorded by the Figure Eight Island Company in Book 933, at Page 286 of the New Hanover County Registry, reference to which . . . is hereby made.

Those portions of the restrictive covenants recorded by Figure Eight Island Co. that are pertinent here are set out below:

2. *Applicability:* These Restrictions shall apply to all residential lots sold by the Company after the date hereof.

3. *Reservations:* The Company reserves the right absolutely to change, alter or redesignate the allocated, planned, platted or recorded use or designation of any property (so long as the Company retains title to said property) on any of the lands known as Figure Eight Island including, but not limited to, the right to change, alter or redesignate lands for condominium or single-family residential use, to change, alter or redesignate roads, utility and drainage facilities, and to change, alter or redesignate such other present and proposed amenities or facilities as may, in the sole judgment of the Company, be necessary or desirable.

. . .

8. *Assessments:* (a) The owner of each residential lot shall, by the acceptance of a deed or other conveyance for such lot, be deemed obligated to pay to the Company an annual assessment or charge to be fixed, established and collected on a lot by lot basis as hereinafter provided. Said annual assessment or charge shall be due on January 1 of the year for which it is assessed, provided that the Company may make provision for payment thereof in installments. Each annual assessment or charge (or installment thereof) shall, when due, become a lien against the lot against which such assessment or charge is made. Upon demand, the Company shall furnish to any owner or mortgagee a certificate showing the assessments or charges, or installments thereof, due as of any given date. Each lot subject to these restrictions is hereby made subject to a continuing lien to secure the payment of each assessment or charge (or installment thereof) when due.

(b) Such assessment or charge shall be in an amount to be fixed from year to year by the Company, which may establish different rates from year to year as it may deem necessary and may establish different rates for various general classifications of lots according to the use or location of said lots. The Company may levy additional assessments if necessary to meet the needs of the entire Island or portion thereof.

(c) The funds arising from said assessment or charge or additional assessment may be used for any or all of the following purposes: Maintaining, operating and improving the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance and improvement of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; and, in addition, doing any other things necessary or desirable in the opinion of the Company to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island.

(d) Upon the failure of the owner of any lot to pay any such assessment or charge, additional assessment, or installment thereof when due, the Company shall have the right to collect the amount thereof by an action at law against the owners as for a debt, and may bring and maintain such other suits and proceedings at law or at equity as may be available. Such rights and powers shall continue in the Company and the lien of such charge shall be deemed to run with the land and the successive owners of each lot, by the acceptance of deeds therefor, shall be deemed personally to assume and agree to pay all unpaid assessments or charges or additional assessments which have been previously levied against the property, and all assessments or charges or additional assessments as shall become a lien thereon during their ownership. Unpaid assessments or charges, additional assessments, or installments thereof, shall bear interest at six percent (6%) from the due date thereof, until paid.

(e) The monies collected by virtue of the assessments or charges or additional assessments, of the lien provided by

this section, shall be paid to the Company to be used in such manner and to the extent as the Company may determine, in accordance with paragraph 8(c) hereof, for the benefit of the residents of Figure Eight Island. The judgment of the Company in the making of assessments or charges or additional assessments and the expenditure of funds shall be final.

(f) The Company shall not be obligated to spend in any one calendar year all of the sums collected during said year by way of assessments or charges or additional assessments and may carry forward to surplus any balance remaining. The Company shall not be obliged to apply any such surplus to the reduction of charges in the succeeding year.

(g) The Company shall have authority, in its discretion, to borrow money to expend for the purposes set forth in paragraph 8(c) hereof upon such terms and security and for such periods as it may determine, and to repay said borrowings and the interest thereon from the assessments or charges or additional assessments provided for in this paragraph 8.

(h) It is contemplated that the Company may, in its discretion, assign to the Figure Eight Island Homeowners' Association, its successors or assigns, the right to make and collect assessments, to expend such funds as may be collected, and to otherwise be substituted for the Company under this paragraph.

. . .

21. *Modifications:* The Company specifically reserves the right to amend or change any part or all of the restrictions, covenants and conditions herein set out by the filing in the office of the Register of Deeds of New Hanover County and/or Pender County a declaration of amended restrictive covenants, which such amendments, modifications or additions to the restrictive covenants contained in this Declaration shall be made applicable to the conveyance of lots made subsequent to the recording of such declaration of amended restrictive covenants.

. . .

> 24. *Miscellaneous:*
>
> . . .
>
> (d) In all cases the restrictions set forth or provided for in these restrictions shall be construed together and shall be given that interpretation or construction which will best tend toward their strict enforcement, and, if necessary, they shall be so extended or enlarged by implication as to make them fully effective.

The pertinent portions of the Declarations of Restrictive Covenants recorded by CIR in 1978 contained essentially the same wording as those set out above with the exception of paragraph 8(c), which is set out below with differences underscored:

> 8. *Assessments*
>
> . . .
>
> (c) The funds arising from said assessment or charge or additional assessment may be used for any or all of the following purposes: Maintaining, operating, improving and replacing the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance, improvement and lighting of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; paying taxes, indebtedness of the Association, insurance premiums, governmental charges of all kinds and descriptions and, in addition, doing any other things necessary or desirable in the opinion of the Association to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island.

In 1979, plaintiff HOA assessed property owners on Figure Eight Island an annual assessment of $382.00 for residences and $255.00 for lots. A special assessment of $275.00 per lot was levied for the purpose of financing the construction of a new bridge to the island. The bridge to be replaced constituted the only land based transportation access to the island.

In the complaints that initiated the legal proceedings in this matter, plaintiff alleged that defendant Parker had refused to pay $500.00 of the special assessment and that defendants Laing had refused to pay any of the special assessment or the annual assessment of $255.00 on their lot.

On 10 March 1982, the trial court granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment. The court ordered defendants to pay the amounts owing under their respective assessments and the costs of the action. From this Order, defendants appealed.

Hogue, Hill, Jones, Nash, Lynch, by William L. Hill, II, for plaintiff-appellee.

Harold P. Laing for defendants-appellants.

HILL, Judge.

Defendants' sole exception is to the entry of judgment by the trial court in this matter. Defendants assign as error the trial court's granting of plaintiff's motion for summary judgment and denial of defendants' motion for summary judgment. On appeal defendants advance three questions:

> I. Is restrictive covenant number 8 of the Declaration of Restrictive Covenants for Figure Eight Island Company unenforceable due to its vagueness, uncertainty, and failure to state an ascertainable standard?
>
> II. Are the restrictive covenants upon which the plaintiff-appellee relies enforceable only by the original grantor?
>
> III. Are the covenants upon which the plaintiff-appellee relies unenforceable as against public policy?

As plaintiff points out in his brief, only the first of these questions was the issue before the trial court. The scope of our consideration is therefore properly limited only to the first question. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E. 2d 170, *disc. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978). We have nevertheless considered the other questions presented by defendants' appeal and the arguments offered in support thereof. We find defend-

ants' contentions with respect to these questions to be without substantial merit.

The sole question remaining for our consideration is whether the trial court acted properly in granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment. Defendants contend that paragraph 8 of the Declaration of Restrictive Covenants recorded by the Figure Eight Island Co. is vague and uncertain and therefore unenforceable. For this reason, defendants argue, the trial judge's grant of summary judgment for plaintiff was improper.

The law in North Carolina is that on a motion for summary judgment under Rule 56, N.C. Rules of Civil Procedure, the test to be applied by the trial court is whether, on the basis of the materials submitted by the parties supporting and opposing the motion, there is any genuine issue as to any material fact. *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975). If no such issue exists, the remaining question for the court's determination is whether the moving party is entitled to judgment as a matter of law. *In re Will of Edgerton,* 29 N.C. App. 60, 223 S.E. 2d 524, *cert. denied,* 290 N.C. 308, 225 S.E. 2d 832 (1976).

In support of their argument, defendants cite us to the cases of *Beech Mountain Property Owner's Association v. Seifart,* 48 N.C. App. 286, 269 S.E. 2d 178 (1980), and *Snug Harbor Property Owners Association v. Curran,* 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *disc. rev. denied,* 305 N.C. 302, 291 S.E. 2d 151 (1982), for the following proposition recited in defendants' brief:

> Assessments based on restrictive covenants lacking some ascertainable standard by which a court can objectively determine both the amount of the assessment and the purpose for which it is levied are void and unenforceable.

Defendants overread both cases.

Beech Mountain, supra, considered for the first time in this jurisdiction the matter of restrictive covenants which imposed affirmative obligations on the grantee of a deed. These affirmative obligations consisted on monetary assessments. In *Beech Mountain,* this Court upheld the trial court's grant of summary judgment for defendants-property owners. Speaking through Judge Parker, the Court said:

> [J]ust as covenants restricting the use of property are to be strictly construed against limitations on use, [citation,] and will not be enforced unless clear and unambiguous, [citation,] even more so should covenants purporting to impose affirmative obligations on the grantee be strictly construed and not enforced unless the obligation be imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application.

Id. at 295, 269 S.E. 2d at 183. The Court in *Beech Mountain* noted with approval the decisions of other jurisdictions which "stressed the necessity for some ascertainable standard contained in the covenant by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Id.* The Court adopted this view and held that in order for assessments to be imposed on the basis of restrictive covenants there must appear a "sufficient standard by which to measure the [property owners'] liability for assessments." *Id.* The Court also required that covenants must identify with particularity the property to be maintained and must provide some guidance to a reviewing court as to which facilities and properties the property owners' association or other similar body chooses to maintain. *Id.* at 295-96, 269 S.E. 2d at 183-84, *Snug Harbor Property Owners Association v. Curran, supra,* at 204, 284 S.E. 2d 752 at 755.

In *Snug Harbor,* this Court considered a fact situation very similar to that in *Beech Mountain,* but did so in the context of defendants-property owners' motion under Rule 12(b)(6), N.C. Rules of Civil Procedure, to dismiss plaintiff-property owners' association's complaint for failure to state a claim for relief. In affirming the trial court's grant of that motion, *Snug Harbor* relied heavily on *Beech Mountain* in finding the restrictive covenants involved unenforceably vague.

The Courts in *Beech Mountain* and *Snug Harbor* concluded that the covenants in each case failed to meet the three-pronged requirement set forth in *Beech Mountain* and found them unenforceable. Nowhere in either opinion, however, does the Court require, as defendants apparently contend, that the restrictive covenants must provide the reviewing court with a standard by which it can objectively determine the *amount* of the assessment.

Considering the matter before us in light of the established requirements, we find that paragraph 8 of the Declaration of Restrictive Covenants is not unenforceably vague. We note first that paragraph 24(d), set forth above, requires that the restrictions in the Declaration be construed together. Bearing this in mind, any reading of the language of paragraph 8(c) would provide a standard against which to measure the property owner's liability. Particularly when read with those portions of the Declaration relating to appearance and maintenance, paragraph 8(c) is sufficiently definite in its terms that the purpose and amount of the annual and special assessments in question clearly "fall within the contemplation of the covenant."

Secondly, we find that the property to be maintained is described with particularity. Having reference to the Declaration of Restrictive Covenants recorded by the developer and its predecessors in title in the New Hanover County Registry, and a map of the entire island showing roads, lots, facilities, bridge, causeway, natural and man-made channels and peninsulas, we can perceive no construction of paragraph 8 of the Declaration of Restrictive Covenants that would support any conclusion other than that reached by the trial court. Further, other than simply asserting that the property to be maintained is not sufficiently described, defendants advance no argument to support them in this regard.

Lastly, we find that there is no question as to which properties and facilities the HOA seeks to maintain with the contested assessments. Contrary to the situation in *Beech Mountain*, defendants here were aware, by reference in the deed to maps and Restrictive Covenants, what properties and facilities were to be maintained and improved with the revenues from the assessments. There are no after-acquired properties or facilities other than those specified or referred to in the Declaration of Restrictive Covenants of the development maps for the maintenance or improvement of which the assessments were made. Consequently, we find the covenants sufficient to guide the trial court in its review of the determination made by plaintiff HOA.

Our careful review of the record on appeal and consideration of the arguments advanced by defendants in their brief fail to persuade us that there is any genuine issue of material fact. The

trial court's judgment granting plaintiff's motion for summary judgment was therefore proper. In affirming the grant of plaintiff's summary judgment motion, we necessarily conclude that defendants' motion for summary judgment was properly denied.

The trial court's judgment granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment is therefore affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

JAMES E. CARTER, EMPLOYEE PLAINTIFF v. FRANK SHELTON, INC., T/D/B/A UTILITY SERVICE COMPANY, EMPLOYER, AETNA LIFE & CASUALTY INSURANCE CO., CARRIER, AND/OR J. E. CARTER COMPANY, EMPLOYER, AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC777

(Filed 7 June 1983)

1. **Master and Servant § 49.1— workers' compensation—employee rather than independent contractor**

Where plaintiff was in the business of water tank cleaning and painting, where all the plaintiff's work after 1973 was for defendant except for one job, where plaintiff was subject to discharge under the terms of the contract if defendant was not satisfied with his work, where defendant examined the plaintiff's work periodically during any project and at its completion, and where even though the contractor provided for payment only upon successful completion of the project, the records showed that the plaintiff drew a set amount each week out of his bank account, the evidence was sufficient to find an employer-employee relationship between plaintiff and defendant rather than finding plaintiff was an independent contractor. G.S. 97-2(2).

2. **Master and Servant § 81— workers' compensation—sole proprietor—failure to notify insurer of election to be included in policy**

Plaintiff could not recover from the insurer of his sole proprietorship under G.S. 97-2(2) since he failed to notify his insurer of his election to be included within the workers' compensation coverage.

3. **Master and Servant § 81; Principal and Agent § 1— compensation insurance—independent accountant not agent of insurance company**

Where plaintiff, as sole proprietor of a sole proprietorship, employed an independent accountant, where plaintiff advised the independent accountant

that he wanted workers' compensation for his sole proprietorship and that he wanted to be covered under it, and where the accountant procured insurance from an agency but failed to notify the insurer of his election to be included, there was insufficient evidence to show that the accountant and the agency were agents of the insurance company in that plaintiff failed to show they acted on the insurance company's behalf or subject to its control.

4. Estoppel § 4.2; Master and Servant § 81— compensation insurance—equitable estoppel not applicable

Plaintiff failed to prove that his insurance company was estopped to deny that plaintiff was covered on the date of his injury where (1) the insurance company did not act to make plaintiff think that he was covered under the workers' compensation policy issued for his proprietorship, (2) the plaintiff only notified his accountant and not the insurance company of his desire to be covered under the policy, and (3) there was no duty on the insurance company to notify plaintiff of the 1979 amendment to G.S. 97-2(2) that allowed sole proprietors to be covered under their compensation insurance policy.

5. Estoppel § 4.6; Master and Servant § 81— compensation insurance—mistaken designation on application—no reliance—no estoppel

A mistaken designation on plaintiff's application for workers' compensation insurance which indicated his business was a corporation instead of a sole proprietorship did not estop his insurance company from denying coverage since plaintiff failed to show that he relied on the mistaken designation to his detriment.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award filed 12 February 1982. Heard in the Court of Appeals 17 May 1983.

The plaintiff was injured from a fall while cleaning the inside of a large water tank in Laurel Hill on 2 July 1979. He is now a paraplegic and is unable to move or function below the area of the upper sternum.

He sought workers' compensation from his proprietorship, James E. Carter Company and its insurer, American Insurance Company, and from the corporation which regularly employed him to do tank cleaning and painting, Frank Shelton, Inc., t/d/b/a Utility Service Company, and its insurer, Aetna Life & Casualty.

In 1968, the plaintiff began work for Utility Service. Utility Service bought, sold, and maintained water tanks. The plaintiff learned the trade of cleaning and repairing water tanks while working there.

The plaintiff signed a contract in 1973 to purchase the same equipment from Utility Service that was previously assigned to

his maintenance crew. The plaintiff and Utility Service agreed to work on a shared basis with the company furnishing the material. Jobs were obtained by the company and plaintiff performed the work.

Work done by the plaintiff for Utility Service under this new arrangement was usually evidenced by a written contract. The contracts generally required Utility Service to furnish materials and plaintiff to furnish labor. Specifications for the work were in accordance with a contract between Utility Service and the water tank owner.

The standard contract reserved a number of rights to Utility Service. The company reserved the right to stop work it deemed necessary, to prevent incompetent persons from working on the job, to have corrections made, and to have general jurisdiction over the plaintiff with regard to the quality of the work. The plaintiff and Michael James, a former division manager for Utility Service, testified that the company did inspect the work while it was being done and at its completion.

Utility Service provided the plaintiff with the services of its bookkeeper T. C. Smith during 1973. In late 1973, Smith was replaced with Barry Dobson, an independent accountant. Utility Service paid one-half of Dobson's fee through the end of 1973. Dobson was thereafter paid from the plaintiff's account.

The plaintiff paid salary and expenses to members of his crew on a weekly basis. The accountant wrote the payroll checks on the plaintiff's account based on information supplied by the plaintiff.

The accountant advised Utility Service each week how much was required to cover checks written on the plaintiff's account. The company made the deposit to cover the checks. These deposits were advances of sums to be paid upon completion of jobs even though the standard contracts between Utility Service and the plaintiff provided that the plaintiff would not be paid anything until the job was completed.

The plaintiff drew $300 per week from the business account. This amount was credited against his portion of each contract price.

Before the date of his accident, the plaintiff told Dobson that he wanted to be sure that he was covered by workers' compensation insurance. Trent Cheely, the plaintiff's stepson, was killed on the job in 1974 while working for the plaintiff on a Utility Service project. The claim for Cheely's death was not settled for two years because of a dispute between the plaintiff's insurer and Utility Service's insurer.

The plaintiff changed his insurer to American after Cheely's death. Carter Co. was designated as a corporation on the declarations in American's policy in effect on the accident date. Following the accident, the policy declaration was corrected to show that Carter Co. was a proprietorship, not a corporation.

In a 29 July 1981 opinion, Deputy Commissioner Ben E. Roney, Jr. dismissed the plaintiff's claim for lack of subject matter jurisdiction. He concluded that neither insurer provided individual workers' compensation insurance for the plaintiff on the accident date.

The full Commission affirmed and adopted Roney's opinion on 12 February 1982. From that decision, the plaintiff appealed.

Egerton, Fowler & Marshall, by Darl L. Fowler and Smith, Patterson, Follin, Curtis, James & Harkavy, by Jonathan R. Harkavy and Henry N. Patterson, Jr., for plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter, by Jeri L. Whitfield and J. Donald Cowan, for defendant-appellees J. E. Carter Co. and American Insurance Company.

No brief filed for defendant-appellees Frank Shelton, Inc., t/d/b/a Utility Service Co. and Aetna Life & Casualty Insurance Company.

ARNOLD, Judge.

Under G.S. 97-86 and our case law, it is axiomatic that an opinion and award entered by the Industrial Commission will not be disturbed on appeal unless a patent error of law exists therein. *See, e.g., Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 505, 293 S.E. 2d 807, 809 (1982). The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence even though there is evidence to the contrary. *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E. 2d 389, 390 (1980).

We consider the liability of the two insurers separately because of the different issues involved in each situation.

UTILITY SERVICE-AETNA LIFE & CASUALTY APPEAL

[1] If the plaintiff was an employee of Utility Service on the date of the accident, then he can collect workers' compensation insurance from Aetna. The opinion of the Commission concluded that the plaintiff was not an employee, but instead was an independent contractor. It also held that the plaintiff was not covered under an Aetna individual workers' compensation policy on the accident date. From those conclusions, the plaintiff appealed.

Because the Act only applies where the employer-employee relationship exists, the question of whether it existed at the time of the accident is jurisdictional. As a result, the Commission's finding on jurisdiction is reviewable on appeal. *Vaughn v. N.C. Dep't of Human Resources*, 296 N.C. 683, 692, 252 S.E. 2d 792, 798 (1979). The rule that the Act is to be liberally construed does not apply to determine if the Act is applicable. *Hicks v. Guilford County*, 267 N.C. 364, 366, 148 S.E. 2d 240, 242 (1966).

G.S. 97-2(2) defines "employee" as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer. . . ."

This statutory definition, however, adds nothing to the common law meaning of the term. As a result, whether the employer-employee relationship existed at the time of the accident is to be determined by ordinary common law tests. The plaintiff has the burden of proof on this issue. *Lucas v. Li'l General Stores*, 289 N.C. 212, 218, 221 S.E. 2d 257, 261-62 (1976).

The law in North Carolina on the relationship between master and servant was outlined in *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944). The Supreme Court found the vital test to be if "the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Id.* at 15, 29 S.E. 2d at 140. Right of control, not whether

it was actually utilized, is determinative. *Scott v. Lumber Co.*, 232 N.C. 162, 165, 59 S.E. 2d 425, 427 (1950). *See also* 1C A. Larson, The Law of Workmen's Compensation § 43.10 n. 2 (1980) (North Carolina sees the amount of control exercised by the alleged employer as determinative on this question).

In summarizing the case law, *Hayes* enunciated a number of elements to consider in the determination.

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. (Citations omitted.)
>
> The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.

Id. at 16, 29 S.E. 2d at 140. A number of cases have relied on the *Hayes* factors in answering this question. *See, e.g., Morse v. Curtis,* 276 N.C. 371, 378, 172 S.E. 2d 495, 500 (1970).

The facts here lead us to conclude that the plaintiff was an employee of Utility Service for purposes of workers' compensation insurance and that Aetna is liable as Utility Service's insurer.

First, all of the plaintiff's work after 1973 was for Utility Service except for one job. He was in regular employ of the company. Utility Service procured business for the plaintiff and then notified him about the job opportunity.

Second, the plaintiff was subject to discharge under the terms of the contract if Utility Service was not satisfied with the

work. The company was given "general jurisdiction over the contractor with regard to the quality of the work" in the contract. Examination of contract terms is a factor to be considered in determining if an employer-employee relationship exists. *See Askew v. Tire Co.*, 264 N.C. 168, 172, 141 S.E. 2d 280, 283 (1965).

Third, Utility Service examined the plaintiff's work periodically during any project and at its completion. Reserved rights in the contract of on-the-job inspection and stopping work for corrections are further indications of the company's control. The contract also allowed Utility Service to stop work to prevent incompetent persons from working on a job, which limited the plaintiff's ability to choose his assistants.

Finally, even though the contract provided for payment only upon successful completion of a project, the record shows that the plaintiff drew a set amount each week out of his bank account. That account was replenished each week by Utility Service in an amount suggested by the plaintiff's accountant.

Because we find that Utility Service and the plaintiff were in an employer-employee relationship so as to make Aetna liable for the plaintiff's accident, it is unnecessary to discuss whether Aetna is estopped from denying that the plaintiff is covered.

CARTER CO.-AMERICAN INSURANCE APPEAL

[2] The plaintiff first argues that a part of G.S. 97-2(2) that was added in 1979, *see* 1979 N.C. Sess. Laws, ch. 86, allows him to recover from the insurer of his sole proprietorship. That amendment became effective on 1 July 1979, the day before the plaintiff's injury.

The relevant portion of the statute states:

> Any sole proprietor or partner of a business whose employees are eligible for benefits under this Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

This statute does not help the plaintiff because he did not notify American of his election to be included. We also reject his contention that sole proprietors were included before the 1979 amendment. That change is an indication that a specific statutory authorization was necessary to include them. The plaintiff was on notice of this fact since his accountant Dobson informed him prior to the amendment that one advantage of corporate status would be to obtain workers' compensation insurance on himself.

[3] The plaintiff next contends that he can recover from American because he advised Dobson that he wanted workers' compensation insurance for his sole proprietorship. He argues that Dobson and the Van Noppen Agency, from whom Dobson obtained insurance for the plaintiff, were American's agents and bound American as principal. We disagree.

The RESTATEMENT (SECOND) OF AGENCY § 1 (1) (1958) defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

There is insufficient evidence here to show that Dobson and Van Noppen were American's agents. It has not been shown that they acted on American's behalf or subject to its control.

The fact that the plaintiff authorized Dobson to talk to insurance companies on his behalf does not make Dobson the agent of American. If anything, Dobson was the plaintiff's agent.

[4] Finally, the plaintiff argues that American is estopped to deny that the plaintiff was covered on the date of his injury because it accepted premiums and was silent when he made requests for coverage to Dobson.

Equitable estoppel arises "when an individual by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E. 2d 599, 602 (1980).

This is not an appropriate case for equitable estoppel. First, American did no act to make the plaintiff think that he was

covered under the workers' compensation policy issued for his proprietorship.

Second, knowledge that the plaintiff wanted to be covered cannot be attributed to American. The plaintiff only notified Dobson of his desire. As the plaintiff stated in his testimony, "I never talked with anyone at the Van Noppen Agency or American Insurance Company about workmen's compensation insurance, but I authorized Mr. Dobson to talk to the insurance companies on my behalf." Dobson was not American's agent, as discussed above, and his acts cannot bind the insurer.

Third, there was no duty on American to notify the plaintiff of the 1979 amendment to G.S. 97-2(2). That statute makes it the claimant's responsibility to notify the insurer of his desire to be covered as a sole proprietor.

[5] Finally, the plaintiff contends that the mistaken designation on his application for workers' compensation insurance that his business was a corporation should estop American from denying coverage. He argues that the mistake led all parties to believe that he was covered.

Before the plaintiff can use this mistake as a basis for estoppel, he must show that he relied on it to his detriment. *See Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 216, 152 S.E. 2d 336, 340 (1967). The requisite facts are not present here.

The plaintiff testified that he never told anyone that he was doing business as a corporation and has shown no reliance on any act or silence of American to his detriment. Dobson was the person the plaintiff informed about his desire to be covered. American is not bound by that statement.

For these reasons, we affirm the dismissal of the plaintiff's complaint against J. E. Carter Company and its insurer, American Insurance Company.

Reversed in part; affirmed in part.

Judges WEBB and BRASWELL concur.

DOUGLAS R. SMITHWICK v. LAWRENCE FRAME AND WIFE, LORRAINE FRAME

No. 8211DC638

(Filed 7 June 1983)

1. **Infants § 6.5— child custody—criminal record and past conduct**

In plaintiff father's action seeking custody of his child from the maternal grandparents, evidence of plaintiff's criminal record and past conduct did not preclude the trial court from finding that the best interest of the child would be served by placing him in the custody of the plaintiff.

2. **Infants § 6.6— child custody—physical accommodations—sufficiency of evidence to support finding**

While there was no evidence that directly supported the trial court's finding of fact concerning the physical accommodations at the home of plaintiff's mother where plaintiff's child would spend part of his time upon the grant of custody of the child to plaintiff, there was sufficient evidentiary facts from which to infer the court's ultimate finding on this point.

3. **Infants § 6— child custody proceeding—court's comment that witness was lying**

The trial court's comment in a child custody proceeding that a witness was lying was not prejudicial since there was no jury to be influenced thereby and since the comment was consistent with the trial court's role as finder of the facts.

4. **Infants § 6.5— child custody—exclusion of prior acts of plaintiff and family**

Certain evidence concerning prior acts of plaintiff and plaintiff's family was properly excluded in a child custody proceeding on the ground of relevance.

APPEAL by defendants from *Christian, Judge.* Judgments entered 9 December 1981 and 21 December 1981. Heard in the Court of Appeals 22 April 1983.

Plaintiff instituted this action by filing a complaint on 25 August 1980 seeking custody of his minor child from defendants, the child's maternal grandparents. Defendants had been keeping and caring for the child since the death of their daughter, plaintiff's estranged wife, in August 1979.

The hearing on this matter was delayed until 14 July 1981 pending the outcome of defendants' attempt to have the child declared abandoned and adopt him, which was unsuccessful. On 14 July 1981, the District Court, Harnett County, entered a consent

order providing that primary custody of the child remain with defendants, subject to temporary custody and visitation rights in plaintiff-father. On 10 September 1981, defendants moved for modification of the 14 July 1981 order, requesting termination of plaintiff's visitation and temporary custody rights. On 25 September 1981, plaintiff moved the court to have defendants held in civil contempt for failure to comply with the 14 July 1981 order. The hearing in this matter took place over the course of several weeks: beginning on 23 November 1981, continuing on 30 November 1981, and ending on 14 December 1981.

On 9 December 1981, the court entered an order finding defendants in civil contempt for failure to comply with the 14 July 1981 Order and an order awarding temporary custody of the child to plaintiff, subject to visitation by defendants. On 21 December 1981, the court, after the hearing was concluded, entered an order containing the following findings of fact:

> 1. That subsequent to the order of Pope Lyon, Judge Presiding, dated July 16, 1981, the plaintiff has seen his child on occasions, has re-established a personal relationship with his minor child, has remarried, has established a new home with his present wife, and that his home surroundings and atmosphere are conducive to promoting the best interests of the minor child, and would not be detrimental to said child.
>
> 2. That plaintiff is gainfully employed, that his wife is gainfully employed, and that he has arranged for the minor child to stay with his mother, Mrs. Annie Smithwick, during the times that he and his wife are both working; that the plaintiff and his wife will both be home each evening, and do not work on weekends, thereby being able to give to the minor child full attention during the weekend period.
>
> 3. That Mrs. Annie Smithwick, paternal grandmother of the child, is an able-bodied person who lives in a clean home in the country, and that the surroundings are suitable for the rearing and keeping of a minor child, and that Mrs. Annie Smithwick has a close personal relationship with the minor child, and the best interest of the minor child would be enhanced if the said child were to stay with Mrs. Annie Smithwick during the periods of time his father and stepmother are working.

4. That the defendants have given to the minor child attention and care during the time that the child has lived with them.

5. That since the death of the mother of the minor child on August 10, 1980, the child has been residing with the defendants on a day to day basis, subject to the visitation rights of the plaintiff which have not been fully exercised by the plaintiff due to the actions of the defendants. However, the Court finds as a fact that during the time the minor child resided with the maternal grandparents excellent care was provided to the child including adequate clothing, a warm home, day care when necessary at the home of Mrs. Joyce Sharp, that the grandparents sought and provided for the medical needs of the minor and that because of providing the above material needs as well as providing for the emotional needs of the child that certain bonds of love and affection have developed between the minor child and the maternal grandparents. That due to this close attachment it is in the best interest of the child to continue an active relationship with the maternal grandparents.

6. That the defendants, by design, have deliberately attempted to keep the minor child, Christopher Shawn Smithwick, from the presence of his father, in order that they might have the complete and sole custody of the child, and have thereby twarted [sic] the rights of the father to see his child; that said actions on the part of the defendants has [sic] not been for the best interest of the minor child.

7. That the defendants have willfully failed to carry out the terms of the order of Judge Lyon dated July 16, 1981, in various particulars, have failed to carry out the order of this Court as relates to the visitation rights, and have deliberately and willfully violated the orders of this Court.

8. That the attitudes and actions of the defendants, and each of them, has not been conducive to the best interests of the child, and have, in fact, been detrimental to the welfare of the minor child.

9. That the plaintiff has attempted to obtain the custody of his child through legal procedures, has complied with the

orders of this Court relating to custody and visitation up to this time, but that the defendants have willfully failed to comply with the orders in many particulars. That the defendants have failed to cooperate with the plaintiff during the visitations of the plaintiff with his minor child, Christopher Shawn Smithwick, in that they have failed to be at the designated place at the times required, have failed to furnish to the plaintiff necessary and proper clothing for overnight visitations, and otherwise have attempted to defeat the rights of the father.

Based on these findings, the court made the following conclusions of law:

1. That the plaintiff is a fit and proper person to have the custody of his minor child, Christopher Shawn Smithwick.

2. That the defendants are the maternal grandparents of the minor child and have adequate facilities to care for the child and the desire to maintain their relationship with the child, and it would be in the best interest of the minor child to continue that relationship.

3. That the best interest of the minor child would be enhanced if the custody of the minor child were awarded to the father-plaintiff.

4. That the defendants, the maternal grandparents of the minor child, should have some reasonable visitation period with the minor child.

5. That the defendants are in willful contempt of the written order of Judge Pope Lyon dated July 16, 1981; that since the plaintiff, in open Court, advised the Court that he would not pursue his prayer for relief to have the defendants punished for contempt, and at the request of the plaintiff in this matter, the Court will not punish the defendants for their willful contempt of this Court.

Based on these conclusions, the trial court awarded permanent custody of the minor child to plaintiff, subject to visitation rights in defendants as set forth in the order. From the orders of 9 December 1981 and 21 December 1981, defendants appealed.

Morgan, Bryan, Jones and Johnson, by Robert C. Bryan for plaintiff-appellee.

Bain and Capps, by Edgar R. Bain and Elaine F. Capps for defendant-appellants.

HILL, Judge.

The 9 December 1981 Order, finding defendants in contempt, is challenged by defendants on the grounds that the court lacked jurisdiction under G.S. 5A-23 to consider the issue of contempt. The contempt order reserved punishment of defendants until final disposition of the child custody matter. In its 21 December 1981 order, disposing of the child custody matter, the court, at the request of the plaintiff, elected not to punish defendants for contempt. Since defendants suffered no injury or prejudice as a result of the contempt order, their exceptions thereto and assignment of error are moot and will not be considered by us.

The 9 December 1981 Order awarding temporary custody of the minor child to plaintiff is challenged by defendants on the grounds that the evidence does not support the findings of fact made by the trial court. Any objections that defendants may have had to this order, interlocutory on its face, were made moot by the 21 December 1981 Order awarding plaintiff permanent custody of his minor child. We therefore will not consider them.

We move now to a consideration of defendants' challenge to the trial court's Order of 21 December 1981. Defendants' several exceptions and assignments of error in this regard present the question of whether the trial court's findings of fact and conclusions of law are supported by competent evidence.

[1] Defendants first take issue with those portions of the trial court's findings of fact that the best interest of the child would be served by placing him in the custody of plaintiff-father. We note that defendants do not contest the sufficiency of the evidence to support the trial court's findings. Rather, defendants argue that certain countervailing evidence of record precludes the findings made.

In support of their argument, defendants refer us to the record and cite therein several instances of plaintiff's prior conduct. These instances involve plaintiff's criminal record of

shooting into a room occupied by his minor son, shooting into an automobile, and shoplifting. Defendants also cite an occasion when the child, after a visit with his father, allegedly was found to have marijuana seeds and a pipe in his pockets. At the hearing, plaintiff did not deny his criminal record, but did deny that he had ever had marijuana in the presence of his child.

Defendants correctly point out that issues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence. *E.g., Coble v. Coble,* 300 N.C. 708, 268 S.E. 2d 185 (1980). The findings of fact made by the trial court are regarded as conclusive on appeal if they are supported by competent evidence. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967). In child custody cases, the paramount consideration of the court is the welfare of the child. *Williams v. Williams,* 18 N.C. App. 635, 197 S.E. 2d 629 (1973). The welfare of the child is the "polar star" that guides the court in the exercise of its discretion. *In re Moore,* 8 N.C. App. 251, 174 S.E. 2d 135 (1970). The trial court's judge's discretion with regard to the weight and credibility of the evidence is bolstered by its responsibility for the welfare of the child. In child custody cases, where the trial judge has the opportunity to see and hear the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal. *Id. Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974). So long as the trial judge's findings of fact are supported by competent evidence, they should not be upset on appeal. *In re Moore, supra.*

Defendants contend that the favored status of the natural parent in child custody cases interfered with the court's judgment regarding the credibility of certain testimony by plaintiff to the point that the trial judge abused his discretion. Based on our reading of the record and of the "example" set forth in defendants' brief, this contention is patently groundless.

Moreover, defendants' argument appears to be premised in part on the theory that evidence of past acts tending to show plaintiff's unfitness as a parent precludes a finding of present fitness. While evidence of past acts is relevant, the court's primary concern, as noted above, is with the continuing welfare of

the child. "A judgment awarding custody is based upon the conditions found to exist at the time it is entered." *Stanback v. Stanback*, 266 N.C. 72 at 76, 145 S.E. 2d 332 at 335 (1965). This requires a prospective outlook by the court. In this regard, evidence of past acts is a factor to be considered, but is not necessarily dispositive. *Almond v. Almond*, 42 N.C. App. 658, 257 S.E. 2d 450 (1979). Here, while the evidence does not show that plaintiff has been "a paragon of fatherly love and care," *Thomas v. Thomas*, 259 N.C. 461 at 467, 130 S.E. 2d 871 at 876 (1963), it does support the court's findings of present fitness and we will not disturb them.

[2] Defendants next argue that there is not sufficient evidence to support the trial court's findings of fact regarding the physical accommodations at the home of Annie Smithwick, plaintiff's mother, where the child would be spending part of his time. Apparently contending that each finding of fact must be directly supported by competent record evidence, defendants have misconstrued the fact-finding function of the trial court. The trial court's role as a finder of fact was recently discussed by our Supreme Court in *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982):

> Rule 52(a) [requiring the trial court, when sitting without a jury, to make findings of fact] does not of course require the trial court to recite in its order all evidentiary facts presented at the hearing. The facts required to be found specially are those ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.

Id. at 451, 290 S.E. 2d at 657. In defining "ultimate facts," the Court relied on *Woodward v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639 (1951) where the Supreme Court said:

> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. [Citations.] In consequence, a line of demarcation between ultimate facts and legal conclusions is not easily drawn. [Citation.] An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. [Citations.]

Id. at 472, 67 S.E. 2d at 645.

Ultimate facts may be established by evidence that is direct and conclusive, requiring no more of the finder of fact than that it find the evidence credible. On the other hand, ultimate facts may depend on one or more circumstantial evidentiary facts which, even if wholly credible, would require the finder of fact to draw inferences therefrom in order to so find. Professor Brandis denominates such inferences "permissive presumptions." Brandis, N.C. Evidence § 215 (1982).

While there is no evidence that directly supports the trial court's findings of fact with respect to the physical accommodations at the home of Annie Smithwick, there are sufficient evidentiary facts from which to infer the ultimate facts found. Defendants' contention in this regard is therefore without substantial merit.

The remainder of defendants' exceptions and assignment of error that the trial court's findings of fact are not supported by competent evidence amounts to an attempt to reargue the evidence in the hope that this Court will substitute itself for the trial court and accept defendants' version of the evidence. *Beall v. Beall*, 26 N.C. App. 752, 217 S.E. 2d 98, *aff'd*, 290 N.C. 669, 228 S.E. 2d 407 (1976). This we will not do. "The trial court must itself determine what pertinent facts are actually established by the evidence before it and it is not for an appellate court to determine *de novo* the weight and credibility to be given to the evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. at 712-13, 268 S.E. 2d at 189. Our review of the record shows that the trial court's findings of fact are supported by competent evidence. Defendants fail to even allege that the trial court abused its discretion in making these findings or to show that the evidence supporting them is incompetent or insufficient. Absent proof of a clear abuse of discretion, we will not disturb these findings.

Defendants' remaining challenge to the 21 December 1981 Order is that the conclusions of law on which the order is based are not supported by the findings of fact. Defendants' arguments in this regard are essentially the same as those accompanying their exceptions to the findings of fact, to wit: that the evidence does not support the findings on which the conclusions are based. However, defendants fail to demonstrate that the conclusions of

the trial court do not follow from the findings of fact. Inasmuch as we have found the findings of fact to be supported by the evidence, we also find that the conclusions drawn from those facts are sound and properly drawn. Defendants' contention in this regard is without merit.

Defendants' next assignments of error concern the manner in which the hearing was conducted by the trial judge. Defendants contend that the trial judge intimidated defendants and their witnesses and exhibited prejudice against defendants, thereby denying their right to a fair and impartial trial. As defendants do in their brief, we limit our discussion, though not our consideration, to those exceptions thought by defendants to be the most "flagrant" examples of intimidation or prejudice.

Exceptions 67 and 68 refer to a colloquy between the court, the attorneys, the parties, and spectators at the hearing. This colloquy occurred after the close of the first day of testimony and involved not the merits of the case, but an attempt to arrange visitation until the hearing could continue. We fail to see how the behavior excepted to is objectionable under the circumstances. Defendants' contention is without merit.

[3] Defendants' exception to the judge's comment on Mrs. Farmer's testimony, to wit: that she was lying, is rendered groundless by the absence of any jury to be influenced by it. The proscription against the expression of opinion by the trial judge does not attach in a trial without a jury. *Everett v. D.O. Briggs Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). Moreover, the court's comment was admonitory, not accusatory, and consistent with the court's role as finder of fact. *Id.* We find this and defendants' remaining contentions in this regard to be without merit.

[4] Defendants next argue that the trial court improperly excluded certain evidence regarding prior acts of plaintiff and plaintiff's family members. Defendants contend that such evidence is relevant to the question of the child's best interest insofar as it relates to the custodial environment into which the child would be placed. Therefore, defendants argue, the evidence should have been admitted. For the reasons discussed above, evidence of past conduct is of limited concern of the court in matters of child custody. The primary concern being the welfare of the child, the court's judgment must be based on conditions that exist at the

time the judgment is rendered. *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332 (1965). The trial judge has discretion in determining the relevance and weight of certain evidence with regard to the prospective custodial environment. The questions disallowed by the court were objectionable on grounds of relevance, *inter alia*, and the evidence was properly excluded.

Defendants assign as error the trial judge's rulings on objections to certain questions and to the admission of certain testimony. We have considered defendants' arguments and exceptions, where the questions objected to are in the record, and find them to be without merit.

Defendants' final assignment of error, that the trial judge denied defendants' counsel the right to preserve the record on appeal, is without merit.

The Orders appealed from are affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

BAUCOM'S NURSERY COMPANY, A CORPORATION v. MECKLENBURG COUNTY, NORTH CAROLINA; EDWIN B. PEACOCK, JR., CHAIRMAN AND MEMBER OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA; AND WILLIAM H. BOOE, ELISABETH G. HAIR, W. THOMAS RAY AND ANN D. THOMAS, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA

No. 8226SC614

(Filed 7 June 1983)

1. **Declaratory Judgment Act § 4.1— rights affected by zoning ordinance—declaratory judgment proper**

   Plaintiff, owner of a 19.6-acre tract of land for farm and agricultural purposes, properly used the Declaratory Judgment Act to determine if his rights were affected by a zoning ordinance. G.S. 1-264.

2. **Agriculture § 8— agricultural use of plaintiff's land—within public policy of statutes**

   Plaintiff established that its acts and conduct on a 19.6-acre tract of land were within the State's declared public policy of encouraging farming, farmers and farmlands. G.S. 106-550, G.S. 139-2(a)(1), G.S. 106-700, and G.S. 106-583.

3. Municipal Corporations § 80.8— *zoning ordinance*—land excluded as "farm"

The evidence of the size and use of plaintiff's 19.6-acre tract of land fitted within the definition of "farm" contained in a city ordinance.

APPEAL by defendants from *Lewis, Judge.* Judgment entered 22 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 April 1983.

This action is brought under the provisions of the North Carolina Declaratory Judgment Act, G.S. 1-253, *et seq.* and involves a controversy between plaintiff and defendants concerning the legal rights of the plaintiff to the use of its 19.6-acre tract of land, contiguous to its 83-acre tract, in Mecklenburg County.

Plaintiff contends that it has the right under the enabling statute, by which the Zoning Ordinance of Mecklenburg County was adopted, and by Section 2-21 of the Zoning Ordinance, to cultivate its 19.6-acre tract of land for farm and agricultural purposes without interference from the defendants or without any attempt by the defendants to subject said tract to other provisions of the Zoning Ordinance because the 19.6-acre tract is a bona fide farm under the law and is exempt from regulation. The defendants contend the tract is not a bona fide farm, that it is not exempt from regulation under the enabling statute by which the Zoning Ordinance was adopted, that other sections of the Ordinance in addition to Section 2-21 must be considered, and that plaintiff is subject to the defendants' Zoning Ordinance.

Judge Robert D. Lewis heard the case upon the parties' waiver of trial by jury. Both sides presented evidence. The judge made extensive findings of fact and concluded, in part, that the 19.6-acre tract is a bona fide farm within the definition of Section 2-21 of the Zoning Ordinance and that it is exempt from the provisions of the Zoning Ordinance of Mecklenburg County. Defendants appeal.

Boyle, Alexander, Hord and Smith by B. Irvin Boyle for plaintiff appellee.

James O. Cobb for defendant appellants.

BRASWELL, Judge.

[1] The applicable standard for appellate review of a judgment rendered under the Declaratory Judgment Act was enunciated by

this Court in *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E. 2d 473, 475, *disc. rev. denied*, 303 N.C. 315, 281 S.E. 2d 652 (1981), to be as follows:

> "[T]he [trial] court's findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary, and even though incompetent evidence may have been admitted. [Citations omitted.] The function of our review is, then, to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions."

It is fundamental under the Declaratory Judgment Act that a party who considers his rights to be affected by a zoning ordinance, in a situation where there can be no doubt that litigation involving him is imminent, does not have to wait to be sued, but that he may go to court, obtain a declaration of his rights under the ordinance and seek "relief from uncertainty and insecurity with respect to rights, status, and other legal relations." G.S. 1-264. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E. 2d 813 (1971). *See Insurance Co. v. Bank*, 11 N.C. App. 444, 181 S.E. 2d 799 (1971). Several factors created a genuine controversy and uncertainty as to the status of the tract of land and now require resolution by the courts: the existence of the Mecklenburg County Zoning Ordinance during the time in question; the issue of whether the plaintiff's 19.6-acre tract of land was a bona fide farm and therefore exempt from the Zoning Ordinance or whether the tract was used as a plant nursery and greenhouses and not for farm purposes; and the history of dealings between the parties as shown in the record.

[2] It is the public policy of North Carolina to encourage farming, farmers, and farmlands. The General Assembly has stated this policy in various ways:

> "It is declared to be in the interest of the public welfare that the North Carolina farmers who are producers of . . . field crops and other agricultural products, including . . . vegetables . . . as well as bulbs and flowers and other agricultural products . . . shall be permitted and encouraged to

act . . . in promoting and stimulating, . . . the increased production, use and sale, domestic and foreign, of any and all of such agricultural commodities." G.S. 106-550.

"The farm, . . . lands of the State of North Carolina are among the basic assets of the State and the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people . . . ." G.S. 139-2(a)(1).

"It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." G.S. 106-700.

"It is declared to be the policy of the State of North Carolina to promote the efficient production and utilization of the products of the soil as essential to the health and welfare of our people . . . ." G.S. 106-583.

Section 106-583 also sanctions the "[d]evelopment of new and improved methods of production, marketing, distribution, processing and utilization of plant . . . commodities at all stages from the original producer through to the ultimate consumer . . . [and] methods of conservation, development, and use of land . . . ."

By the evidence presented, plaintiff has established that its acts and conduct on the 19.6-acre tract are within the State's declared public policy. The evidence shows that the plaintiff has utilized the most modern and efficient equipment and methods in growing, cultivating and harvesting agricultural products of all kinds,[1] including vegetables and vegetable plants, and in growing and cultivating shrubbery which is used for the prevention of soil erosion, for noise control, and for wind and sun screen. However, about 14 May 1979, defendants' zoning inspector informed the plaintiff that its 19.6-acre tract was zoned for R-12 for single family residences and that plaintiff's raising agricultural products thereon in conjunction with its contiguous 83-acre tract was in

1. Brussell sprouts, broccoli, cabbage, cauliflower, cucumbers, eggplant, greens, lettuce, onions, peppers, potatoes, squash, tomatoes, cantaloupe, watermelons; petunias, snapdragons, verbena, begonias, pansies, vinca; ageratum, alyssum, celosia, coleus, dusty miller, impatiens, marigolds, portulaca, salvia; photinia, ligustrum, burfordi juniper; azaleas, and other types of plants and shrubbery.

violation of the Zoning Ordinance. Plaintiff's subsequent request to be rezoned to RU-Rural District was denied. This declaratory judgment action followed on 1 February 1980.

The basic evidence and findings of fact are not substantially in dispute. Plaintiff purchased the 19.6-acre tract in 1976, and during the three years prior to institution of this action in 1980, plaintiff prepared, developed and used the land for agricultural purposes in conjunction with its adjacent 83-acre tract. It is the application of the law to the facts that divide the parties. We now take a closer look at the zoning law.

[3] The grant of the power of zoning was given to the counties by the General Assembly in 1959 by former G.S. 153-266.10, now redesignated G.S. 153A-340. This enabling act allows a county to regulate and restrict, among other things, "(5) The . . . use of . . . land for trade, industry, residence, or other purposes, *except farming*. These regulations may not affect *bona fide farms*, but any use of farm property for nonfarm purposes is subject to the regulations." (Emphasis added.) In 1967 the enabling act was amended through an act applying only to Mecklenburg County to add this sentence: "The board of county commissioners, as part of any ordinance adopted pursuant to this Article, may define 'bona fide farm' and 'farm purposes' in such reasonable manner as it may deem wise." 1967 N.C. Sess. Laws ch. 611.

Pursuant to the enabling act, Mecklenburg County adopted a Zoning Ordinance on 20 November 1967, which, as amended from time to time, remains in full force and effect. Section 2-21 of the Zoning Ordinance defines bona fide farm in these words:

> "*Farm, Bona Fide.* Any tract of land containing at least three (3) acres which is used for dairying or for the raising of agricultural products, forest products, livestock or poultry and including facilities for the sale of such products from the premises where produced provided that, a farm shall not be construed to include commerical poultry and swine production, cattle feeder lots and fur-bearing animal farms."

Although the evidence may not show that plaintiff's operations fit the traditional and historic concept of a "farm," the evidence does show that to equip itself for the raising of agricultural products plaintiff has worked with N.C. State Uni-

versity Division of Agriculture, Clemson University, N.C. Department of Agriculture, and others. By experimentation and utilization of various methods of improving the raising of agricultural products, such as cost analysis, fertilizer control, pesticides, seeds, insecticides, plant analysis to fertilizer, nutrients, and soil mixture, plaintiff has developed a successful operation. Plaintiff grows many plants in pots on top of plastic ground cover, instead of planting seeds in the ground. Plaintiff utilizes a lake, greenhouses, cold frames, hanging baskets, pottings sheds, planting beds, and other methods of cultivation advocated by the N.C. State Department of Agriculture. Plaintiff's improved methods of cultivation enable it "to produce on one acre what we used to produce on 50 acres," without the use of the traditional farm mule or row plow. Section 2-21 of the Zoning Ordinance does not say "how" the products must be raised on the land but that its use be "for the raising of agricultural products." Likewise, this section does not say that it is subject to any other provision of the Zoning Ordinance. The record before us contains abundant competent evidence to support the trial judge's findings of fact concerning the "raising of agricultural products." Thus, it follows that a 19.6-acre tract of land [more than 3 acres] which is used for the raising of agricultural products [*i.e.*, vegetables, plants, shrubbery for soil erosion control] and including the facilities for the sale of such products from the premises where produced constitutes a bona fide farm.

Even so, defendants argue that the provisions of Section 2-21 "should not annul the efficacy of more specific provisions of the ordinance." Defendants contend that seven other sections were more specific; that all the other sections were ignored and disregarded by the trial judge; that these seven sections prohibit plaintiff's present use of the 19.6-acre tract; and that for this error of law in failing to apply these sections, the case should be reversed and remanded with direction to the plaintiff "to remove its greenhouse and plant nursery beds from this area, and to refrain from any future use of the 19.6 acre tract in connection with the activities presently conducted upon the adjoining 84 acres." We disagree and will examine the seven sections.

The jurisdiction section, 1-3 of the Ordinance, applies to all use of land in unincorporated areas, then adds: "[H]owever, these regulations shall not be applicable to bona fide farms, except that

such regulations shall be applicable in cases where non-farm uses are made of farm properties." We agree with defendants that this language is consistent with the enabling act of the General Assembly, that no effort was made to regulate bona fide farms, and that the regulations are applicable to non-farm use. We also agree with defendants' example that "a used car lot upon an area of a farm" would be a non-farm use made of farm properties. However, the evidence shows a farm use by plaintiff "for the raising of agricultural products." This section does not aid the defendants.

Another specific section is 3-1, Rural District, which provides: "The major uses permitted within this district are farms and residences plus commercial activities and enterprises related to agriculture, such as dairies, plant nurseries, and rural home occupation." Solely because this section mentions "plant nurseries" and because plaintiff once applied to have the 19.6-acre tract rezoned to Rural District are not of themselves controlling in a declaratory judgment action. The evidence before the Superior Court supported the judge's finding that as of the time of trial the plaintiff was making use of the property "for the raising of agricultural products." When agricultural products are grown, in part, in "plant nurseries" upon a tract of land containing not less than three acres, and within the ordinance definition of bona fide farm, the fact that "plant nurseries" may also be utilized in a Rural District does not require the bona fide farm to be zoned Rural District. It is exempt by the enabling act in conjunction with Section 2-21 of the Ordinance.

Defendants cite Section 4-1 for our consideration. This section is captioned "Zoning Affects Every Building and Use." Its last sentence reads: "The regulations contained herein shall not be applicable to bona fide farms." Thus, the Ordinance clearly expresses an intention not to regulate bona fide farms.

Defendants cite Section 6-2.1 as being a direct, explicit prohibition of the plaintiff's activities. This section is a table of permitted uses and is defendants' Exhibit No. 9. On page two of the exhibit is the following use: "Farm-type enterprises when not considered as being part of bona fide farms, such as . . . plant nurseries, green houses . . . vegetable packing sheds, the sale of . . . vegetables and similar farm products, . . . and similar uses

. . . ." Defendants argue that this table of uses permits the listed activities to be done only in Rural Districts, Light Industrial and General Industrial Districts. On the contrary, we hold that the explicit language of this table exempts plant nurseries, greenhouses, and vegetable packing sheds when they are considered as being a part of a bona fide farm. The evidence supports the trial judge's conclusion that the 19.6-acre tract of land is a bona fide farm and thus the complained of farm-type enterprises of the plaintiff must be considered as being a part of a bona fide farm.

Through Exhibit No. 10, defendants refer to an examination of Section 6-2.3 of the Ordinance. This exhibit is another table of uses, and it shows that "Greenhouses and nurseries involving retail and wholesale sales" are excluded from all residential districts. We agree with this interpretation, but must repeat that the evidence presented in the trial court shows that the 19.6-acre tract is a bona fide farm. When the whole of the Zoning Ordinance is read collectively, including the tables of uses contained in Exhibits Nos. 9 and 10, it shows that farm-type enterprises of greenhouses and plant nurseries, when used as a part of a bona fide farm, are exempt from the Zoning Ordinance.

Another section of the Ordinance with a negative proviso is Section 7-21.1. This section states: "When not considered as being part of bona fide farms, farm-type enterprises, such as . . . plant nurseries, green houses, fruit or vegetable packing sheds, the sale of fruit, vegetables and similar farm products . . . and similar uses are permitted within the Rural District subject to the following provisions, and other pertinent provisions of this ordinance." Although this section does define "farm-type enterprises," we cannot overlook that it also contains the disclaimer of "When not considered as being part of bona fide farms." We hold that plant nurseries and greenhouses when used in conjunction with bona fide farms are excluded from this section of the Zoning Ordinance.

The final section of the Ordinance cited by defendants is Section 4-23. This section is a statement of the proposition that if a particular land use is not affirmatively permitted within a zoning district, such use is prohibited. Even though we agree with defendants' statement that "The Mecklenburg County Zoning Ordinance is complicated," this specific section does not aid defendants because the plaintiff's evidence brought it within the

meaning of the enabling act and the exemption of Section 2-21 by being a bona fide farm. Our Supreme Court has held: "A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use." *In Re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1967).

Although the word "farm" appears in more than one section of the County's complex Ordinance, Section 2-21 does unconditionally define bona fide farm in a reasonable manner. Even when the seven other sections cited by the defendants are integrated into our consideration, the Ordinance definition of bona fide farm, as applied to this case, means (1) 3 or more acres of land, (2) used for the raising of agricultural products. This definition and the enabling act are clear and unambiguous. The evidence of the size and the use of the 19.6-acre tract fits the definition contained in the Ordinance.

We hold that the record before us does contain competent evidence to support the findings of fact of the trial judge and that the findings support the conclusions of law in the judgment.

For the foregoing reasons the judgment exempting plaintiff's 19.6-acre tract from the Zoning Ordinance is

Affirmed.

Judges WEBB and WHICHARD concur.

ROSE'S STORES, INC. v. CHARLES E. PADGETT, GENERAL MUSIC CORPORATION, AND FUTURES MANAGEMENT, LTD.

No. 829SC515

(Filed 7 June 1983)

Constitutional Law § 24.7; Process § 14.3— individual defendant—foreign corporation—personal jurisdiction—suffficient minimum contacts

In an action to recover for breach of fiduciary duty by the individual defendant in accepting kickbacks through defendant Virginia corporation for records and tapes bought for plaintiff while an employee of plaintiff, the courts

of this State could assert personal jurisdiction over the individual defendant since he was a resident of North Carolina during the period of the alleged illegal kickbacks; furthermore, defendant Virginia corporation had sufficient minimum contacts with North Carolina to permit courts of this State to assert personal jurisdiction over it where the individual defendant had a number of financial and supervisory contacts with the corporation and functioned as the alter ego of the corporation while he was a resident of North Carolina, and where agents of the corporation made buying trips to North Carolina and on at least two occasions made purchases of musical recordings in this State totalling several thousand dollars. G.S. 1-75.4; G.S. 55-145.

APPEAL by defendant, Futures Management, Ltd., from *Hobgood, (Robert), Judge.* Order entered 8 January 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 11 April 1983.

This is a civil action wherein the plaintiff makes the following relevant allegations in its complaint:

. . .

3. That, at all times hereinafter complained of, Charles E. Padgett was employed by Rose's Stores, Inc., was Vice President of said corporation, and in such capacity acted as general merchandise manager of the corporation supervising the purchase of merchandise.

4. That, at all times hereinafter complained of, Charles E. Padgett owned all or substantially all of the stock of Futures Management, Ltd. and/or that he was doing business as Futures Management, Ltd.

5. That at all times hereinafter referred to, the defendant General Music Corporation operated as a manufacturer and/or wholesale distributor of musical recordings and tapes which it sold and distributed to retail merchandising businesses. That on or about August 25, 1978 the defendant General Music Corporation executed and delivered a check in the amount of $18,897.36 payable to Futures Management, Ltd. which said check was executed and delivered as a gift gratuity or commission for the benefit of Charles E. Padgett for the purpose of influencing his action in relation to the business of Rose's Stores, Inc. and particularly to induce said Charles E. Padgett to purchase merchandise manufactured or distributed by the defendant General Music Corporation.

That said payment was made in violation of G.S. § 14-353 and as an unfair or deceptive practice or act in the conduct of a trade or business in violation of G.S. § 75-1.1 et seq.

6. That the defendant Charles E. Padgett requested or accepted said gift or gratuity in the amount of $18,897.36 while an agent, servant and employee of Rose's Stores, Inc. under an agreement with General Music Corporation or with an understanding that he would act in a particular manner in relation to Rose's Stores, Inc. business and more particularly that he would purchase merchandise distributed or manufactured by General Music Corporation. That, being authorized to procure materials, supplies or other articles either by purchase or contract for Rose's Stores, Inc., Charles E. Padgett received, directly or indirectly, for himself or for another, said sum of money as a commission, discount or bonus from General Music Corporation. That the same was in violation of G.S. § 14-353 and constituted an unfair and deceptive trade practice or act as prohibited by G.S. § 75-1.1. That the action of the defendant General Music Corporation in paying said sum to the defendant Charles E. Padgett and the action of the defendant Charles E. Padgett in accepting said sum was willful, malicious and fraudulent.

. . .

8. That Futures Management, Ltd., as alleged herein, is a Virginia corporation owned by the defendant Charles E. Padgett at the time of the matters herein complained of. That said Futures Management, Ltd. was used as a vehicle by said Charles E. Padgett for the purpose of concealing the sum received by him pursuant to the agreement set forth herein. That on information and belief plaintiff alleges that Futures Management, Ltd. received all or part of the funds herein specified.

The defendant, Futures, moved to dismiss the complaint against it for lack of personal jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b). In support of its motion to dismiss, the defendant, Futures, filed affidavits, answers to interrogatories and depositions which tended to show that Futures is a Virginia corporation engaged in maintaining retail outlets which sell material, notions, domestic goods and ready-to-wear items and that it has

maintained outlets in Virginia, Kentucky and Tennessee, but it has never operated a store in North Carolina.

After a hearing on the motion, the trial judge made the following findings of fact:

1. On January 14, 1974 the defendant Charles E. Padgett was promoted to Sales Manager of Rose's Stores, Inc., the plaintiff, and moved to Henderson, North Carolina (the home office of Rose's Stores, Inc.) during the month of March 1974. As Sales Manager Charles E. Padgett was responsible for all company sales which included advertising promotions, special selling events and in connection with such special selling events he was in charge of buying the merchandise. As Sales Manager he reported directly to the President of Rose's Stores, Inc., L. H. Harvin, Jr. On May 22, 1975 Charles E. Padgett was promoted to Vice President of Sales and Merchandising. As Vice President of Sales and Merchandising, Charles E. Padgett was responsible for all functions which he had as Sales Manager, and in addition was placed in charge of all buying functions and had supervision of all buyers. As Vice President of Sales and Merchandising, he reported directly to the President of the Company, L. H. Harvin, Jr. Charles E. Padgett's employment with Rose's Stores, Inc. was terminated on February 27, 1979. From the date on which Charles E. Padgett moved to Henderson in March 1974 until his employment was terminated on February 27, 1979, Charles E. Padgett was a resident of Henderson, North Carolina, and resided at 1256 David Avenue, Henderson, North Carolina, and was at all times employed by Rose's Stores, Inc. in the capacities set forth above.

2. On February 11, 1980, Charles E. Padgett and Betty Myers became stockholders of Futures Management, Ltd. and on February 16, 1981, Dan Hardee of Mt. Sterling, Kentucky, became a stockholder.

3. Charles E. Twisdale was the bookkeeper for Futures Management, Ltd. from the date of its incorporation to the present and is currently also serving as Secretary-Treasurer of the corporation. Futures Management, Ltd., a Virginia corporation, was organized by Vincent J. Mastracco, an attorney in Norfolk, Virginia. At the time of the organization of said

corporation, Vincent J. Mastracco was the sole stockholder as nominee for persons not named in the Charter. The stock of said corporation was later placed in the names of Charles Padgett and Betty Myers and later in February or March 1981 was placed in the names of Padgett, Myers and Hardee. During the period of time that the activities alleged in the complaint and amended complaint were taking place, the sole stockholders of Futures Management, Ltd. were in fact Charles E. Padgett and Betty Myers, both of whom resided in Henderson, North Carolina, and both of whom were employed by Rose's Stores, Inc.

From Henderson, North Carolina, using the mail, telephone and bank wire service, provided within this state they directed and supervised the operation, management and financing of Futures Management, Ltd. Padgett repeatedly called Twisdale from Henderson, North Carolina, mostly in the evening, and they discussed "what we were going to do with the business", as well as finances and merchandise to be purchased for the stores.

On a regular basis Twisdale received funds from Padgett and Myers for the Futures Management, Ltd. account, often sent in the mail from Padgett's house in Henderson, North Carolina. Twisdale recalls that the amount of $18,897.36 (which is the exact amount of the defendant General Music check to Futures Management, Ltd. dated August 25, 1978) was posted as one of the first amounts in the Futures Management [account].

Charles Padgett obtained a check on August 25, 1978 in Charlotte, North Carolina from General Music Corporation, gave the check back to General Music and asked them to reissue the check in the amount of $18,897.36 in the name of Futures Management, Ltd. and ultimately, that check was used to acquire a bank check from a bank in Charlotte, North Carolina. Charles Padgett brought that check back across the State of North Carolina and caused it to be deposited in the Futures Management, Ltd. account on August 29, 1978.

. . .

Futures also at least twice purchased records from defendant General Music in Charlotte, North Carolina for

several thousand dollars. On page 78 of his deposition Twisdale indicates that a Futures' employee, Wayne Eastridge, went on several buying trips to North Carolina to buy merchandise and store fixtures.

Although Futures was operating as a retailer in Virginia, the overall supervision and direction of the corporation, especially the financial direction, came from Padgett and Myers in Henderson, North Carolina. Twisdale testified that all the funds in the Futures' investment account, which appears to be its only capital asset other than fixtures and inventory, were received either by mail from Padgett in North Carolina or from Myers, or from funds wired directly to Futures' bank account from North Carolina. In Twisdale's words, "On many occasions Miss Myers would call up (from Henderson, North Carolina) and say Mr. Padgett's going to wire money into the account and give me the amount."

Twisdale testified that all sets of the tax returns for Futures were sent directly to Padgett in Henderson, North Carolina from the accounting firm of Peat, Marwick & Mitchell. When it was necessary for Futures to borrow money, Padgett pledged his personal certificate of deposit for a $35,000.00 loan to Futures, and also signed the Note for Futures.

. . .

From an order denying the defendant Futures' motion to dismiss, Futures appealed.

Ward and Smith, by David L. Ward, Jr., and Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn for the plaintiff, appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Eugene W. Purdom for the defendant, appellant.

HEDRICK, Judge.

The defendant first argues the findings of fact are not supported by the evidence in the record. Futures contends that the trial judge erred in finding Padgett and Myers to be the sole shareholders during the period of activity complained of in the

plaintiff's complaint on grounds that the record shows they did not become shareholders until 11 February 1980, almost a year after Padgett's employment was terminated with Rose's. Futures argues that the findings pertaining to Padgett's "supervision" of Futures and his "business conversations" with Twisdale were erroneous because Twisdale's testimony was "not specific as to times or places" and because Twisdale had talked to Padgett only "eight or ten times since June 6, 1978." Futures further contends that the trial court's finding that Padgett brought an $18,897.36 check across North Carolina and deposited it in the Futures management account is "pure speculation." Finally, the defendant asserts there are not sufficient "minimum contacts" with North Carolina to establish personal jurisdiction.

The question of personal jurisdiction is controlled by a two-part determination: (1) a statutory basis must exist for finding personal jurisdiction and (2) the exercise of personal jurisdiction must meet the requirements of constitutional due process. *Dillon v. Funding Corp.*, 291 N.C. 674, 675, 231 S.E. 2d 629, 630 (1977). *See* Annot., 20 A.L.R. 3d 1201 (1968). In this case, N.C. Gen. Stat. § 1-75.4 and § 55-145 set forth the applicable statutory requisites. The "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) controls the due process prong of the two-part test. The United States Supreme Court refined this standard in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> The application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

See also Farmer v. Ferris, 260 N.C. 619, 133 S.E. 2d 492 (1963); *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974); and *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). "Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion thereof comports with due process." *Kaplan School Supply v. Henry Wurst, Inc.*, 56 N.C. App. 567, 570, 289 S.E. 2d 607, 609 (1982) (citations omitted).

The basis of plaintiff's claim against the defendant, Futures, is found in the critical allegations in the complaint that the defendant, Padgett, breached his fiduciary relationship as an employee of Rose's by using the defendant, Futures, as a vehicle to conceal the allegedly illegal commissions from General Music Corporation. The substance of plaintiff's claim against Futures is that Padgett was at all times Futures' alter ego, and that as such Futures was carrying on "substantial activity" in this state within the meaning of N.C. Gen. Stat. § 1-75.4(1)(d). The evidence, adduced at the hearing on the defendant's motion, tends to show that Futures stock was in the name of Vincent J. Mastracco, Jr. as nominee during the time that Padgett was allegedly receiving the "unlawful kickbacks" from General Music Corporation and that he and Myers eventually took the stock after he severed his relationship with the plaintiff. The evidence, therefore, does not support the court's finding that Padgett and Myers were the sole stockholders during the activities alleged in the complaint, but it is sufficient to raise the inference that Padgett and Myers were in control of the corporation, although officially they were not stockholders. The finding of fact that Padgett and Myers "directed and supervised the operation, management and financing of Futures Management, Ltd." is supported by Twisdale's testimony that he and Padgett discussed finances, merchandise and "what they were going to do with the business." The finding is further substantiated by Twisdale's statement that Myers often called to give him the amount of money Padgett was wiring to his Futures Investment account. Although Futures challenges the finding of fact that "Padgett repeatedly called Twisdale" by arguing that "eight to ten" phone calls does not constitute repeated contacts, we feel the trial judge's basic finding of fact as to Padgett's participation in Futures' corporate business is supported by the evidence.

Also, we think there is sufficient evidence to raise a reasonable inference that Padgett deposited in Futures' account a check he had obtained from General Music Corporation for allegedly illegal commissions. There is no conclusive evidence that Padgett carried the same check across North Carolina and deposited it in the Futures account, but there was evidence presented at the hearing from General Music Corporation that Padgett did receive a check for $18,897.36 and Twisdale's deposition reveals that a

deposit for precisely $18,897.36 was credited to Padgett's investment account with Futures. Even though all of the court's findings do not match up with evidence presented, every critical part of the findings of fact is substantiated by the evidence. Therefore, defendant's argument that the trial judge's findings of fact are not supported by the record is overruled.

We are also unconvinced by the contention that Futures did not have the requisite "minimum contacts" with North Carolina to establish jurisdiction. The judge's findings indicate Padgett had a number of financial and supervisory contacts with Futures. Thus, Padgett functioned as the alter ego of Futures while he was a resident of North Carolina. Since Padgett was a North Carolina resident during the period of the illegal activities alleged, he is clearly subject to personal jurisdiction in North Carolina, and since he acted as the alter ego of Futures, Futures is likewise subject to the jurisdiction of North Carolina courts. In addition, the evidence tends to show that agents of Futures made buying trips to North Carolina and on at least two occasions made purchases of musical recordings from General Music Corporation totalling several thousands of dollars.

The order denying the defendant's motion to dismiss is

Affirmed.

Chief Judge VAUGHN and Judge ARNOLD concur.

IN THE MATTER OF: THE ESTATE OF RICHARD SWINSON, JR.

No. 828SC780

(Filed 7 June 1983)

1. Clerks of Court § 3; Courts § 6.1— appeal of probate matter—jurisdiction of superior court

When an order or judgment appealed from in a probate matter fails to show any specific exceptions, the role of the trial judge upon appeal to the superior court is to review the order of the clerk for errors of law only, and it is not proper to have a trial *de novo* or to hear any evidence in superior court. However, when the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been

taken, the role of the trial judge on appeal is to apply the whole record test, and if there is evidence to support the findings of the clerk, the judge must affirm.

2. **Courts § 6— civil actions or special proceedings before clerk—jurisdiction on appeal to superior court**

In cases originating before the clerk which are properly called "civil actions" or "special proceedings" as contemplated by G.S. 1-276, the hearing on appeal to the superior court is *de novo,* and it is appropriate for the trial court to hear evidence.

3. **Marriage § 6; Wills § 61.2— widow—right to dissent—presumption of validity of second marriage**

Where petitioner proved her marriage to deceased but failed to offer proof of divorce from or death of a prior husband, the trial court properly concluded that petitioner was the widow of deceased and thus entitled to dissent from his will upon the basis of the unrebutted presumption of the validity of a second marriage.

APPEAL by respondents from *Llewellyn, Judge.* Order entered 4 March 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 May 1983.

In this estate action Eudora Holmes Swinson, as a widow, filed her dissent to the will of Richard Swinson, Jr. The parties respondent, Nellie Brown and James Brown, are residuary legatees under the will.

After evidentiary hearing before the Clerk of Superior Court an order was entered on 5 February 1982 dismissing the dissent. Eudora Holmes Swinson appealed to Superior Court.

After evidentiary hearing in Superior Court an order was entered validating the dissent and ordering the Clerk to give full force and effect to the dissent. The respondents appealed.

Earl Whitted, Jr., for respondent appellants.

Barnes, Braswell & Haithcock, by W. Timothy Haithcock for petitioner appellee.

BRASWELL, Judge.

The main issue is whether Eudora Holmes Swinson was the lawful wife of Richard Swinson, Jr., so as to be qualified to dissent from his will at his death. For the reasons stated below we hold that she was lawfully married to Richard Swinson, Jr., that

as his widow she could and did dissent, and that the dissent is valid as a matter of law on the facts of this case.

On 3 July 1981 Richard Swinson, Jr., died testate. On 29 July 1981 his will was admitted to probate. The will made no provision for Eudora Holmes Swinson. She filed a dissent on 2 September 1981.

Richard Swinson, Jr. was married twice. His first wife, Estelle Cox Swinson, died on 7 August 1976. The second marriage was to Eudora Holmes Swinson on 26 July 1980.

It appears in the findings of fact in the Clerk's order dismissing the dissent that Eudora Holmes Swinson had been married on some undisclosed date (more than 30 years previously) to Herman Holmes. Herman Holmes had not been seen or heard from for over 29 years and three months. Eudora did not produce any direct evidence that she was divorced from Herman Holmes or that Holmes was dead at the time of her marriage to Richard Swinson, Jr. Upon the evidence of proof of marriage to Richard but failure of proof of divorce from or death of Herman, the Clerk concluded as a matter of law:

> "3. That Eudora Holmes Swinson failed to carry the burden of proof and establish that she is the lawful wife of Richard Swinson, Jr. sufficient to entitle her to inherit within the definition and meaning of the laws of INTERSTATE [*sic*] SUCCESSION specifically G.S. 29-14."

There were no specific exceptions to any of the Clerk's findings of fact or conclusions of law. The record shows only a notice of appeal to Superior Court.

Once in Superior Court the appellant, Eudora Holmes Swinson, offered evidence as if on trial *de novo.* The respondents did not offer any evidence. The findings of fact essential to our consideration were substantially the same in the Superior Court order as in the Clerk's order. However, the trial judge made different conclusions of law:

> "1. That the recognized presumption of the validity of a second or subsequent marriage as applied to the marriage between Richard Swinson, Jr., and Eudora Cobbs Holmes Swinson has not been rebutted or overcome by competent evidence.

2. That at the time of the death of Richard Swinson, Jr., he was lawfully married to Eudora Cobb Holmes Swinson, and she, at the time of his death, became his lawful widow."

The respondents appealed from this order. The record fails to show any specific exception to any finding of fact or conclusion of law in the order as made by the trial judge. *See* Rule 10(b)(1), N.C. Rules App. Proc.

[1] Before we consider the law on the merits, we deem it essential to chart the path of the standard for review of orders from the Clerk to the Superior Court, and then to the appellate court. In probate matters, as in a dissent from a will, the Clerk of Superior Court has original jurisdiction. After an evidentiary hearing the Clerk has a duty to make findings of fact, to make conclusions of law, and to enter the judgment accordingly. The aggrieved party who appeals should make specific exceptions to any finding or conclusion with which he disagrees. He should except to the entry of judgment. When the order or judgment appealed from fails to show any specific exceptions, and the case is before the Superior Court, the role of the trial judge is to review the order of the Clerk for errors of law only. It is not proper to have a trial *de novo* or to hear any evidence in Superior Court.

When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. If there is evidence to support the findings of the Clerk, the judge must affirm. If a different finding could be supported on the same evidence, the trial judge cannot substitute his own finding for that of the Clerk. It is not a *de novo* hearing. The trial court is sitting as an appellate court, since its jurisdiction is derivative.

[2] In cases that originate before the Clerk and which are properly called "civil actions" or "special proceedings" as contemplated by the terms of G.S. 1-276, and when there is an appeal to Superior Court, the hearing is *de novo* in Superior Court. Only in *de novo* hearings is it appropriate for the trial court to hear evidence. G.S. 1-276 does not apply to probate matters. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976); *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967).

Reviewability on appeal of the exercise of the powers granted a Clerk of Superior Court for revocation of letters of administration has been addressed by our Supreme Court in *In re Taylor*, 293 N.C. 511, 519, 238 S.E. 2d 774, 778 (1977), as follows:

> "Upon appeal to the Superior Court, the trial judge may review any of the Clerk's findings of fact when the finding is properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings. However, absent exceptions to specific findings of fact, a general exception to the judgment only presents the question of whether facts found support the conclusions of law."

In the case before us, specific exceptions were not taken.

The function of the court in the review of probate matters was considered in *Lowther, supra.* The Supreme Court stated:

> "To say that the Superior Court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions."

In re Estate of Lowther, supra, at 354, 156 S.E. 2d at 700-01.

Lowther also cites *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421 (1952). In its discussion of *Sams, Lowther* quotes this distinction which is applicable to our case: "However, there was no objection or exception to the *de novo* hearing . . . and . . . no prejudicial error has been made to appear." *In re Sams, supra,* at 230, 72 S.E. 2d at 422.

Lowther, at 355-56, 156 S.E. 2d at 702, sets forth the correct rule to be:

> "Where no exceptions are taken to specific findings of fact, a general exception to the judgment presents only the question whether the facts found support the conclusions of law. [Citations omitted.] Where such exceptions are properly taken to specific findings of fact, however, it remains the rule that the judge will review those findings, and either affirm, reverse of modify them. If he deems it advisable, he may submit the is-

> sue to a jury. Obviously, he could not follow this latter course without hearing evidence."

When a dissent from a will was before our Court in *In re Snipes*, 45 N.C. App. 79, 262 S.E. 2d 292 (1980), the record showed that the trial judge refused to hear the testimony from a witness offered by appellant. In finding no error, it was noted that "[t]he authority and duty of the Superior Court was limited to review of the Clerk's findings of fact and conclusions of law." *Id.* at 82, 262 S.E. 2d at 294.

There being only a general objection to the Superior Court judgment, the standard for our appellate review is whether the facts found by the trial judge support the judgment. Because there was no objection or exception to the *de novo* hearing in the Superior Court, and no prejudicial error appears on the face of the record, we do not examine the evidence on which the trial judge's findings of fact are based. *See In re Sams, supra,* at 229-30, 72 S.E. 2d at 422.

[3] Here, the appeal of Eudora Holmes Swinson from the Clerk to the trial court carried to the judge the single question of whether Eudora carried her burden of proof of the death of or divorce from Herman Holmes. The face of the order shows error in that the Clerk applied the wrong burden of proof. The Clerk had found as a fact that Eudora was married to Richard Swinson, Jr., in a ceremony solemnized in Wayne County on 26 July 1980. The Clerk incorrectly concluded that Eudora had failed to carry the burden of proof that she was the lawful wife of Richard. The conclusion of the trial judge in his order properly applied the law of the recognized presumption of the validity of a second marriage. This conclusion was based upon the same basic evidence as in the Clerk's order.

The law of burden of proof of a second marriage was affirmed in *Chalmers v. Womack*, 269 N.C. 433, 436, 152 S.E. 2d 505, 507 (1967), when it quoted with approval from *Kearney v. Thomas*, 225 N.C. 156, 163-64, 33 S.E. 2d 871, 876-77 (1945).

> " ' "A second or subsequent marriage is presumed legal until the contrary be proved, *and he who asserts its illegality must prove it.* In such case the presumption of innocence and morality prevail over the presumption of the continuance of

> the first or former marriage." . . . Moreover, *proof of the second marriage . . . raises a presumption of its validity,* upon which property rights growing out of its validity [may][1] be based.' " (Emphasis added.)

Stewart v. Rogers, 260 N.C. 475, 481, 133 S.E. 2d 155, 159 (1963); 1 R. Lee, N.C. Family Law § 15 (4th ed. 1979).

This principle of law from *Kearney* was considered by the Virginia Supreme Court in *Parker v. American Lumber Corp.,* 190 Va. 181, 56 S.E. 2d 214 (1949), and found to be the decided weight of authority. Our Court quoted *Parker* with approval in *Denson v. Grading Co.,* 28 N.C. App. 129, 131, 220 S.E. 2d 217, 219 (1975):

> " '[W]hen two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than or overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. When both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce.' "

Also, in *Denson, supra,* at 131, 220 S.E. 2d at 219, the court held that, "The mere proof that one party had not obtained a divorce is not sufficient to overcome the presumption, since the other party might have obtained a divorce." *Parker v. Parker,* 46 N.C. App. 254, 257, 265 S.E. 2d 237, 239 (1980).

We find that the trial judge applied the correct burden of proof, and the Clerk applied the incorrect burden of proof upon the finding of a proven second marriage of Eudora with Richard Swinson. There being no evidence to overcome the presumption of validity of the second marriage, we hold that the facts found by the trial judge support his conclusion of law and thus support the order. We further hold that Eudora Holmes Swinson is the widow of Richard Swinson, Jr., and, as such, is entitled to dissent from her husband's will.

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1. We note that *Chalmers, supra,* at 436, 152 S.E. 2d at 507, uses the word "must" in quoting *Kearney,* whereas the text in *Kearney, supra,* at 164, 33 S.E. 2d at 877, shows the word "may," which is the word we adopt.

The order of the Superior Court validating the dissent is

Affirmed.

Judges ARNOLD and WEBB concur.

GREGG HORNBY, D/B/A THE TOUCH OF GLASS v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, AND C. BENJAMIN SPRADLEY, D/B/A C. BENJAMIN SPRADLEY INSURANCE

No. 825SC409

(Filed 7 June 1983)

1. Insurance § 4— insurance binder—not in effect at time of fire

Plaintiff was not covered by a valid binder at the time of a fire which destroyed his property where, on the face of the binder, it was obvious the binder had expired prior to the time of the fire. G.S. 58-177(4).

2. Insurance § 2.2— sufficiency of evidence of insurance company's negligence in failing to effect insurance coverage

The evidence was sufficient to go to the jury on the question of whether an insurance company was negligent by its own actions in failing to effect insurance coverage where there was evidence that the company was aware of plaintiff's application for insurance since their agent testified that he contacted the company two to four times between the date of the application and the date of the fire and that it never acknowledged whether the application had been received.

3. Insurance § 2.2— liability of insurance company for negligence on part of agent

Where plaintiff alleged and his evidence tended to prove that the person with whom he dealt concerning insurance was defendant insurance company's actual and apparent agent, that the agent had authority to bind the insurance company, that the insurance company entered into a contract of insurance with plaintiff, that the agent repeatedly told plaintiff prior to the fire and for several days thereafter that he had insurance coverage, and that the agent failed to take those steps necessary to effect insurance coverage, the trial court improvidently entered a directed verdict for the insurance company on the issue of whether the insurance company was liable for negligence on the part of its agent.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 6 August 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 February 1983.

This is an action to recover damages incurred by plaintiff when property he owned was destroyed by fire on 23 December 1977. Plaintiff alleged a number of claims for relief against Pennsylvania National Mutual Casualty Insurance Company (Penn), including breach of contract and, in the alternative, negligent failure to effect insurance coverage. Plaintiff also alleged a claim for relief against Penn's agent, Benjamin Spradley, for negligent failure to procure insurance coverage.

Plaintiff's evidence tended to show the following: At all times pertinent to this appeal, Spradley, an independent insurance agent, had "full power and authority to receive and accept proposals for insurance including binding authority," pursuant to an agency agreement with Penn. Spradley was also authorized to write insurance policies for Penn. Penn's and Spradley's agency agreement stated that the relationship of employer and employee did not exist between Penn and Spradley and that Spradley was an independent contractor.

On 4 March 1977, plaintiff gave Spradley a $200 down payment toward an annual premium of $600 for a policy to insure a building, which plaintiff owned, for $25,000 and to insure its contents for $10,000. Spradley told plaintiff that he "was covered" by Penn, effective 9 March 1977. An application for insurance, completed by plaintiff, indicated an effective date of 9 March 1977. Spradley deposited the $200 check he received from plaintiff in his own account, and on 11 March he mailed the application to Penn in the regular course of his business. The application was mailed in an envelope furnished to Spradley by Penn. There was no evidence that Penn actually received the application prior to the fire. A written policy was never issued to plaintiff. Upon failing to receive a policy, plaintiff contacted Spradley numerous times inquiring about the policy. Spradley repeatedly assured plaintiff that he was covered and told plaintiff that Penn was slow in sending out policies. Spradley testified that he called the company two to four times between 11 March and the day of the fire but "[t]hey never acknowledged either way whether they received the application."

In October 1977, Waccamaw Bank, which held a mortgage on plaintiff's property, contacted Spradley and requested verification of insurance coverage. To accommodate the bank, Spradley pre-

pared a binder, dated 11 October 1977, which stated that pending issuance of a policy, insurance coverage was bound for a 90 day period, effective 15 August 1977 through 15 November 1977. Although the binder stated that it was countersigned on its effective date, Spradley testified that it was actually countersigned on the date it was prepared, 11 October 1977. The binder provided that it would be "continuous for 12 months with policy issued as replacement of binder" and that it would "not continue in force beyond the expiration date stated herein." A copy of the binder was given to the plaintiff, but not to Penn.

In late October, plaintiff requested that Spradley increase the amount of insurance coverage on the contents of the building from $10,000 to $40,000. Plaintiff testified that Spradley told him it would be "no problem." Spradley then told plaintiff he was covered for the increased amount. Spradley testified, as an adverse witness, that he told plaintiff he only had authority to bind coverage on the contents for $10,000 and could not increase it to $40,000, but that as soon as the written policy was issued he would request an increase in coverage from the company.

On 23 December 1977, plaintiff's building and its contents were almost completely destroyed by fire. While the building was burning, Spradley assured plaintiff that he had insurance coverage. Sometime later he was told that coverage was being denied on his claim.

At the close of plaintiff's evidence, the trial court granted a directed verdict in favor of Penn and denied Spradley's motion for directed verdict. Plaintiff took a voluntary dismissal without prejudice as to Spradley and appealed from the judgment awarding Penn a directed verdict.

Rose, Rand, Ray, Winfrey and Gregory, by Ronald E. Winfrey, and Newton, Harris and Shanklin, by Kenneth A. Shanklin, for plaintiff appellant.

Robert White Johnson, for defendant appellee Penn.

JOHNSON, Judge.

The question raised by this appeal is whether the trial court erred in directing a verdict for Penn at the close of the plaintiff's evidence. In determining whether the evidence is sufficient to

withstand a motion for directed verdict under Rule 50(a) of the Rules of Civil Procedure, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979). Applying this standard to the present case, we find that the trial court properly allowed Penn's motion for a directed verdict on the issue of breach of contract, however, we believe the issue of negligence should have been submitted to the jury.

[1] As to the issue of breach of contract, plaintiff contends that Spradley, acting as Penn's agent, bound Penn to an oral contract of insurance which was in effect at the time plaintiff's property was destroyed by fire. A binder is an "insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insurer gives notice of its election to terminate." *Moore v. Electric Co.*, 264 N.C. 667, 673, 142 S.E. 2d 659, 664 (1965). Assuming *arguendo* that Spradley's statements to plaintiff in March of 1977 concerning insurance coverage, in fact, constituted a valid binder and that the effective date of that binder was 9 March 1977, as recited in the application for insurance, we must decide whether the binder was still in effect at the time plaintiff's property was destroyed by fire. G.S. 58-177(4) provides that "[b]inders or other contracts for temporary insurance may be made orally or in writing, for a period which shall not exceed sixty (60) days . . ." We have found no North Carolina cases determining whether binders are void beyond this 60 day statutory period. However, the Virginia Supreme Court of Appeals has interpreted a similar statute, which provides that contracts for temporary insurance may be made for 30 days, and has held that such contracts are not valid beyond the statutory time period. *National Liberty Ins. Co. of America v. Jones*, 165 Va. 606, 183 S.E. 443 (1936); *Eastern Shore of Virginia Fire Insurance Co. v. Kellam*, 159 Va. 93, 165 S.E. 637 (1932). We find no valid reason for holding otherwise in this case. The wording of our statute is unambiguous, reflecting a clear legislative intent that binders and contracts for temporary insurance be enforceable for only 60 days. We, therefore, find that under the express language of G.S. 58-177(4), any binder

issued in March of 1977 would have terminated long before plaintiff's property was destroyed by fire.

It is undisputed that a second binder was prepared on 11 October 1977. Plaintiff contends that the language of this binder is ambiguous because, among other things, it is impossible for this binder to have been countersigned on its effective date. Plaintiff also argues that since the binder stated it was to be effective for 90 days and to be continuous for 12 months with the policy issued as a replacement for the binder, then it could easily be interpreted as providing coverage at the time of the fire. We do not agree. The undisputed testimony at trial, as well as the language in the binder, indicates that 15 August 1977 was to be its effective date. There is no ambiguity on the face of the binder concerning this effective date. Even if we were to hold that the binder was effective for 90 days, rather than for 60 days as provided by G.S. 58-177(4), it would still have expired prior to the fire.

For the foregoing reasons, we hold that plaintiff was not covered by a valid binder at the time of the fire. The uncontradicted evidence also shows no written policy was ever issued. Therefore, the court properly granted a directed verdict to Penn on plaintiff's breach of contract claim.

[2] The next issue we decide is whether Penn was entitled to a directed verdict on plaintiff's negligence claims. We believe the evidence, when viewed in the light most favorable to the plaintiff, is sufficient to go to the jury on the question of whether Penn was negligent by its own actions in failing to effect insurance coverage. There is clearly some evidence that Penn was aware of plaintiff's application for insurance since Spradley testified that he contacted the company two to four times between 11 March and the date of the fire and that it never acknowledged whether the application had been received. Although there was no evidence that Spradley properly addressed or stamped the application prior to mailing it, the evidence does show that Spradley placed the application in an envelope provided to him by Penn and that he mailed it in the regular course of business. Evidence that a letter has been mailed permits an inference that it was properly addressed and stamped and that it was received by the addressee. *Mill Co. v. Webb*, 164 N.C. 87, 80 S.E. 232 (1913); *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E. 2d

463 (1981). We find the foregoing evidence sufficient to overcome plaintiff's motion for a directed verdict as to Penn's own negligence.

[3] Furthermore, we believe the trial court improvidently entered a directed verdict for Penn on the issue of whether Penn was liable for negligence on the part of its agent Spradley. In his complaint, plaintiff alleged that Spradley was Penn's actual and apparent agent, that as Penn's agent Spradley had full power and authority to receive and accept proposals for insurance including authority to bind Penn, that Penn through its agent Spradley entered into a contract of insurance with plaintiff in March of 1977, that plaintiff was repeatedly told by Spradley prior to the fire and for several days thereafter that he had insurance coverage, that if Spradley failed to take those steps necessary to effect insurance coverage then Spradley was negligent, and that such negligence is imputed to his principal Penn. These allegations are sufficient to state a claim for relief against defendant insurance company under generally accepted principles of agency law. *Harrell v. Davenport*, 60 N.C. App. 474, 299 S.E. 2d 308 (1983). The evidence presented at trial, when considered in the light most favorable to the plaintiff, is sufficient to support these allegations. In *Harrell*, the pretrial forecast of evidence revealed facts remarkably similar to those in the present case. Under those circumstances, this Court held that summary judgment was improvidently entered for defendant insurance company. We believe that the presentation of such evidence at trial is also sufficient to overcome defendant insurance company's motion for a directed verdict. Accordingly, we hold that the court improperly granted a directed verdict on plaintiff's claim for relief against Penn based on the negligence of its agent Spradley.

Plaintiff also contends that equitable estoppel should be invoked to preclude Penn from denying plaintiff insurance coverage. We can find no evidence of misleading acts on the part of Penn sufficient to justify the application of the doctrine of equitable estoppel. Furthermore, since we have found that a directed verdict was improperly granted on the issue of negligence, there is no need to address plaintiff's remaining contention concerning the exclusion of evidence.

Affirmed in part, reversed in part and remanded.

Judges WELLS and HILL concur.

CHARLES H. SEDBERRY, ADMINISTRATOR CTA DBN OF THE ESTATE OF WILLIAM J. JOHNSON, DECEASED, APPELLEE v. KATHLEEN MULLINS JOHNSON, APPELLANT; AMY WRENN JOHNSON, MINOR, SANDRA JOANN JOHNSON COMBS, APPELLEES; LAUREN LYNN JOHNSON, SUSAN GAIL KRIDEL, AND JANET ELAINE JOHNSON, PARTIES OF RECORD ONLY

No. 8210SC713

(Filed 7 June 1983)

Husband and Wife § 11.1; Wills § 67— separation agreement as renunciation of right to take under will

Where a husband executed a will devising and bequeathing all his property to his wife, the spouses thereafter entered a separation agreement in which each waived and renounced "*all rights . . . under any previously executed Will of the other,*" and the husband subsequently died without having revoked or modified his will, the separation agreement constituted a valid renunciation which adeemed the devise and bequest to the wife. G.S. 52-10.1; G.S. 31B-5.

APPEAL by defendant from *Battle, Judge.* Judgment entered 7 June 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 12 May 1983.

Hall, Hill & O'Donnell, by Lawrence W. Hill, Jr., for defendant appellee.

Ragsdale, Kirschbaum & Day, P.A., by Ronald I. Kirschbaum, for defendant appellant.

WHICHARD, Judge.

I.

The issue can be stated as follows:

Where a husband executes a will devising and bequeathing all his property to his wife, the spouses thereafter enter a separation agreement in which each "waives and renounces all rights . . . under any previously executed Will of the other," and the husband subsequently dies without having revoked or modified

his will, does the separation agreement constitute a valid renunciation which adeems the devise and bequest to the wife?

We hold that it does.

II.

This is a declaratory judgment proceeding in which the administrator CTA DBN of the estate of William J. Johnson (hereafter decedent) seeks instructions concerning the persons entitled to share in the estate.

By will dated 23 November 1976 decedent devised and bequeathed all his property to his wife, defendant Kathleen Johnson (hereafter defendant). He further provided that if defendant predeceased him, he devised and bequeathed all his property in trust for the benefit of his children.

On 3 August 1979 decedent and defendant entered a separation agreement, the general validity and binding effect of which is not disputed. The agreement provided, *inter alia*, that each spouse "waives and renounces all rights he or she may now have under any previously executed Will of the other as well as the right which they may now have or hereafter acquire under the present or future laws of any jurisdiction to share in the property or estate of the other in any way by reason of the marital relationship . . . ."

On 12 February 1980 decedent died. He had not revoked or altered the 1976 will, nor had an absolute divorce been entered between him and defendant.

III.

The trial court made the following pertinent findings of fact:

> 5. By executing said Separation Agreement dated August 3, 1979, William J. Johnson and Kathleen Mullins Johnson each intended to relinquish, waive and renounce all rights either then had or might subsequently acquire under the provisions of any previously executed Will of the other, including the right to take a bequest, legacy or devise under such previously executed Will, as well as all rights to share in the property or estate of the other in any way by reason of the marital relationship or to administer upon the estate of the other.

6. Article IV of said Last Will and Testament of William J. Johnson contains a devise and bequest of all his property to his said wife, Kathleen Mullins Johnson.

7. Article V of said Last Will and Testament of William J. Johnson contains a residuary clause which provides for the establishment of a testamentary trust for the benefit of his daughters, Amy Wrenn Johnson and Sandra Joann Johnson, and devises and [bequeaths] the residue of his estate to said testamentary trust in the event he is predeceased by Kathleen Mullins Johnson.

8. The said Last Will and Testament of William J. Johnson contains no dispositive provisions other than those contained in Article IV and Article V.

9. It was the intent of William J. Johnson, as manifested in the provisions of his said Last Will and Testament, that the residuary clause contained in Article V of said Will would be operative in the event Kathleen Mullins Johnson, for any reason, failed to take under said Last Will and Testament.

On the basis of these findings it entered the following conclusions of law:

1. The Separation Agreement dated August 3, 1979, between Kathleen M. Johnson and William J. Johnson, Deceased, was and is valid and binding.

2. William J. Johnson and Kathleen Mullins Johnson, by their [Separation] Agreement, intended to relinquish, waive and renounce all rights either of them then had or might subsequently acquire under the provisions of any previously executed Will of the other, including the right to take a bequest, legacy or devise under such previously executed Will as well as all rights to share in the property or estate of the other in any way by reason of their marital relationship or to administer upon the estate of the other.

3. Kathleen Mullins Johsnon is barred by the Separation Agreement she executed with William J. Johnson, from taking any bequest, legacy, or devise contained in the Last Will and Testament of William J. Johnson dated November 23, 1976, and is also barred from all rights to share in the prop-

erty or estate of William J. Johnson by reason of their marital relationship and is further barred from the right to administer upon the Estate of William J. Johnson, Deceased.

4. William J. Johnson intended the residuary clause contained in Article V of his Last Will and Testament to be operative in the event Kathleen Mullins Johnson, for any reason, failed to take under said Will.

5. The testamentary trust provided for in Article V of the Last Will and Testament of William J. Johnson is operative for the benefit of Amy Wrenn Johnson and Sandra Joann Johnson.

6. None of the defendants in this action, except said Amy Wrenn Johnson and Sandra Joann Johnson, have any interest in or are entitled to share in the Estate of or take under the Will of William J. Johnson, Deceased.

It thereupon adjudged that decedent's children were the persons entitled to share in his estate, to the exclusion of defendant.

Defendant appeals.

IV.

Defendant's contentions can be summarized as follows:

Because the will speaks from the time of death rather than of execution, defendant's rights thereunder did not exist when the separation agreement was executed and thus could not be waived at that time. When the agreement was executed, then, the will "was inoperative to confer upon [defendant] any rights which were subject to waiver."

A conclusion that the agreement barred defendant's rights as beneficiary is equivalent to holding that the agreement operated to modify or revoke the will. G.S. 31-5.1 (1976) provides that a will can be revoked only by the methods provided therein, which do not include subsequent execution of a separation agreement. The statutory method of revocation is thus exclusive, and the separation agreement cannot operate as a bar to defendant's rights under the will.

V.

We reject these contentions for the following reasons:

A.

The statutory law of this state permits a married couple to execute a separation agreement "not inconsistent with public policy which shall be legal, valid, and binding in all respects." G.S. 52-10.1 (Cum. Supp. 1981). Thus, "[i]t is a common practice upon the break-up of a marriage for the parties to enter into an agreement which determines . . . [their] full and final rights . . . in and with respect to their joint and separate property . . . ." 2 R. Lee, *North Carolina Family Law* § 187, at 461 (4th ed. 1980).

The parties here executed such an agreement. As part of their "full and final" property rights thereunder, they bargained for and obtained a provision whereby each waived and renounced all rights under any previously executed will of the other. To restore to one party, subsequent to the death of the other, rights bargained away in the separation agreement, would deny the agreement its intended "full and final" effect, in contravention of the policy that such agreements "shall be legal, valid, and binding in all respects."

B.

The public policy of this state permits renunciation of property interests transferred by will. G.S. 31B-1 to -7 (1976 & Cum. Supp. 1981). While a statutory method for accomplishing such renunciation is provided, G.S. 31B-1, -2 (1976 & Cum. Supp. 1981), such provision expressly "does not abridge the right . . . to waive, release, disclaim or renounce property or an interest therein under any other statute or as otherwise provided by law." G.S. 31B-5 (1976).

It clearly would have been the better practice for defendant to have modified his will to accord with the change therein effected by the separation agreement. We perceive no valid or compelling reason, however, to deny effect to the clearly expressed intent to renounce rights under a will by means "otherwise provided by law," *viz.*, a separation agreement which, not being contrary to public policy, has, by virtue of G.S. 52-10.1, "legal, valid, and binding" effect.

We thus hold that defendant's renunciation, in the separation agreement, of her interests under the will, was valid and binding. This holding renders immaterial defendant's contention that dece-

dent did not modify or revoke the will by the exclusive statutory method.

C.

The indisputable intent of each party to the agreement here was to waive and renounce "all rights . . . under any previously executed Will of the other." The agreement is clear, concise, and unambiguous. The record is devoid of any suggestion that it was entered as a result of fraud, duress or undue influence, or was otherwise volitionless. That defendant knew and understood its meaning and effect, and intended that it operate as a renunciation of her rights under the will, is, on this record, beyond question.

"[W]here it has been found that a postnuptial agreement or settlement was intended to adeem a devise or legacy to one spouse in the will of the other, . . . the surviving spouse has been denied the right to such devise or legacy." Annot., 53 A.L.R. 2d 475, 486-87 (1957). That the intent of the parties here was that the separation agreement operate to adeem any devise or bequest from one spouse to the other seems incontrovertible.

In 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 102, at 302 (1964), we find:

> It has been held that a property settlement unaccompanied by a divorce does not revoke the provisions of the will in favor of the divorced spouse. In such instances, it would seem appropriate to contend that the settlement constituted ademption by satisfaction of the benefits bestowed upon the divorced spouse by the will of the deceased.

Because the agreement here clearly indicates an intent that it constitute an ademption by satisfaction of the benefits bestowed on defendant by decedent's will, we find the above contention not only appropriate, but decisive.

VI.

We hold that the separation agreement constituted a valid and enforceable renunciation of defendant's rights under decedent's will; that as a result of the renunciation the interest renounced devolved upon decedent's children in accordance with his intent readily discernible from the will (see G.S. 31B-3(b) (Cum. Supp. 1981) and G.S. 31-42(a) (1976)); and that the court thus cor-

rectly adjudged that the children are the persons entitled to take under the will to the exclusion of defendant.

Accordingly, the judgment is in all respects

Affirmed.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA v. ARNOLD RAY MOORE

No. 828SC1155

(Filed 7 June 1983)

1. **Burglary and Unlawful Breakings § 6.2— first degree burglary—insufficient evidence of felonious intent**

The evidence was insufficient to support a verdict of felonious breaking or entering where the facts and circumstances, as presented by both the defendant and the State, supported the inference that defendant entered the home because he was coerced and rebutted the inference that defendant entered with the intent to steal. Further, nothing in the evidence supported a finding that defendant entered the home with the intent to commit either felonious assault or rape.

2. **Burglary and Unlawful Breakings § 7— failure to instruct on misdemeanor breaking and entering—error**

The trial court erred in failing to instruct on misdemeanor breaking and entering where, should the jury disbelieve defendant's evidence of coercion, the only evidence of the defendant's intent to commit a felony in the residence was the fact that the defendant broke and entered a building containing personal property.

3. **Criminal Law § 86.4— impeachment of defendant—prior indictments for crime**

It was error for the trial court to allow defendant to be cross-examined regarding two prior convictions for misdemeanor breaking and entering by questioning whether he had been indicted for two counts of first degree burglary.

APPEAL by defendant from *Reid, Judge*. Judgment entered 22 April 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 April 1983.

Defendant was indicted for first degree burglary. From a verdict of guilty as charged and a judgment imposing a fifteen-year sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Richard H. Carlton, for the State.

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

BECTON, Judge.

Defendant has assigned error to the denial of his motion to dismiss the charge of first degree burglary, the refusal of the court to instruct on misdemeanor breaking or entering, the portion of the jury charge explaining the defense of coercion, and the State's cross-examination of him about his prior criminal charges. We find merit in each assignment of error and order a new trial.

I

Defendant was found guilty of first degree burglary. The State contended that defendant intended to commit larceny, felonious assault or rape. We agree with defendant that there was insufficient evidence for the jury to find that the breaking or entering was carried out with an intent to commit a felony. That charge should, therefore, have been dismissed. On a motion to dismiss, the question is whether there is substantial evidence which will support a reasonable inference of the defendant's guilt. When the evidence here is viewed in the light most favorable to the State, we deem it insufficient to support an inference of felonious intent.

The State's evidence tended to show that on the early morning of 6 March 1982, Janice Wright and her brother Jerome Sutton were sleeping in adjacent upstairs bedrooms in their parents' house. Janice's parents and her two younger sisters were asleep downstairs. She heard someone walking across the porch outside the second floor, and she awakened Jerome. She then saw defendant standing behind the door to an unoccupied bedroom. Jerome approached the defendant and asked him what he was doing

there. Defendant indicated that someone was out to kill one of Jerome's sisters. Janice testified that defendant then told her that a man forced him into the house by threatening to cut defendant's throat. Defendant told her that this man was going to get "one of the girls." When Officer Pate of the Kinston Police Department arrived at the scene, the defendant also told him that a man who lived in Carver Courts had forced him to enter the Suttons' house. Defendant was crying and in a drunken condition. He was frisked, but no weapons were found. Officer Pate discovered that a piece of cardboard which had been taped over an upstairs window had been partially pushed away. After defendant was taken to the police station, he gave the following statement: "I was walking home and a man Cogman from Mitchell Wooten Courts, and he held a knife to my throat and said he was going to kill me if I didn't break into 314 East Grainger Avenue (the Suttons' address)."

Defendant testified that he lived two blocks from the Suttons' residence. On the evening of 5 March 1982 defendant had been at Mitchell Wooten Courts with a man who said his name was Cogman. As he was returning home around 3:00 a.m., he saw a man standing by the stairway to the Suttons' house. This man asked defendant to go into the house and tell one of the female occupants to "quit messing around" or "he was going to kick her ass." When defendant refused, the man placed a knife to his neck and told him to start walking up the stairs. Defendant then climbed the stairs believing that the man was behind him. Upon reaching the second floor porch, defendant opened the door and walked into the house. He heard someone in the house and hid behind a door to one of the rooms. After defendant was discovered in the house he did not flee but stayed until the police arrived.

[1] Nothing in this evidence supports a finding that defendant entered the Suttons' home with the intent to commit either felonious assault or rape. The State apparently recognizes this fact, since it merely argues that "there was more than a scintilla of evidence to infer intent to commit larceny on the part of the defendant." In support of its argument that there was a sufficient showing of intent to commit larceny, the State has relied upon the following language in *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887):

> The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, *accompanied by flight* when discovered, is some evidence of guilt, *and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances*, may warrant a reasonable inference of guilty intent. (Emphasis added.)

Id. at 396-97, 1 S.E. at 927. The State's reliance upon this language is misplaced. It is uncontested that defendant entered the Suttons' house at night while they were home and without their consent. The facts and circumstances, as presented by both the defendant and the State, however, support the inference that defendant entered the home because he was coerced and rebut the inference that defendant entered with the intent to steal. Pursuant to the *McBryde* rule, we conclude that there was insufficient evidence to sustain a verdict of felonious breaking or entering. Consequently, the felony count against defendant must be stricken.

II

[2] Should the jury on retrial disbelieve defendant's evidence of coercion, the remaining evidence would support only a conviction of the lesser included offense of misdemeanor breaking and entering, the wrongful breaking or entering of any building. N.C. Gen. Stat. § 14-54(b) (1981). The trial court, therefore, erred in failing to instruct on this misdemeanor. Our Appellate Courts have consistently found error when trial courts have failed to instruct on misdemeanor breaking or entering in situations "where the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property." *State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 196, 278 S.E. 2d 535, 542 (1981); *disc. review allowed, State v. Christmas*, 304 N.C. 198, 287 S.E. 2d 127 (1981), *later vacated*, 305 N.C. 654, 290 S.E. 2d 613 (1982); *cert. denied, State v. Thomas*, 305 N.C. 591, 292 S.E. 2d 16 (1982).

III

[3] At trial defendant admitted that he had previously pleaded guilty to two counts of misdemeanor breaking and entering. Defendant now assigns error to the following portions of the State's cross-examination regarding each prior conviction:

> Q. You plead guilty in that incident as a result of a plea bargain did you not?
>
> A. Yes I did.
>
> Q. On which the charge was reduced?
>
> > MR. DUKE: Objection.
> >
> > COURT: Overruled.
>
> Q. The charge was reduced from first degree burglary to breaking and entering?
>
> A. Yes.
>
> Q. As a result of a plea bargain signed by you and your attorney, Mr. Pollock, at that time?
>
> A. Yes sir.
>
> > MR. DUKE: I'd like to approach the bench, Your Honor.
> >
> > (Mr. Duke and Mr. Heath approach the bench.)
>
> Q. Now Mr. Moore, in that instance, is it not a fact that you were charged on the 8th of January with during the night time between the hours of 2:00 A.M. and 2:30 A.M., of breaking and entering the dwelling of Dexter Mills while it was occupied?
>
> A. Yes sir.
>
> Q. And you plead guilty as a result of a plea bargain to a lesser charge?
>
> A. No sir.
>
> Q. You didn't plead guilty with a plea bargain as a lesser charge?
>
> A. I plead guilty to breaking and entering and probation.

Q. You got probation in that case?

A. Yes sir.

Q. In 1979?

A. Yes.

Q. And the second breaking and entering you have talked about, did that occur on January 21, 1980, almost exactly a year later?

A. Yes sir.

Q. And in that case you plead guilty to misdemeanor breaking and entering and you got a two-year active sentence did you not?

A. Yes sir.

Q. And that was the result of a plea bargain between yourself and the State of North Carolina was it not?

A. Yes sir.

Q. And in that case weren't you originally charged on the 21st of January, 1980 in Lenoir County.

MR. DUKE: Objection to what he was charged with.

COURT: Overruled.

We agree with defendant that this cross-examination violated the rule set out in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971): A defendant's character may not be impeached by asking about or referring to prior arrests, indictments or charges. In a recent case before our Court, we applied the *Williams* rule and ordered a new trial when the State asked the defendant if several counts of larceny against him had been reduced to one count of larceny, and if he had pleaded guilty to that charge. *State v. Woodrup*, 60 N.C. App. 205, 298 S.E. 2d 439 (1982). We noted that "[t]hese questions clearly had the effect of asking the defendant whether he had been *indicted* for two counts of larceny." *Id.* at 207, 298 S.E. 2d at 440. In the case *sub judice*, the questions had the effect of asking defendant whether he had been indicted for two counts of first degree burglary. This the State is not allowed to do.

IV

[4] The court failed to inform the jury that the defense of coercion is merely a denial that defendant committed the alleged offense, and that the burden remained on the State to prove defendant's guilt beyond a reasonable doubt. *See, State v. Strickland,* 307 N.C. 274, --- S.E. 2d --- (1983), *State v. Kearns,* 27 N.C. App. 354, 219 S.E. 2d 228 (1975), *disc. review denied,* 289 N.C. 300, 222 S.E. 2d 700 (1976), and Pattern Jury Instructions N.C.P.I. Crim.—310.10. The trial court's instruction on coercion in the case *sub judice* did not comply fully with the mandate of *State v. Strickland.*

For the foregoing reasons, defendant must have a

New trial.

Judges WELLS and EAGLES concur.

ROGER D. BYRD v. CRYSTAL R. BYRD

No. 8218DC648

(Filed 7 June 1983)

1. **Divorce and Alimony § 24.9— child support—sufficiency of findings**

A finding that "the needs of the minor children of the parties are set forth in the affidavit of [defendant mother], which was filed in this action" was a sufficient finding upon which to base an award of child support where there was no evidence that the needs of the children were otherwise than specified in defendant's affidavit. Moreover, the evidence supported the court's findings as to the relative abilities of the parties to pay, and the court's findings supported its conclusion that plaintiff father should be ordered to pay child support of $750.00 per month. G.S. 50-13.4(c).

2. **Divorce and Alimony § 24.2— child support—modification of amount in separation agreement—changed circumstances**

The evidence supported the trial court's finding that there had been a change in circumstances since the parties signed a separation agreement so as to justify an increase in child support from the $400.00 per month required by the agreement to $750.00 per month.

3. **Divorce and Alimony § 27— child support—attorney's fees—pleadings deemed to conform to evidence**

Although defendant's answer and counterclaim in which she sought child support did not include the required allegations or prayer for an award of attorney's fees, the pleadings are deemed to conform to the evidence, and the trial court's award of attorney's fees was proper, where the trial court found upon evidence introduced without objection that defendant was acting in good faith, that she had insufficient means to defray the expense of the suit and that plaintiff had refused a request to furnish adequate child support at the time the action was instituted. G.S. 50-13.6; G.S. 1A-1, Rule 15(b).

APPEAL by plaintiff from *Yeattes, Judge.* Order entered 2 February 1982 in District Court, GUILFORD County. Heard in the Court of Appeals 9 May 1983.

Plaintiff instituted this action against defendant by filing a complaint on 31 December 1979 seeking divorce from defendant based on one year's separation. In her Answer and Counterclaim of 7 February 1980, defendant admitted the allegations in the complaint and sought custody of the minor children of the marriage and child support over and above the child support of $400.00 per month agreed to in a separation agreement signed by the parties on 27 December 1978. Divorce was granted on 11 February 1980. Defendant filed a motion seeking an increase in child

support, and in a hearing confined to the issue of the amount of child support, both parties gave testimony relating to their expenses and income. On 2 February 1982, plaintiff was ordered to pay into the office of the Clerk of Superior Court $750.00 per month in child support and to pay reasonable attorney's fees of $1,300.00 to defendant's attorney. From this order, plaintiff appealed.

Hatfield, Hatfield & Kinlaw, by Kathryn K. Hatfield for the plaintiff, appellant.

Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James for the defendant, appellee.

HEDRICK, Judge.

[1] Plaintiff assigns as error the award by the trial court of $750.00 per month in child support. Plaintiff contends that the award was based on findings of fact not supported by the evidence. Plaintiff argues that awards of child support must be based on appropriately detailed findings of fact. To this end, plaintiff contends the trial court's Finding of Fact No. 4 which states, "the needs of the minor children of the parties are set forth in the affidavit of Crystal R. Byrd, which was filed in this action," is not a legally sufficient finding upon which to base an award of child support.

Plaintiff's contention has two premises. First, that the trial court, in failing to enumerate specifically its findings as to the needs of the children, did not provide an adequate factual basis as to the amount of support required. Second, that the trial court's finding of fact as to the needs of the children is not supported by the evidence.

A trial court, in determining a proper amount to be awarded for the support of minor children is directed by statute to consider the "reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. Sec. 50-13.4(c). The Supreme Court in *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980), said that an order for child support "must be

based upon the interplay of the trial court's conclusions of law as to (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* further holds that where the trial court sits without a jury, the judge is required to make factual findings "specific enough to indicate to the appellate court that . . . 'due regard' " was taken of the factors enumerated in the statute. *Id.*

With regard to what the findings of fact concerning the needs of the minor children must contain, there are no set guidelines. The appellate courts of this state require only that the findings be based on competent evidence as to what the needs of the children are, *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E. 2d 197 (1976), and that such findings sustain the conclusion that the support payments ordered are in such amount as to meet the reasonable needs of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). The evidence must support the facts found by the trial court which in turn support the trial court's conclusions of law which in their turn provide a basis for the trial court's judgment. Each link in this chain of reasoning must appear in the trial court's order. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

In *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 468-469 (1978), this Court held that the trial court's conclusions as to the abilities of the parties to provide support must be supported by "findings of specific facts (*e.g.*, incomes, estates)" and that conclusions as to the reasonable needs of the minor children must be supported by findings of specific facts as to actual past expenditures. Where past expenditures are below subsistence, due regard must be given to meeting the reasonable needs of the child.

In the present case, there was evidence in the form of an affidavit submitted by defendant that itemized the monthly financial needs of the three minor children. These needs amounted to $946.00. In her testimony, defendant indicated that these itemized amounts were in excess of actual past expenditures but that they reflected her needs. There was no evidence that the needs of the children were otherwise than specified in defendant's affidavit.

The trial court, in its order, made specific reference to the defendant's affidavit rather than setting forth the specific facts

regarding the needs of the children. To have done otherwise would have amounted to a recitation of the uncontradicted evidence.

With respect to the other half of the child support equation, the relative abilities of the parties to pay, plaintiff excepts to and assigns as error the trial court's findings of fact regarding the respective incomes and estates of plaintiff and defendant. Plaintiff argues that these findings of fact were not supported by the evidence. While there is conflicting evidence on these points, the findings of fact are supported by evidence in the record introduced without objection, and are thus binding on appeal. Plaintiff's assignments of error amount to an attempt to reargue the evidence adduced at the hearing in the hope that this Court will substitute itself for the trial court and accept plaintiff's version of the evidence. This we cannot do. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. at 712-713, 268 S.E. 2d at 189.

Based on these findings, the trial court concluded that plaintiff should be ordered to pay child support in the amount of $750.00 per month. Plaintiff argues that the trial court, in setting this amount, made no inquiries as to the reasonableness of the expenses itemized in defendant's affidavit and no finding as to the relative abilities of the parties to pay. With regard to the expenses of a party claiming child support, there is a requirement that the trial court be satisfied as to the reasonableness of the itemized expenses. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). However, absent contrary indications in the record, there is no requirement that a specific conclusion as to the reasonableness of such expenses be made, although to do so is the preferred practice. In such a case, as here, it is presumed, absent evidence to the contrary, that the expenses claimed have been deemed reasonable by the trial court. *Id.*

The trial court's conclusion is also premised on specific findings of fact that defendant is unable to pay the itemized expenses from her income and that plaintiff has the ability to pay an in-

creased amount of child support. Again, plaintiff's contention that these findings are not based on record evidence is without merit and the trial court's conclusion was properly drawn. Moreover, in awarding the amount of $750.00 per month, the trial court substantially reduced the amount of child support claimed by defendant, indicating that there was some regard given to the reasonableness of the expenses and the relative abilities of the parties to provide for them. The amount of child support to be awarded is within the discretion of the trial court, based on its consideration of the evidence before it. Absent a showing of an abuse of that discretion, the trial court's award will not be disturbed on appeal. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975). Such a showing has not been made by plaintiff in this case. Further, plaintiff makes no exception in his appeal to the trial court's finding of fact that the children need support from plaintiff in the amount of $750.00 per month.

[2] Plaintiff next excepts to and assigns as error the trial court's finding of fact that there had been a change in circumstances since the signing of the separation agreement in December 1978. Plaintiff contends that there is no evidence that he is any better able to provide for the support of the children or that the needs of the children have increased. In the absence of such evidence, plaintiff argues, such a finding of fact is improper and modification of the amount of child support specified in the Separation Agreement was not warranted.

The amount of child support agreed to by the parties to a Separation Agreement is presumed to be just and reasonable. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). However, separation agreements are not binding on the courts and the presumption of the reasonableness of the child support specified therein attaches only in the absence of evidence to the contrary. *Id.* Here, there is evidence to support the trial court's finding of fact. This evidence was introduced without objection at the hearing, therefore, the trial court's finding of fact will not be disturbed.

[3] Finally, plaintiff assigns as error the award by the trial court of attorney's fees to defendant's attorney. Plaintiff contends that such an award is appropriate in actions for child support only where it is alleged and proved that the party claiming attorney's

fees is (1) acting in good faith, (2) has insufficient means to defray the expense and (3) the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time the action is instituted. Plaintiff further contends that such relief must be prayed for in the pleadings. In support of his contention, plaintiff argues that defendant's Answer and Counterclaim does not make the required allegations or pray for the appropriate relief and that an award of attorney's fees is therefore improper.

The findings required to justify an award of attorney's fees must ordinarily be alleged and proved, *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980), and the court must find as a fact that the request for adequate support had been refused at the time the matter was instituted. N.C. Gen. Stat. Sec. 50-13.6. However, when issues not raised in the pleadings are tried by the express or implied consent of the parties, North Carolina allows for the pleadings to be amended to conform to the evidence. N.C. Gen. Stat. Sec. 1A-1, Rule 15(b). Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue. *Hardison v. Williams*, 21 N.C. App. 670, 205 S.E. 2d 551 (1974).

Here, the required allegations and pleadings were not made in defendant's answer and counterclaim. However, it was found from the evidence at the hearing that the defendant was acting in good faith, that she had insufficient means to defray the expense of the suit and that plaintiff had refused a request to furnish adequate support at the time the action was instituted. These findings are supported by evidence in the record which was introduced at the hearing without objection by plaintiff. Since plaintiff did not object to the admission of this evidence, the pleadings are deemed to be amended to conform to the evidence and the trial court's award of attorney's fees was therefore proper.

Affirmed.

Chief Judge VAUGHN and Judge ARNOLD concur.

TRYON REALTY CO. OF NEW BERN, INC. v. L. H. HARDISON AND WIFE, FRANCES NELSON HARDISON; R. B. NELSON AND WIFE, RHUNELL G. NELSON; JOSEPH C. NELSON AND WIFE, MARY E. HOUSE NELSON; H. W. BROUGHTON AND WIFE, MARTHA NELSON BROUGHTON; JOHN C. COUGHLAN AND WIFE, MARGARET NELSON COUGHLAN; AND J. C. GALLOWAY AND WIFE, CHRISTINE NELSON GALLOWAY

No. 823SC652

(Filed 7 June 1983)

Brokers and Factors § 6— realty contract—no condition on realtor's right to commission

Language in a realty agreement did not make the realtor's right to a commission contingent upon delivery of the deed and payment of a down payment. Rather, the agreement was a general contract and the language in question referred merely to the time and manner of the payment of the commission.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 8 April 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 May 1983.

This is a civil action wherein plaintiff seeks to recover a broker's commission pursuant to the terms of an agreement between plaintiff as broker and defendants as sellers entered into on 31 August 1978. The agreement is as follows:

> THIS CONTRACT AND AGREEMENT, Made and entered into this 31st day of August, 1978 by and between Joseph C. Nelson and wife, Mary E. House Nelson of Craven County, North Carolina; Martha N. Broughton and husband, H. W. Broughton of Nash County, North Carolina; R. B. Nelson and wife, Rhunell G. Nelson; Christine N. Galloway and husband, J. C. Galloway; and John C. Coughlan and wife, Margaret N. Coughlan, all of Pitt County, North Carolina; and Frances N. Hardison and husband, L. H. Hardison of Martin County, North Carolina, parties of the first part, hereinafter referred to as "OWNERS" and Tryon Realty Company of New Bern, North Carolina, party of the second part.
>
> WITNESSETH: That whereas, parties of the first part are the owners of a tract of woodsland known as the Nelson Estate Woodsland in No. 1 Township, Craven County, North Carolina, containing 3000 acres more or less. The said parties of the first part in consideration of the sum hereinafter set

out do hereby give and grant to Tryon Realty Company, party of the second part, the exclusive right for a period of six months from the date of this agreement to sell said tract of woodsland in fee simple upon the following terms and conditions:

FIRST: The gross sale price shall be ONE MILLION, THREE HUNDRED, THIRTY-THREE THOUSAND, THREE HUNDRED, FORTY-FIVE AND NO/100 ($1,333,345.00) DOLLARS, twenty-eight percent of which shall be paid in cash upon delivery of the deed, and the balance in ten equal annual installments with interest at 7-1/2 percent per annum payable annually on the unpaid balance. The party of the second part shall receive as commissions in connection with the sale of the land ten percent of the gross sale price which shall be paid in full from the twenty-eight percent down payment upon delivery of the deed.

SECOND: If the property is not sold by party of the second part within six months from the date of this agreement, then this agreement shall become null and void and the parties of the first part as owners shall not be responsible to pay party of the second part any amount, and the owners may dispose of the property as they see fit without regard to this agreement.

THIRD: It is further understood and agreed that the party of the second part as selling agency for the parties of the first part has no authority and shall make no representations to any prospective purchaser as to the quantity or quality of the land being sold or the uses to which the same might be put.

FOURTH: It is further understood and agreed that if the property is sold it will be conveyed subject to any and all easements of record in the Public Registry of Craven County, subject to all highway and roadway rights of way, and the taxes for the year in which a sale may be consummated will be prorated between the sellers and the purchaser as of the date of such conveyance.

FIFTH: It is further understood and agreed that the unpaid balance of the purchase price over and above the 28 per-

cent down payment shall be represented by a note secured by a purchase money deed of trust, which said deed of trust shall contain the usual and standard provisions found in North Carolina mortgages and deeds of trust.

SIXTH: All earnest money or option money deposited by any prospective purchaser with the party of the second part as selling agency shall be held by the party of the second part in escrow until the termination of the transaction. In the event the prospective purchaser forfeits the earnest money or option money and does not purchase said property, then the earnest money or option money shall be divided one-half to the selling agency, party of the second part, and one-half to the sellers, parties of the first part.

WITNESS our hands and seals.

In its complaint, plaintiff alleged that, on or about 2 July 1979, plaintiff found a purchaser who was ready, willing and able to purchase the defendants' property on the terms specified by the defendants. Plaintiff further alleged that defendants, in July of 1979, accepted the offer to purchase submitted by plaintiff for the purchaser, subject to several minor changes. On 1 August 1979, the purchaser agreed to the terms of the defendants along with the minor changes. On 5 September 1979, defendants and purchaser executed a Memorandum to Buy and Sell. The purchaser deposited with plaintiff $50,000 in earnest money to be held in escrow by plaintiff. Plaintiff alleged that subsequent to 5 September 1979, defendants refused to sell and convey this property to the purchaser, that plaintiff has demanded payment of the broker's commission according to the terms of the 31 August 1978 agreement, and that defendants refused to pay the agreed commission.

In their answer, defendants admitted the 31 August 1978 agreement with plaintiff and admitted the Memorandum to Buy and Sell, executed by the defendants and the purchaser on 5 September 1979. Defendants admitted that they failed to pay plaintiff the broker's commission as per the agreement of 31 August 1978. Defendants denied that plaintiff had found a purchaser on the terms specified by defendants. Defendants further alleged that the agreement of 31 August 1978 contained a special condition that made payment of the broker's commission con-

tingent upon payment in cash by the purchaser of twenty-eight percent of the purchase price.

At trial, plaintiff offered as Exhibit No. 1 the Agreement of 31 August 1978 between plaintiff and defendants; as Exhibit No. 4, an extension of that agreement and all of its terms, dated 1 March 1979; and, as Exhibit No. 5, the Memorandum to Buy and Sell, executed by defendants and purchaser on 5 September 1979.

Evidence put on by plaintiff at trial tends to support his allegations that a purchaser had been found by plaintiff who was ready, willing, and able to purchase defendants' property on the terms specified by defendants. Plaintiff's expert witness, attorney James Lee Davis, testified that in his opinion, "the defendants in the lawsuit could not convey fee simple unencumbered, marketable title of record to the property in question, to all of the property in question, subject only to ad valorem taxes." Plaintiff's evidence also tends to support his allegation that defendants have refused to sell or convey the property, that plaintiff had demanded payment of the broker's commission by defendants, as per the 31 August 1978 agreement, and that plaintiff's demand had been refused by defendants.

Defendants' motion for a directed verdict made at the close of plaintiff's evidence was allowed. From a judgment directing a verdict for defendants, plaintiff appealed.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III for plaintiff, appellant.

Gaylord, Singleton, McNally & Strickland, by Louis W. Gaylord, Jr. and Danny D. McNally, and Lee, Hancock, Lasitter & King, by C. E. Hancock, Jr. and John W. King, Jr. for defendants, appellees.

HEDRICK, Judge.

The question presented by this appeal is whether the trial court erred in granting the defendants' motion for a directed verdict.

Plaintiff argues that it offered evidence at trial that tended to show that it complied fully with the terms of the 31 August 1978 agreement (hereinafter referred to as the Agreement) in

that it produced a purchaser who was ready, willing and able to purchase defendants' property according to the terms specified by defendants, that the sale was not consummated because defendants could not produce good title, and that plaintiff is therefore entitled to recover the commission specified in the Agreement.

Defendants argue that plaintiff's evidence shows as a matter of law that it did not comply with the terms of the Agreement in that the sale of defendants' property was never consummated and there was therefore no twenty-eight percent down payment by the purchaser from which plaintiff's commission could be paid.

It is well established in North Carolina that when a broker, pursuant to an agreement with the owner of certain real property, procures a purchaser for that property who is ready, willing and able to buy the property upon the terms offered, he is entitled to his commission. *Carver v. Britt*, 241 N.C. 538, 85 S.E. 2d 888 (1955). The right of the broker to his commission is not affected if the principal voluntarily cancels the contract that the broker negotiated, *Ross v. Perry*, 281 N.C. 570, 189 S.E. 2d 226 (1972), or is unable to fulfill the terms on his part or produce good title, or if the sale fails of consummation upon the fault of the seller. *Crowell v. Parker*, 171 N.C. 392, 88 S.E. 497 (1916).

When the broker's right to his commission is made to depend upon the satisfaction of any condition other than his production of a ready, willing and able purchaser, North Carolina courts require that such a variation from the general rule be clearly expressed. *Ross v. Perry*, 281 N.C. 570, 189 S.E. 2d 226 (1972); *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946).

It is important in such situations that a distinction be made between language that imposes a condition which goes to the substance of a contract and language which relates only to its ultimate performance. *Carver v. Britt*, 241 N.C. 538, 85 S.E. 2d 888 (1955); *Harrison v. Brown*, 222 N.C. 610, 24 S.E. 2d 470 (1943).

In the present case, defendants assert that the Agreement with plaintiff was a special brokerage contract in that it contained provisions requiring payment of the commission only upon delivery of the deed and that this payment was to come from the down payment of twenty-eight percent of the purchase price to be

received from the purchaser. Defendants contend that the language in the Agreement makes plaintiff's right to the commission contingent upon delivery of the deed and payment of the down payment.

In support of their contention, defendants cite us to the case of *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946), wherein the Supreme Court affirmed the trial court's judgment of nonsuit, denying a broker's right to his commission. However, we find *Jones* to be clearly distinguishable. There, the court held that the trial court's judgment was grounded on a special contract, prepared by the broker, where the sale failed because of the inability of the purchaser procured by the broker to complete it.

The *Jones* court noted that the case before it was "not like the usual broker's action where a responsible purchaser is procured by [the broker's] efforts under a general contract, express or implied." *Id.* at 305, 37 S.E. 2d at 907 (citations omitted). In that case, the court based its finding of a special contract on the language of a letter, found to be a part of the contract, which read, "When the deal is closed up we will pay Frank F. Jones his commission of 5% . . . out of the sale price of the property." *Id.* at 304, 37 S.E. 2d at 907. The *Jones* court found that this language was clear enough to leave no question as to the intention of the parties to impose a condition on the broker's right to his commission and thereby create a special contract. 226 N.C. 303, 37 S.E. 2d 906.

The *Jones* case is further distinguishable from the case before us. There it was the purchaser procured by the broker and not the seller, as in this case, whose inability to comply with the contract caused the sale to fail.

We find that the Agreement in the present case is a general contract. The language upon which defendants base their contention does not condition plaintiff's right to his commission. Rather, we find that the language in question goes merely to the time and manner of the payment of the commission.

We therefore hold that the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission of the case to the jury and that the trial court erred in directing a verdict for the defendants.

Reversed and remanded.

Chief Judge VAUGHN and Judge EAGLES concur.

HARRELSON RUBBER COMPANY v. DIXIE TIRE AND FUELS, INC.

No. 8219SC609

(Filed 7 June 1983)

Constitutional Law § 24.7; Process § 14.3— personal jurisdiction over foreign corporation—statutory authority—minimum contacts

In an action to recover royalties due under a franchise agreement, G.S. 55-145(a)(1) and G.S. 1-75.4(5)a. and b. provided statutory authority for the exercise of personal jurisdiction over defendant foreign corporation, and defendant had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over it did not offend due process, where the franchise agreement was made in this State and the parties contemplated that plaintiff would perform services under the agreement within North Carolina.

APPEAL by defendant from *Walker (Hal H.), Judge.* Order entered 2 April 1982 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 21 April 1983.

This is a civil action based on breach of contract in which plaintiff sought an accounting and an injunction.

Defendant, a foreign corporation, filed a motion to dismiss for lack of jurisdiction, alleging insufficient contacts with North Carolina for the State to assert jurisdiction. Judge Walker entered an order denying that motion.

Defendant appeals.

Smith, Moore, Smith, Schell & Hunter by James A. Medford and Pamela DeAngelis for plaintiff appellee.

McNairy, Clifford & Clendenin by Harry N. Clendenin III and Michael R. Nash for defendant appellant.

BRASWELL, Judge.

Defendant contends that the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Defendant's

argument is that no allegations in the complaint or in the affidavits submitted by both parties establish defendant had sufficient minimum contacts with the State of North Carolina to satisfy due process requirements of the United States Constitution.

The facts alleged in plaintiff's complaint showed the following: Plaintiff, a Delaware corporation with its principal offices in Asheboro, North Carolina, had developed a process for retreading tires which it termed "Supertread." Defendant, a South Carolina corporation with its principal place of business in Spartanburg, South Carolina, entered into a franchise agreement with plaintiff on 9 December 1974. Defendant contracted to pay plaintiff a 20-cent royalty for each pound of pre-cured tread rubber and cushion gum used in the "Supertread" process. Under the terms of the contract, defendant was free to use other suppliers for these materials, but materials obtained from other suppliers were subject to approval by plaintiff to ensure proper quality control. Defendant agreed to maintain adequate records for determination of the royalties due plaintiff under the contract and agreed to allow plaintiff to inspect these records of account for verification of royalties due, upon adequate notice.

According to the complaint, plaintiff learned defendant was using pre-cured rubber and cushion gum from other sources which had not been approved by plaintiff for use in its retreading process. Defendant was not paying the required royalties on these supplies. Plaintiff requested by letter dated 20 February 1976 that defendant send plaintiff samples of these supplies for testing and remit the royalties due on these materials. Defendant failed to respond.

Plaintiff attempted in December 1981 to audit defendant's records, but was denied access to defendant's place of business to inspect the records.

Plaintiff, by this action filed in January 1982, sought an accounting to determine royalties due for materials purchased from other suppliers and an injunction to stop defendant's use of plaintiff's retreading process until defendant provided the accounting and paid the royalties.

Defendant filed a motion to dismiss challenging North Carolina's jurisdiction over it. The motion to dismiss was sup-

ported by the affidavit of Harry Lancaster, president of defendant corporation. Lancaster stated in the affidavit that defendant was a South Carolina corporation, with all officers and agents in Spartanburg County, South Carolina, and performed all of its business in that county. All of defendant's dealings with plaintiff prior to execution of their franchise agreement had been through R. L. Hawkins, plaintiff's agent, who was a resident of Spartanburg County, and all of their business with plaintiff was transacted in that county. After the franchise agreement was executed, defendant purchased necessary equipment from a Salisbury, North Carolina, machinery company. However, all negotiations and arrangements were made by plaintiff for the equipment purchase in South Carolina and the products were also sold in South Carolina. Lancaster further stated that none of defendant's business relating to this contract was transacted in North Carolina.

Plaintiff submitted in opposition to the motion the affidavit of Albert A. Harrelson, president of the corporate plaintiff. Harrelson stated that plaintiff conducts all of its business from its principal offices and plant in Asheboro, North Carolina, and from its second plant in Siler City, North Carolina. The franchise agreement was executed in the Asheboro offices of plaintiff, under the express terms of the contract stating the agreement became effective and binding on both parties when executed by plaintiff. The agreement also expressly states that North Carolina law is to govern interpretation and construction of the agreement. All services rendered by plaintiff under the franchise agreement were performed and all goods were manufactured and shipped from the Asheboro offices or from one of the two North Carolina plants.

In denying the motion to dismiss, the trial court found that "the Franchise Agreement was made in North Carolina, goods and services were shipped to defendant from North Carolina, and the Franchise Agreement specifically provides that it should be governed by the laws of North Carolina." Being supported by the evidence, these findings showed defendant had sufficient minimum contacts with North Carolina for it to exercise personal jurisdiction and satisfy due process as to appellant. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978).

The trial court also concluded that North Carolina had jurisdiction pursuant to both G.S. 1-75.4(5) and G.S. 55-145. Under G.S. 55-145(a), North Carolina has jurisdiction over foreign corporations which are not transacting business in this State in four circumstances:

> "(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State; or
>
> (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or
>
> (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
>
> (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance."

"While the mere act of entering into a contract with a North Carolina resident does not constitute the necessary minimum contacts for the exercise of jurisdiction over a nonresident [citation omitted] a single contract which was *made* or *was to be performed* in this state is sufficient to subject a nonresident corporation to suit under N.C.G.S. 55-145(a)(1). [Citations omitted.]" *Time Corp. v. Encounter, Inc.,* 50 N.C. App. 467, 471, 274 S.E. 2d 391, 393-94 (1981). A contact with North Carolina "sufficiently substantial" to confer jurisdiction on its courts has been established when

the contract was made in North Carolina or was to be performed in North Carolina. *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970).

Plaintiff's execution of the agreement was the final act necessary for creating a binding agreement, under the express terms of the contract. Defendant first executed the franchise agreement and forwarded it to plaintiff's offices in Asheboro for its execution. The language of the contract discloses that both parties contemplated plaintiff's performing services under the contract within North Carolina. Information on the "Supertread" process was mailed from the Asheboro offices, and materials were to be shipped from the Asheboro and Siler City plants. Materials purchased by defendant from other suppliers were to be shipped to the North Carolina plants for quality control testing. Plaintiff's efforts to improve its retreading process were to be carried out in North Carolina facilities.

We find that the terms of the franchise agreement reveal the contract was made in this State and was to be performed in this State, thus, there were sufficient minimum contacts for due process. Under the terms of G.S. 55-145(a)(1), North Carolina has jurisdiction over defendant.

Additionally, G.S. 1-75.4(5)a. and b. provide statutory authority for the exercise of personal jurisdiction by North Carolina courts in an action which:

"a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant . . . ."

Defendant agreed in the franchise contract to pay plaintiff a 20-cent royalty and service fee on every pound of materials essential to the "Supertread" process, in exchange for plaintiff's development of the process and for technical services plaintiff

would render to defendant. Because this action arose from defendant's failure to pay the promised royalties, jurisdiction also is conferred over defendant under G.S. 1-75.4(5)a. and b. *See Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). We also note that defendant states in its brief: "The defendant will concede that the North Carolina Long Arm Statutes confer statutory jurisdiction over it."

For the reasons stated, due process has been satisfied. We hold that the trial court did not err in denying defendant's motion to dismiss. The order is

Affirmed.

Judges WEBB and WHICHARD concur.

RONALD WAYNE BARBER AND WIFE, MONA LISA BARBER; GILBERT R. HERSHEY AND WIFE, FRANCES O. HERSHEY; JAMES L. GENTRY, SR. AND WIFE, BEULAH ANN GENTRY v. HERMAN F. DIXON AND WIFE, MATILDA P. DIXON

No. 824DC554

(*Filed 7 June 1983*)

1. **Deeds § 20.3— restrictive covenants—prohibiting use of house trailer**

   There was sufficient evidence to support the trial judge's findings that defendants' structure was a trailer and a temporary structure within the meaning of a subdivision's restrictive covenants where the evidence showed that two units that comprised the defendants' structure were transported by wheels, tongues and axles which were bolted on at the place of manufacture and removed about two days after the units were located on the lot.

2. **Deeds § 20.6— restrictive covenants—no waiver of right to enforce**

   Plaintiffs did not waive their right to enforce restrictive covenants in a subdivision by failing to enforce the covenants against one plaintiff who had a storage shed on his land that was there when he bought his lot and where another owner in the subdivision has a building on his lot in which he stores his boat.

3. **Deeds § 20.7— witness not tendered as expert—not allowed to define terms—no error**

   Where defendants never tendered their witness as an expert, the trial court did not err in failing to allow the witness to answer certain questions, including defining the terms "trailer" and "manufactured home."

4. Parties § 1.1— necessary party—not before court

The trail judge's judgment exceeded the court's jurisdiction where, although the defendants' son and his wife were not parties named in the pleadings, the judgment purported to enjoin them from putting a mobile home or trailer on the defendants' lot.

APPEAL by defendants from *Erwin, Judge.* Judgment entered 1 February 1982 in District Court, ONSLOW County. Heard in the Court of Appeals 18 April 1983.

The plaintiffs here seek a permanent injunction requiring the defendants to remove the structure in which they live from their lot in Blue Creek Park Subdivision in Onslow County. All parties are lot owners in the subdivision.

In their 3 December 1981 complaint, the plaintiffs allege that the defendants' structure violates restrictive covenants applicable to all lots in the subdivision, that the defendants have failed to remove the structure after a request to do so, and that their remedy at law is inadequate.

The defendants' answer denies that their structure violates the restrictive covenants and also alleges that the covenants are too vague to be enforced against them.

The relevant restrictive covenant, which was recorded on 3 June 1968, states:

> 6. TEMPORARY STRUCTURES: No structure of a temporary character (including house trailers) shall be used upon any lot at any time.

Three issues were submitted to the trial judge by stipulation of the parties. Those issues and his answers were:

> *ISSUE 1:* Is the improvement placed upon the property of the defendants a trailer within the meaning of the restrictive covenants?
>
> *ANSWER:* Yes.
>
> *ISSUE 2:* Have the plaintiffs waived their right to enforce a violation of the restrictive covenants?
>
> *ANSWER:* No.

ISSUE 3: Is the improvement placed upon the property of the defendants a structure of a temporary character within the meaning of the restrictive covenants?

ANSWER: Yes.

The trial judge held for the plaintiffs and ordered the defendants to remove their structure from their lot and enjoined them from placing it, a trailer or a mobile home upon the lot. The defendants then appealed to this Court.

Warlick, Milsted, Dotson and Carter, by Marshall F. Dotson, Jr., for plaintiff-appellee.

Thomasine E. Moore and Bowen C. Tatum, Jr., for defendant-appellants.

ARNOLD, Judge.

We first note that injunction is a proper equitable remedy to enforce a restrictive covenant when the plaintiffs show that their remedy at law is inadequate and that they will suffer irreparable damage if the violation is allowed to continue. *See Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388 (1954); *Franzle v. Waters,* 18 N. C. App. 371, 197 S.E. 2d 15 (1973). Because the plaintiffs here have met this burden, the judgment is affirmed.

North Carolina follows the rule of strict construction when interpreting restrictive covenants. That is, any ambiguities will be resolved in favor of unrestricted use. But this rule must not be applied to defeat the plain and obvious purposes of the restriction. *Long v. Branham,* 271 N.C. 264, 268, 156 S.E. 2d 235, 239 (1967). *See also,* J. Webster, Real Estate Law in North Carolina § 388 (Hetrick rev. 1981). As owners of lots in the subdivision, the plaintiffs are proper parties to enforce the restrictive covenants. *Stegall v. Housing Authority,* 278 N.C. 95, 102, 178 S.E. 2d 824, 829 (1971).

[1] This dispute turns on if the defendants' structure violates clause six's prohibition of temporary structures and house trailers. Neither of these terms are defined in the restrictive covenants. In such cases, we follow the intentions of the parties. "[E]ach part of the covenant must be given effect according to the natural meaning of the words. . . ." *Hobby & Son, Inc. v. Family Homes,* 302 N.C. 64, 71, 274 S.E. 2d 174, 179 (1981).

With these general principles in mind, we turn to cases that have considered similar restrictions. In *Strickland v. Overman*, 11 N.C. App. 427, 181 S.E. 2d 136 (1971), the restriction stated: "No trailer, tents or temporary structures shall be erected or allowed on any lot. . . ." The court held that the defendants' "prefabricated modular unit" violated the covenant.

The restriction in *Van Poole v. Messer*, 19 N.C. App. 70, 198 S.E. 2d 106 (1973), stated: "No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently." The court held that there was no material issue of genuine fact that "a modern mobile home" is a "trailer" within the meaning of that covenant.

Judge Morris (later Chief Judge) continued:

> That the term "trailer" includes a "mobile home" within its meaning is the accepted rule in every authority we have found dealing with that issue. (Citations omitted.) In Annot., 96 A.L.R. 2d 232 (1964), at page 234, it is stated that "[t]he term 'trailer' is understood in its usual meaning regardless of whether it is referred to or described as house trailer, mobile home, trailer coach, or some such term."

19 N.C. App. at 72, 198 S.E. 2d at 107.

We also note *City of Asheboro v. Auman*, 26 N.C. App. 87, 214 S.E. 2d 621, *cert. denied*, 288 N.C. 239, 217 S.E. 2d 663 (1975), where the court upheld a permanent injunction prohibiting the defendants from allowing a mobile home to remain in an area where it was prohibited by an ordinance. According to that case, "the mere removal of the wheels, tongue and the erection of a foundation . . . did not change the nature of the offending use of the property." 26 N.C. App. at 88, 214 S.E. 2d at 621. The evidence here showed that the two units that comprise the defendants' structure were transported by wheels, tongues and axles that were bolted on at the place of manufacture and removed about two days after the units were located on the lot.

The expressed intent of these covenants also supports our holding that the defendants' structure is a violation. An introductory paragraph states that one purpose of the covenants is "to

prevent uses which might tend to diminish the value of said property and any part thereof. . . ." As was found in the judgment, the defendants' structure "materially impairs the uniform scheme of development of said subdivision and threatens to impair the marketability of the property of the plaintiffs. . . ."

Thus, there was sufficient evidence to support the trial judge's findings that the defendants' structure was a trailer and a temporary structure within the meaning of the restrictive covenants.

[2] The defendants raise waiver as a possible defense. The evidence shows that one of the plaintiffs has a storage shed on his land that was there when he bought his lot and that another owner in the subdivision has a building on his lot in which he stored his boat. Because the plaintiffs' have not enforced the covenants against those two owners, the defendants contend that the right to enforce the covenants has been waived. We disagree.

Whether acquiescence in violations of restrictive covenants is a waiver by owners in a subdivision of the right to enforce the restrictions was addressed in *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 120 S.E. 2d 817 (1961). Restrictive covenants will be given full effect unless changed conditions within the covenanted area are "so radical as practically to destroy the essential objects and purposes" of the scheme of development. 255 N.C. at 39, 120 S.E. 2d at 828. *See also, Webster, supra,* at § 389. The two examples cited by the defendants, if they are violations, are not so drastic as to warrant the removal of the restrictions.

[3] Two other arguments are raised by the defendants. They first contend that their witness Gene Longo should have been allowed to answer certain questions, including defining the terms "trailer" and "manufactured home." According to the defendants, Longo was an expert as a result of his training and ten years of experience in the manufactured home business.

Our examination of the record shows that Longo was never tendered by the defendants as an expert. When the plaintiffs objected to Longo's defining "trailer" and "manufactured home" and distinguishing the structures in the subdivision based on their construction, the defendants should have requested the court to find him qualified as an expert. "[I]f there is no such request, and

no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed" on appeal. 1 Brandis, N.C. Evidence § 133 (2d rev. ed. 1982); *State v. Satterfield,* 300 N.C. 621, 268 S.E. 2d 510 (1980). Although no expertise is necessary to distinguish the structures based on their appearance, it was harmless error to refuse to let Longo answer that question. *See* G.S. 1A-1, Rule 61.

[4] Finally, the defendants argue that all parties necessary for a decision were not before the court. Although the defendants' son and his wife were not parties named in the pleadings, the judgment purports to enjoin them from putting a mobile home or trailer on the defendants' lot. The defendants contend that this part of the judgment exceeds the court's jurisdiction. We agree.

As stated in *Buncombe County Bd. of Health v. Brown,* 271 N.C. 401, 404, 156 S.E. 2d 708, 710 (1967): "[A] judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court."

As a result, that part of the judgment enjoining Herman Franklin Dixon, Jr. and wife, Ellen G. Dixon, is void. The remainder of the judgment against the named defendants is valid and stands as rendered.

We note that even with this change, the practical effect of the judgment will be to prevent anyone from placing a violating structure on the defendants' lot. The judgment permanently enjoins the defendants from violating the covenant in question by "locating or *causing to be located* upon their property" a violating structure (emphasis added).

Affirmed as modified.

Chief Judge VAUGHN and Judge HEDRICK concur.

COMMERCIAL UNION INSURANCE COMPANY v. SANFORD LEE MAULDIN, COLLECTOR OF THE ESTATE OF KAY MAULDIN PUGH, DECEASED, TOMMY JOE WILMOTH AND BRENDA S. WILMOTH

No. 8218SC752

(Filed 7 June 1983)

Insurance § 149— homeowner's insurance—shooting death—guilty plea to second degree murder—exclusion of coverage

Where the insured shot into a car occupied by his wife and killed the driver thereof, the insured stipulated that he intended to shoot his wife but not the driver, and the insured pled guilty to second degree murder of the driver, the insured's shooting of the driver was excluded from coverage under a homeowner's policy by a provision that the policy did not apply "to bodily injury or property damage which is either expected or intended from the standpoint of the insured" since (1) the insured's guilty plea to second degree murder of the driver was an admission that he had the general intent to do the act which caused the driver's death, and (2) the likelihood of one of the bullets hitting the driver should have been expected by the insured.

Judge BECTON *concurring.*

APPEAL by defendant from *Helms, Judge.* Judgment entered 13 May 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 May 1983.

Plaintiff filed this declaratory judgment action to determine whether its policy provided coverage for Tommy Joe Wilmoth in connection with a shooting incident that occurred on 6 April 1978. In his deposition, Wilmoth testified that he and his wife, Brenda Wilmoth, were married in November 1976. They had marital problems, and Brenda would often go away from the house for several days. She spent a lot of time with her close friend, Kay Mauldin Pugh. The plaintiff and defendant Mauldin stipulated to the following facts only for the purpose of plaintiff's motion for summary judgment. On 6 April 1978, Pugh and Brenda Wilmoth drove in Pugh's car to the drive-in window at Cleaner World to deliver some clothes. Wilmoth pulled up beside Pugh's car and began talking and then arguing with Brenda Wilmoth. He pulled out a .38 caliber pistol and fired four or five shots into Pugh's car as it sped out of the parking lot. The shots killed Pugh and injured Brenda Wilmoth and a Cleaner World attendant. Wilmoth stipulated that he intended to shoot and injure his wife, but he did not have a specific intent to shoot and injure Pugh.

On 6 April 1978, Wilmoth was an insured under plaintiff's homeowner's policy No. CZ-S259175. The policy included the following provisions.

(1) The exclusion section of the policy provides that: *This policy does not apply.*

. . .

(f) *to bodily injury or property damage which is either expected or intended from the standpoint of the insured.* (Emphasis added.)

(2) The coverage section of the policy provides that: Coverage E—Personal Liability

This Company agrees to pay on behalf of the Insured all sums to which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. This Company shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient.

(3) The definitions section of the policy provides that: "*occurrence*": means an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.

Wilmoth pled guilty to the second degree murder of Pugh and to assault with a deadly weapon with intent to kill Brenda Wilmoth. He was sentenced to eighty years' imprisonment for second degree murder and twenty years' imprisonment for assault.

On 3 April 1980, Sanford Lee Mauldin, collector of the estate of Kay Mauldin Pugh, filed a wrongful death action against Wilmoth. Plaintiff filed this declaratory judgment action seeking a declaration that its policy did not provide coverage for Wilmoth in connection with the events that occurred in the shooting inci-

dent on 6 April 1977, and filed a motion for summary judgment. The court granted plaintiff's motion for summary judgment.

Smith, Moore, Smith, Schell and Hunter, by Bynum M. Hunter and Alan W. Duncan, for plaintiff appellee.

Nichols, Caffrey, Hill, Evans and Murrelle, by G. Marlin Evans and R. Thompson Wright, for defendant appellant.

VAUGHN, Chief Judge.

The sole issue is whether the trial court erred in finding that Wilmoth was not covered by the homeowner's policy for the claims asserted by Sanford Lee Mauldin. An insurance policy is a contract between the parties and is to be construed and enforced in accordance with its terms. *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967). "[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978). There is no ambiguity in the sentence "[This policy does not apply] to bodily injury or property damage which is either expected or intended from the standpoint of the insured." The sentence obviously means that the policy is excluding from coverage bodily injury caused by the insured's intentional acts, determining whether the act is intentional from the insured's point of view.

A similar clause in an insurance policy was interpreted by the Fourth Circuit in *Stout v. Grain Dealers Mutual Insurance Co.*, 307 F. 2d 521 (4th Cir. 1962). In *Stout*, the policy stated: "*This coverage does not apply*: (c) to injury, sickness, disease, death or destruction caused intentionally by the or at the direction of the insured." The insured had shot and killed a "peeping Tom" who was looking into his daughter's window. He was indicted for murder and pled guilty to voluntary manslaughter. Subsequently, the administratrix of the deceased's estate brought a wrongful death action against the insured. The insurer refused to defend the suit on the grounds that the death was intentionally inflicted and thus not covered by the policy. The Fourth Circuit agreed, holding that the insured's acts took him outside the coverage of

the policy because the insured admitted he intentionally caused decedent's death when he pled guilty to voluntary manslaughter.

In this case, Wilmoth stipulated that he intended to shoot his wife but not Pugh. He pled guilty to second degree murder of Pugh. As in *Stout*, Wilmoth's guilty plea to second degree murder removed him from coverage under the policy. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980). In discussing the element of intent in second degree murder, our Supreme Court said:

> While an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death. [Citations omitted] . . . [A]ny act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. *Such an act will always be accompanied by the general intent to do the act itself* but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing. (Emphasis added.)

State v. Wilkerson, 295 N.C. 559, 580-581, 247 S.E. 2d 905, 917 (1978). Wilmoth's guilty plea to second degree murder was an admission that he had the general intent to do the act, and it excluded him from coverage under the insurance policy.

Additionally, the likelihood of one of the bullets hitting Pugh should have been expected by Wilmoth. To expect is to anticipate that something is probable or certain, Webster's Seventh New Collegiate Dictionary (1969), and Wilmoth obviously knew it was probable that he would hit Pugh when he fired four or five shots into her moving car.

As there is no issue of fact and, for the reasons stated above, plaintiff was entitled to judgment as a matter of law, the trial court's entry of summary judgment is

Affirmed.

Judge HILL concurs.

Judge BECTON concurs and files a concurring opinion.

Judge BECTON concurring.

I am not convinced that Tommy Wilmoth's guilty plea to the second degree murder of Kay Pugh is conclusive evidence of his intent to inflict bodily injury on Kay Pugh so as to exclude coverage under plaintiff's homeowner's policy No. CZS-295175. Although it is true that a guilty plea in a criminal action may properly be admitted into evidence in a related civil proceeding as an admission against interest, such a plea is not, in my view, determinative of the ultimate factual question in a civil suit. Experienced members of both the bench and bar are aware that pleas are entered for many different reasons. The most common is the most pragmatic: the sobering realization that in many criminal cases a plea of not guilty is a game of chance. The defendant has no control over the dice, and the stakes comprise his freedom.

However, as the majority points out (ante p. 5), that one or both occupants of the car would be severely wounded or killed when Wilmoth wildly and repeatedly fired his .38 into the car should have been expected. Since the policy exempts from coverage *expected* injuries, Commercial Union was within its rights to deny coverage to Wilmoth.

Accordingly, although the more appropriate *ratio decidendi* is, in my view, the "expected" consequence policy exclusion, I nevertheless concur in the result reached by the majority.

WILLIAM B. POWELL, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM B. POWELL, JR. v. ROBERT LEWIS PARKER AND DELORES PARKER

No. 826SC516

(Filed 7 June 1983)

Death § 7.4— wrongful death action—competency of hypothetical question

In a wrongful death action, the trial court did not err in allowing an economist to testify concerning the present monetary value of the decedent to

the plaintiff where the economist testified that his opinion was based on decedent's age, race, life expectancy, health, education, the life expectancy of his parents, his work record and earnings, and his living situation and where he further testified that his opinion was consistent with, and took into account, the decedent's sporadic work history and income record.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered on 30 December 1981 in Superior Court, HERTFORD County. Heard in the Court of Appeals 11 April 1983.

This is a civil case wherein the plaintiff seeks to recover damages for the wrongful death of his son allegedly resulting from the negligence of the defendant in the operation of a motor vehicle on 7 July 1980.

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

1) Was the death of plaintiff's intestate, William B. Powell, Jr., caused by the negligence of defendant, Robert Lewis Parker, as alleged in the complaint?

ANSWER: Yes.

2) If so, did the plaintiff's intestate, William B. Powell, Jr., by his own negligence contribute to his death as alleged in the answer?

ANSWER: No.

3) What amount of damages is the plaintiff, William B. Powell, Sr., administrator of the estate of William B. Powell, Jr., entitled to recover by reason of the death of William B. Powell, Jr.?

ANSWER: $60,000.00.

4) Was the defendant, Robert Lewis Parker, the agent of the defendant, Delores Parker, at the time of this automobile wreck?

ANSWER: Yes.

From a judgment entered on the verdict, defendants appealed.

Moore, Van Allen and Allen, by Arch T. Allen, III and C. Steven Mason, for plaintiff appellee.

Ragsdale and Liggett, by William Woodward Webb and John Hutson, Jr., for defendant appellants.

ARNOLD, Judge.

Defendants' several assignments of error present the single question of whether the trial court erred in allowing into evidence the opinion testimony of plaintiff's expert witness, an economist.

Defendants argue that testimony of plaintiff's expert witness, John Fremon Jones, an economist, concerning the present monetary value of the decedent to the plaintiff, and the loss to the plaintiff resulting from the decedent's death, is based on "inadequate, unreliable and misleading factual data" and should therefore have been excluded by the trial court.

The established rule in North Carolina with regard to the opinion testimony of experts is that such evidence is admissible when the witness is better qualified than the jury to draw inferences from the facts. *Matter of Collins,* 49 N.C. App. 243, 271 S.E. 2d 72 (1980). *See generally,* 1 Brandis, N.C. Evidence § 132-134 (1982). North Carolina courts have held that the opinion of an economist, testifying as an expert, is admissible in wrongful death cases. *Beck v. Carolina Power and Light Co.,* 57 N.C. App. 373, 291 S.E. 2d 897 (1982).

Under the rules of evidence in effect at the time of this trial, the proper method of eliciting the opinion of an expert, after qualifying him as such, was to present a hypothetical situation, based on the facts of the case, and ask the witness, first, whether he could form an opinion satisfactory to himself based on those facts and, if so, what that opinion was. *See* 1 Brandis, *supra,* at § 137.

The answer to the hypothetical question must be based on facts that are within the knowledge of the expert or upon the hypothesis of the finding of certain facts recited in the question. *Dean v. Carolina Coach Co., Inc.,* 287 N.C. 515, 215 S.E. 2d 89 (1975).

Thus, in order to be unobjectionable, the hypothetical question must recite sufficient facts to put the premise of the expert's

opinion before the trier of fact in order that the trier of fact may properly evaluate the opinion in its consideration of the evidence. *Schafer v. Southern R.R. Co.*, 266 N.C. 285, 145 S.E. 2d 887, *modified on other grounds*, 267 N.C. 419, 148 S.E. 2d 292 (1965). Once the trial court in its discretion determines that the expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence.

As long as the hypothetical question meets the above criteria, the questioner has broad latitude in the phrasing of the question. "[T]he interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove." *Dean*, 287 N.C. at 518, 215 S.E. 2d at 92.

The Supreme Court has adopted the view that the hypothetical question need not include all the facts in evidence, and that the adversary party is protected from prejudice by his right of cross-examination. When the adversary party believes that certain facts or theories material to the issue have been omitted, it is his right and duty to incorporate those facts or theories in his questions on cross-examination, and to ask the expert witness whether his opinion would be modified by their inclusion. *Dean*, 287 N.C. at 520, 215 S.E. 2d at 93.

When the adversary is able, by a thorough cross-examination, to make the trier of fact fully cognizant of any weaknesses or omissions in the recitation of the facts that form the basis of his opinion on direct examination, the court cannot say that the opinion was based on incomplete facts or incorrect inferences from those facts. *Id.* at 521, 215 S.E. 2d at 93.

In applying these principles to wrongful death cases involving the testimony of economist experts, this Court has held that while the probative value of expert testimony may be weakened by the failure to include in the hypothetical question certain facts and data which form the basis of the opinion, it does not render the testimony incompetent. Rather, it is the function of cross-examination to expose the weakness of that expert's opinion. *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. Ap. 630, 248 S.E. 2d 887 (1978); *cert. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979).

In the present case, the expert witness, John Fremon Jones, was found by the court to be an expert in economics. Defendants posed no objection to this finding.

After counsel for both parties discussed the sufficiency of the hypothetical question with the court, the court allowed the witness, over the objection of defendants' counsel, to answer the question.

Dr. Jones testified that, based on decedent's age, race, life expectancy, health, education, the life expectancy of his parents, his work record and earnings, and his living situation, that he could form an opinion satisfactory to himself as to the present monetary value of the projected net income of the decedent to the plaintiff. Dr. Jones further testified that in forming his opinion he also took into account projected personal maintenance expenditures. He also testified that his figure was consistent with, and took into account, the decedent's sporadic work history and income record. Upon subsequent direct and cross-examination, Dr. Jones testified that his projections were based in part on statistical averages contained in studies published in official government publications. These studies were not introduced into evidence.

Based on the facts in evidence, and on his computations, Dr. Jones testified that $74,004 was a reasonable estimate of the projected loss, reduced to present monetary value, resulting from decedent's death.

Defendants' objection was based primarily on the contention that the evidence tends to show that decedent had, at best, a sporadic work history, and that any projection of future earnings based on this evidence was speculative and therefore misleading to the jury.

The General Assembly, in enacting the wrongful death statute, intended to compensate persons for the loss of their decedents as fully as possible. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). In allowing recovery under this statute the courts have recognized that some speculation is necessary in determining damages, and that "monetary recovery cannot be denied simply 'because no yardstick for ascertaining the amount thereof has been provided.'" *Beck*, 57 N.C. App. at 381, 291 S.E. 2d at 902, *quoting Bowen*, 283 N.C. at 419, 196 S.E. 2d at 805-06.

In *Beck*, a case involving the wrongful death of a 24 year old male, this Court considered the testimony of an expert economist regarding the decedent's projected earnings. The premises of the expert's opinion in *Beck* were substantially the same as in this case, the only material difference being that the decedent in *Beck* had a short, as opposed to a sporadic, work history. This Court held that it was not error for the trial court to allow the expert testimony of plaintiff's witness. The court in *Beck* concluded that "[s]uch evidence provided a reasonable basis for the computation of damages, even though the result is, at best, only approximate. It is the function of cross-examination to expose any weakness in such testimony." *Beck*, 57 N.C. App. at 382, 291 S.E. 2d at 902.

Further, the jury's award of $60,000 was substantially less than the $74,004 value that plaintiff's expert witness projected, indicating that the jury was not in fact misled by the testimony, as defendants' contention implies.

No error.

Chief Judge VAUGHN and Judge HEDRICK concur.

DEAN C. PLEMMONS, JR., A MINOR BY HIS GUARDIAN AD LITEM, CAROL L. TEETER v. CITY OF GASTONIA AND GASTON COUNTY BOARD OF EDUCATION AND DEAN C. PLEMMONS, SR., AND MARGARET F. PLEMMONS v. CITY OF GASTONIA AND GASTON COUNTY BOARD OF EDUCATION

No. 8227SC272

(Filed 7 June 1983)

1. Schools § 11— school property leased to city—immunity of school board from tort liability

Where a minor was injured in a fall from school gymnasium bleachers while the gymnasium was leased to a city, defendant school board was immune from liability for damages sustained by the minor and his parents pursuant to the provisions of G.S. 115C-524(b) even if the school board was guilty of active negligence.

2. Municipal Corporations § 42— minor's tort claim against city—who may give notice

Effective notice of a minor's tort claim against a city can be furnished pursuant to former G.S. 1-539.15 by the minor's parent, close relative, lawyer or

other representative. Therefore, the trial court erred in ruling that under the statute only a guardian ad litem could furnish effective notice of a minor's tort claim against a city.

APPEAL by plaintiffs from *Kirby, Judge.* Judgments entered 16 October 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 21 January 1983.

Harris, Bumgardner & Carpenter, by Seth H. Langson, for plaintiff appellants.

Caudle, Underwood & Kinsey, P.A., by John H. Northey, III and Frank C. Newton, Jr., for defendant appellee City of Gastonia.

Garland & Alala, P.A., by James B. Garland and Julia M. Manning, for defendant appellee Gaston County Board of Education.

BECTON, Judge.

Dean Plemmons, Jr., a minor, was injured on 1 April 1978, when he fell eight feet from gymnasium bleachers to the floor. He was mildly retarded at that time. His parents contend that, as a result of the fall, Dean Jr. suffered serious and permanent brain damage. On 6 June 1980, a guardian ad litem was appointed to act on Dean Jr.'s behalf and filed actions against the City of Gastonia (City) and Gaston County Board of Education (Board). Dean Jr.'s parents filed separate suits against the same defendants the same day.

Both defendants filed motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1981). The City cites plaintiffs' alleged failure to give it proper notice of both the parents' and minor's claim; the Board relies on its statutory immunity pursuant to N.C. Gen. Stat. § 115C-524 (1981).[1] The motions were granted, judgments were entered thereon, and both plaintiffs appealed to this Court. Since then, however, the plaintiff parents abandoned their appeal as to the City, and the judgment dismiss-

1. The parties refer in their briefs to N.C. Gen. Stat. § 115-133 (1978) as the relevant provision. They recognize, however, that G.S. § 115-133 was repealed and reenacted as G.S. § 115C-524. We will cite it throughout this opinion in its present form.

ing that claim is being affirmed. We now consider the parents' contention as it relates to the Board and the minor plaintiff's contentions concerning the Board and the City.

I

Gaston County Board of Education

[1] A motion to dismiss pursuant to Rule 12(b)(6) is properly granted when the complaint affirmatively discloses to a certainty that even if the facts alleged therein were true, the plaintiff would be entitled to no relief. *Yates v. City of Raleigh*, 46 N.C. App. 221, 264 S.E. 2d 798 (1980). The Board asserts that because of the clear provisions of G.S. § 115C-524(b), and the fact that the gymnasium was leased to the City at the time Dean Jr. was injured, plaintiffs have failed to state a claim for which relief can be granted. G.S. § 115C-524(b) provides, in pertinent part:

> Not withstanding the provisions of G.S. 115C-263 and 115C-264,[2] local boards of education shall have authority to adopt rules and regulations by which school buildings, including cafeterias and lunchrooms, may be used for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. *No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property.* [Emphasis added.]

We agree with the Board that the statute renders it immune from liability in this instance. While not unmindful that this interpretation is likely to produce harsh results in many cases, we nevertheless are compelled by two factors to reach this conclusion.

First, the clear, specific mandate of the statute categorically bars liability: "No liability shall attach . . . by reason of the use of such school property." Second, common law rules governing landlord-lessee relationships also bar liability. North Carolina courts have held that absent some active negligence on the part of the landlord—and none was alleged in the case *sub judice*—a third party injured on leased premises has recourse against the lessee, not the lessor. *Wilson v. Dowtin*, 215 N.C. 547, 2 S.E. 2d

2. Reenactments of N.C. Gen. Stat. § 115-51 (1978).

576 (1939); *Boyer v. Agapion*, 46 N.C. App. 45, 264 S.E. 2d 364 (1980).

Plaintiff nevertheless contends as a policy matter, that G.S. § 115C-524 should be construed to include an active negligence caveat and that we should limit the statute's operation to circumstances in which liability is sought to be imposed on a Board of Education solely by reason of its status as landlord. The statute ought, in plaintiff's view, to reflect the common law rationale that if a Board of Education commits some affirmative act of negligence, or leases the premises in a ruinous condition, a third party injured on school premises would have recourse against that Board. Although that construction, arguably, would be the more humane, we simply cannot read into a statute a requirement that is not there. G.S. § 115C-524 provides no chink in its armor of immunity, even for the sword of active negligence. To accept plaintiffs' argument would render the statute superfluous. The Legislature clearly intended to do more than codify the common law rule. *See, e.g., City of Raleigh v. Fisher*, 232 N.C. 629, 633, 61 S.E. 2d 897, 901 (1950): "[I]t is well-settled 'that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmance of the old law. . . .'" [Citations omitted.] Further, the General Assembly, by repealing and reenacting the operative portion of the statute, *verbatim*, during the pendency of this case, emphasized its satisfaction with the law as codified, and we are bound by such expressions of its intent. Thus, the Board's motion for dismissal of plaintiffs' claim pursuant to Rule 12(b)(6) was proper.

II

City of Gastonia

[2] Though repealed[3] since then, the plaintiff's action, filed in 1980, was subject to N.C. Gen. Stat. § 1-539.15 (1981), which, in pertinent part, read as follows:

3. By Session Laws 1981, c. 777, s. 1, effective July 2, 1981. By s. 2 of the same Session Laws chapter, now identified as N.C. Gen. Stat. § 1-539.16, the General Assembly abrogated the power of cities and other local government units to require notice of claims as a condition precedent to suing them. The Act, by its terms, does not apply to claims pending before July 2, 1981.

> (a) In order to preserve a claim against a city arising in contract or in tort, notice must be given and the cause of action commenced in accordance with this section. A person with a claim against a city arising in tort or contract must give written notice of the claim to the council or its designee within six months, and commence his action within two years after the claim is due or the cause of action arises. . . .
>
> No action based on a claim arising in contract or in tort may be commenced except after 30 days following the day on which the notice required by this section is given. Unless notice of the claim is given and the action commenced in accordance with this section, any action based on the claim is barred. . . .

Although Dean Jr. alleged in his complaint that the City and the Board had been "notified of said accident and claim against them as provided by law. . . ," the trial court concluded to the contrary and dismissed the action. In so doing the trial court ruled that the allegation as to prior notice was legally and factually impossible, since effective notice of a child's claim can be given only by the child's duly appointed guardian ad litem and the complaint was filed on the same day that the child's guardian ad litem was appointed. The correctness of this legal ruling is the question presented, the recorded facts upon which it is based being admitted.

Since G.S. § 1-539.15 did not specify how notice for minors was to be accomplished, we must first consider the purposes that prompted the enactment of this special notice law. The rationale for special notice statutes has been variously stated, but perhaps most succinctly by our Supreme Court in *Miller v. City of Charlotte*, 288 N.C. 475, 478-79, 219 S.E. 2d 62, 65 (1975):

> (1) To give municipal authorities an early opportunity to investigate such claims while the evidence is fresh, so as to prevent fraud and imposition; (2) to inform defendant of all the facts upon which plaintiff's claim for damages was founded; (3) to enable defendant, after an investigation of the claim within the time fixed by statute to determine whether it should admit liability and undertake to adjust and settle said claim; (4) to prevent additional accidents by allowing the public entity a chance to take precautionary and corrective

measures; and (5) to aid in establishing fiscal planning and budgeting based on potential liabilities. [Citations omitted.]

All of the above stated purposes, which special notice laws are designed to serve, can be accomplished by reasonably accurate, timely information about a claim being conveyed to a city, and not one of them depends for its achievement upon the information being furnished by any particular person or official. That being so, it is inescapable, we think, that it is information about the claim that the statute requires and nothing else.

We hold that effective notice of a child's claim can be furnished a city by that child's parent, close relative, lawyer, or even other representatives, under some circumstances. To interpret the statute otherwise would unnecessarily and burdensomely extend it. For example, requiring the intervention of a guardian ad litem at the informal, preliminary notice stage would not benefit the city and would add to the expense and inconvenience of the child or its parents. Thus, the judgment based upon the erroneous notion that under this statute only a guardian ad litem can furnish effective notice for a child must be reversed.

That the record does not reflect how, when or by whom the notice was allegedly given is of no moment at this juncture, since only the complaint's adequacy as a pleading is being considered. N.C. Gen. Stat. § 1A-1, Rule 9(c) (1969) expressly authorizes and encourages the general averment of conditions precedent. In compliance therewith, plaintiff has alleged that the requisite notice was given. Since the allegation is not necessarily untrue, it is a matter to be proved at trial like other allegations. *Benton v. W. H. Weaver Construction Company*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975).

III

The judgment and order dismissing the actions of the plaintiffs Dean C. Plemmons, Sr. and Margaret F. Plemmons against both defendants are

Affirmed.

The judgment dismissing the action of the minor plaintiff Dean C. Plemmons, Jr. against the defendant Board of Education is

Affirmed.

The order dismissing the action of the minor plaintiff Dean C. Plemmons, Jr. against the defendant City of Gastonia is

Reversed.

Judges WEBB and PHILLIPS concur.

DEBORAH A. HENDERSON v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY (OF CHATTANOOGA, TENNESSEE)

No. 8218DC731

(Filed 7 June 1983)

1. **Appeal and Error § 14— appeal timely perfected**

Defendant's appeal was timely perfected where the jury returned a verdict for plaintiff on 15 December 1981; defendant moved in open court for judgment n.o.v. and, in the alternative, a new trial; on 18 December 1981 defendant filed and delivered to the trial judge a written memorialization of the motion for judgment n.o.v. and, in the alternative, a new trial; on 18 December 1981 after receipt of defendant's motion, the trial judge executed a judgment and filed it; on 30 December 1981 defendant filed a notice of appeal fearing that the trial judge's execution of judgment might be construed as a ruling on defendant's motion; and where defendant's motion for judgment n.o.v. and, in the alternative, a new trial was denied by order dated 24 February 1982, and notice of appeal was filed 2 March 1982. App. Rule 3(c).

2. **Insurance § 16— coverage under group life insurance policy—summary judgment properly denied**

Where defendant's evidence tended to show that coverage of plaintiff's dependent terminated on 3 December 1978 and plaintiff's evidence tended to show that the policy was in force through 17 December 1978, a material issue was before the court based on the pleadings, affidavits and exhibits concerning the coverage of plaintiff's dependent between the time of 5 December and 11 December 1978, and the trial court properly overruled defendant's motion for summary judgment.

3. **Insurance § 16— coverage under group life policy—issue of when coverage ended**

The trial court properly denied defendant's motions for directed verdict and judgment n.o.v. where a group life insurance policy set general guidelines within which coverage began and ended, but where it was necessary to go outside the policy for the exact dates, and where there was conflicting evidence regarding such dates.

4. Trial § 11.1— closing argument—matter outside record—not sufficiently prejudicial to require new trial

While it was clearly error for plaintiff's attorney to read a letter from defendant to plaintiff's employer to the jury in his closing argument since the letter was not in evidence, the argument was not sufficiently prejudicial to require a new trial.

APPEAL by defendant from *Cecil, Judge.* Judgment filed 18 December 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 13 May 1983.

Appeal by defendant insurance company from judgment entered on a jury verdict in plaintiff's favor, citing as error the trial court's denial of defendant's motions for summary judgment, judgment n.o.v. and a new trial.

Robert S. Cahoon for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr., Robert A. Singer, and S. Leigh Rodenbough, IV, for defendant-appellant.

HILL, Judge.

Plaintiff at all times pertinent to this case was an employee of Cone Mills Corporation. She and her minor son were insured under a group life, disability and hospitalization policy written by defendant Provident Life and Accident Insurance Company. On or about 1 December 1978, plaintiff signed (1) a form requesting that her son be dropped from coverage, and (2) the "change of coverage" portion of her enrollment card confirming the termination.

Prepayment of premiums under the group plan was made by Cone Mills at the beginning of each "coverage month." Then, through its payroll deduction plan, Cone Mills deducted from each employee's salary the premium prepaid for the employee's insured dependents.

Cone Mills deducted $11.14 from plaintiff's paycheck on 7 December 1978. Defendant contends this sum constituted reimbursement for premiums it had previously paid defendant for coverage of plaintiff's dependent son through December 3, 1978. Plaintiff contends, however, the payment covered the period beginning 3 December and ending 17 December 1978.

Plaintiff's son contracted spinal meningitis on 5 December and died 11 December 1978. By her complaint, plaintiff sought under the insurance policy $4,113.50 for hospital and medical expenses and a $400.00 death benefit. Defendant contends plaintiff terminated coverage of her dependent son as of 3 December 1978, the termination date of the coverage month.

On 28 February 1981 and 10 July 1981, defendant filed motions for summary judgment which were denied. The matter came on for trial 14 December 1981 on the single issue whether the insurance policy was in effect on 5 December 1978 as to plaintiff's son, Maurice A. Henderson. The Court entered judgment on a jury verdict for plaintiff, from which defendant appeals.

[1] Plaintiff contends this appeal was not timely perfected and should therefore be dismissed. We disagree.

The jury returned a verdict for plaintiff on 15 December 1981. At that time, defendant moved in open court for judgment n.o.v. and, in the alternative, a new trial. The trial judge directed the court reporter to indicate that he reserved a ruling on defendant's motion. On Friday, 18 December 1981, counsel for defendant filed and delivered to the trial judge a written memorialization of the motion for judgment n.o.v. and, in the alternative, a new trial. On the same day, but after receipt of defendant's motion, the trial judge executed a judgment prepared by plaintiff's counsel and filed it in the office of the Clerk of Court. Counsel for defendant first became aware of the filing of the judgment on 30 December 1981. The trial judge could not be reached. Fearing that the trial judge's execution of judgment might be construed as a ruling on defendant's motion, defendant filed a notice of appeal on 30 December 1981 containing the following provision: "In giving this notice of appeal, the defendant in no way waives its right to decision of and entry of an order on its motion for judgment notwithstanding the verdict and, in the alternative, for a new trial filed on December 18, 1981."

Rule 3(c) of the Rules of Appellate Procedure provides:

> . . . The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and

> the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of a new trial; . . . (iv) a motion under Rule 59 for a new trial.

Defendant's motion for judgment n.o.v. and, in the alternative, a new trial was denied by order dated 24 February 1982, and notice of appeal was filed 2 March 1982. The record on appeal was filed with this Court 19 July 1982, well within the time allowed. Therefore, we find that this matter is properly before the Court.

By its first substantive assignment of error, defendant contends the trial court erred in denying its motions for summary judgment. We disagree.

[2] Defendant first moved for summary judgment on 23 February 1981. The motion was supported by the affidavit of David Moff to which were attached copies of the group insurance contract, the plaintiff's enrollment card, and the plaintiff's change of status card. Defendant's evidence tended to show that coverage of plaintiff's dependent terminated on 3 December 1978 and the deduction of $11.14 from plaintiff's paycheck on 7 December 1978 was a reimbursement of premiums paid by Cone Mills for coverage through 3 December 1978 only. Plaintiff's response tended to show that the payroll deduction kept the policy in force through 17 December 1978. Hence, a material issue was before the court based on the pleadings, affidavits and exhibits, and the trial judge properly overruled the motion.

On 10 July 1981, the defendant renewed its motion for summary judgment. Finding the existence of genuine issues of material fact, the trial judge again properly denied defendant's motion. It is axiomatic that the party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. *See* G.S. 1A-1, Rule 56(e), *Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980). Defendant failed to do so, and therefore the trial judge correctly denied the motion for summary judgment.

[3] Defendant next contends the trial court erred in denying its motions for directed verdict and judgment n.o.v. In support of

this contention, defendant argues that since plaintiff's suit was on the policy as written, her rights should have been determined in accordance with its terms, and parol evidence was incompetent to vary the terms concerning the parties or risks covered. *Peirson v. Insurance Co.*, 248 N.C. 215, 102 S.E. 2d 800 (1958).

The policy, which was introduced into evidence by plaintiff, provided:

> Termination of Insurance
>
> The Employee's insurance under this policy with respect to all Dependents shall terminate as of the earliest date determined in accordance with the following provisions:
>
> * * *
>
> (b) the date ending the period for which the last contribution is made if the Employee is required to contribute and fails to make any required contribution when due.

Under the policy, aggregated premiums for employees and their dependents were paid by Cone Mills to defendant at the beginning of each coverage month. During the coverage month, Cone Mills deducted from employee's paychecks reimbursement of the premiums paid for their insured dependents.

We conclude that the central issue here is the disputed period of insurance coverage. Plaintiff testified, without objection, that prior to 1 April 1977, defendant held plant meetings at which its representative explained to her that coverage of her dependent child would begin after payment of the first premium therefor was deducted from her paycheck; that coverage began in April 1977 and was maintained through bimonthly payroll deductions; that on 7 December 1978, plaintiff paid the required $11.14 premium to maintain coverage of her son at least through 17 December 1978.

Defendant offered evidence through its personnel director that when plaintiff signed the change of status and enrollment cards, coverage of her son terminated at the end of the pay period in which the change was made; that her 7 December 1978 paycheck covered the period ending December 3.

Thus, a question of fact regarding the period of coverage was raised. The policy set general guidelines within which coverage

began and ended; it was necessary to go outside the policy for the exact dates. There was conflicting evidence regarding such dates, and therefore the issue was properly submitted to the jury.

For these reasons, we hold the trial judge properly denied defendant's motions for directed verdict and judgment n.o.v.

[4] Finally, defendant contends the trial judge erred in denying its motion for a new trial because the attorney for plaintiff made an improper jury argument. We disagree.

During his closing argument to the jury, plaintiff's attorney read a letter from defendant to Cone Mills Corporation which stated an employee's coverage under the group policy could be continued for two months when it would otherwise be terminated if the employee was transferred to a salaried position. The trial judge was not in the courtroom. The letter was not in evidence. Counsel for plaintiff argued that while the provision was not "directly relevant," it logically related to this case; i.e., it showed coverage could be extended beyond a termination point.

When the judge returned, attorney for defendant moved for a mistrial or, in the alternative, a jury instruction to disregard the argument of plaintiff's counsel. The trial judge initially withheld ruling on the request and subsequently denied the motion.

While attorneys have a wide latitude in arguing to the jury, use of this letter, which was not in evidence, was clearly error. Nevertheless, though improper, the argument was not sufficiently prejudicial to require a new trial.

The grant or denial of a motion for a new trial is addressed to the sound discretion of the trial judge whose ruling in the absence of an abuse of discretion is not reviewable on appeal. *Currence v. Hardin*, 36 N.C. App. 130, 243 S.E. 2d 172, *aff'd*, 296 N.C. 95, 249 S.E. 2d 387 (1978). We conclude the trial judge committed no prejudicial error.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

JOHN E. SKVARLA III, ET AL. v. FRANCES WILLIAMS PARK

No. 8210SC808

(Filed 7 June 1983)

Easements § 11— appurtenant easement—no extinguishment by abandonment or adverse possession

In a declaratory judgment action brought by plaintiffs to determine whether they had a right to use an easement across defendant's property wherein the parties stipulated that a 1908 deed created an appurtenant easement in favor of plaintiffs' property across the rear of defendant's property, and wherein plaintiffs introduced a 1950 agreement between their predecessor in title and defendant's predecessor in title that a fence maintained across the easement would not affect the easement, defendant's evidence was insufficient to show that plaintiffs' easement was abandoned by their predecessor in title where it showed only that a fence had been maintained across the easement by the owner of the servient property since 1912 and that the easement had not been used in 70 years. Furthermore, defendant's evidence was insufficient to show that the easement was extinguished by adverse possession by the owner of the servient property since defendant failed to show any unequivocal act to put the owner of the easement on notice of an adverse claim, and since the 1950 agreement between the previous owners showed unequivocally that the use was permissive.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 9 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 18 May 1983.

Plaintiffs brought this declaratory judgment action to determine whether they had the right to use an easement across defendant's property.

The parties stipulated to the following facts. On 16 April 1908, Joseph J. Bernard, the owner of lots at 1405 and 1407 Hillsborough Street, conveyed the 1405 Hillsborough Street lot to C. B. Williams. The deed contained the following sentence: "It is understood and agreed that an alleyway in the rear of said property, ten feet in width and opening upon Park Avenue, shall be kept open for the mutual use and benefit of the parties hereto, their heirs and assigns." The easement was across the rear of the 1405 Hillsborough Street lot, now owned by defendant, the daughter of C. B. Williams.

Plaintiffs purchased the 1407 Hillsborough Street lot on 29 April 1980 from Clancy and Theys Construction Company. Plain-

tiffs introduced into evidence a notarized agreement between Madge Bernard (Joseph J. Bernard's widow, and the owner of 1407 Hillsborough Street at that time) and Margaret Williams (defendant's mother, the widow of C. B. Williams, and owner of 1405 Hillsborough Street at that time), which was executed in June 1950. It provided, in part:

> That whereas, the parties hereto are owners of adjoining tracts of land. . . .
>
> And whereas, the said Joseph J. Bernard and wife Ella M. Bernard in the said deed to C. B. Williams, reserved an alleyway, ten feet in width, and opening on Park Avenue across the land deeded and conveyed to said C. B. Williams;
>
> And whereas, there is now erected across the entrance to said alleyway and in the line between the said Bernard property and the said Williams property, a wire fence;
>
> And whereas, all of the said parties agree that it would be for their mutual benefit and interest to maintain this fence, but that it is not their desire nor intention that the erection and maintenance of this fence is to forfeit the right of easement established in the above mentioned deed;
>
> NOW, THEREFORE, said party of the first part. . . and said party of the second part. . . do hereby mutually agree that said fence may remain in the position where now erected without prejudice to or without affecting the easement heretofore established and marked out in the aforesaid deed. And the fact that the said fence is allowed to remain standing is not to be construed as meaning that the party of the second part may not be entitled to have said fence removed when needed. . . .

This document, which was signed and notarized, was not recorded until 1975.

At trial, defendant based her defense on the theory that plaintiffs' easement was abandoned by their predecessor in title, Madge Bernard. Defendant testified that she lived at 1405 Hillsborough Street since 1909. She said there had been a fence completely separating the 1405 and 1407 properties since 1912, and at no time, since 1912, had there been an alley across the

back ten feet of the 1405 Hillsborough Street property. Defendant had posted signs on her property, about 15 years ago, which said "No Trespassing" and "No Parking." Defendant's nine other witnesses testified that the fence had been there for a long time, and, as far as they knew, the easement had never been used by the 1407 Hillsborough Street property.

At the close of defendant's evidence the trial court granted plaintiffs' motion for a directed verdict and made the following pertinent findings of fact and conclusions of law:

> 4. That contained in the deed from Joseph J. Bernard and wife, Ella M. Bernard, conveying the lot at 1405 Hillsborough Street to C. B. Williams was the following language:
>
> > "It is understood and agreed that an alleyway in the rear of said property, ten feet in width and opening upon Park Avenue, shall be kept open for the mutual use and benefit of the parties hereto, their heirs and assigns."
>
> 5. That the alleyway, ten feet wide, is located adjacent to the rear or southern boundary of the Defendant's property at 1405 Hillsborough Street.
>
> 6. That there is currently a fence dividing the property line between the lots at 1405 and 1407 Hillsborough Street. That in 1950, the then owners of the lots at 1405 and 1407 Hillsborough Street entered into an agreement recorded in the Wake County Register of Deeds, Deed Book 2352, Page 465, which provided, in part, "it would be for their mutual benefit and interest to maintain this fence, but it is not their desire nor intention that the erection and maintenance of this fence is to forfeit the right of easement established in the above-mentioned deed." The above-mentioned deed is the deed from Joseph J. Bernard and wife, Ella M. Bernard conveying the lot at 1405 Hillsborough Street to C. B. Williams recorded in the office of the Register of Deeds of Wake County, North Carolina in Deed Book 229, Page 288.
>
> 7. That the Defendant has offered no evidence of an intention by the owners of the lot at 1407 Hillsborough Street to abandon the easement across the lot at 1405 Hillsborough Street.

8. That the Defendant has offered no evidence of an external act by which the owners of the lot at 1407 Hillsborough Street have expressed their intention to abandon the easement across the lot at 1405 Hillsborough Street.

9. That the Defendant has offered no evidence of the concurrence of the intention to abandon the easement across the lot at 1405 Hillsborough Street by the owners of the lot at 1407 Hillsborough Street with an actual relinquishment of the easement across the lot at 1405 Hillsborough Street by the owners of the lot at 1407 Hillsborough Street.

. . .

CONCLUSIONS OF LAW

. . .

5. Contained in the above-described deed of Joseph J. Bernard and wife conveying the lot at 1405 Hillsborough Street to C. B. Williams was the following language:

> "It is understood and agreed that an alleyway in the rear of said property, ten feet in width and opening upon Park Avenue, shall be kept open for the mutual use and benefit of the parties hereto, their heirs and assigns."

This language created an easement appurtenant across the lot at 1405 Hillsborough Street in favor of the lot at 1407 Hillsborough Street.

6. This appurtenant easement across the lot at 1405 Hillsborough Street is an alleyway, ten feet wide, adjacent to the rear or southern boundary of the property.

7. The Defendant bore the burden of proof with respect to her affirmative defenses. Defendant's evidence, even when considered true and in the light most favorable to her, is insufficient as a matter of law to have her affirmative defenses presented to the jury.

8. The Plaintiffs, having moved for directed verdict at the close of the Defendant's evidence, are entitled to a directed verdict in their favor in this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Directed Verdict in favor of the Plaintiffs is entered, pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure.

2. The Plaintiffs, as the fee simple owners of the lot at 1407 Hillsborough Street, are entitled to use the easement appurtenant across the rear of the lot at 1405 Hillsborough Street, ten feet in width, and located adjacent to the rear or southern boundary of the property.

Skvarla, Wyrick and From, by Robert A. Ponton, Jr., for plaintiff appellees.

Kirby, Wallace, Creech, Sarda and Zaytoun, by William A. Creech and David F. Kirby, for defendant appellant.

VAUGHN, Chief Judge.

Since the parties have stipulated that the deed from the Bernards to C. B. Williams created an appurtenant easement in favor of 1407 Hillsborough Street, the sole issue is whether defendant presented sufficient evidence to support her affirmative defense, that the easement was extinguished, to withstand plaintiffs' motion for a directed verdict. Defendant contends the easement was extinguished by abandonment. As the party claiming the easement was abandoned, defendant has the burden of proof to establish the abandonment. *Raleigh, Charlotte and Southern Railway v. McGuire*, 171 N.C. 277, 88 S.E. 337 (1916). Therefore, plaintiffs' motion for directed verdict was properly granted if the evidence, considered in the light most favorable to defendant, and with all conflicts in the evidence resolved in defendant's favor, is insufficient to justify a verdict for defendant as a matter of law. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). An appurtenant easement is an incorporeal right attached to the land; it is incapable of existence apart from the dominant estate, and it passes with the transfer of title to the land. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963); Hetrick, Webster's Real Estate Law in North Carolina § 303 *et seq.* (1981). An easement may be abandoned by unequivocal acts showing a clear intention to abandon

and terminate the easement; the intent to abandon is the material question. *Combs v. Brickhouse*, 201 N.C. 366, 160 S.E. 355 (1931). The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect. *Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942). Mere lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement. *Ward v. Sunset Beach and Twin Lakes, Inc.*, 53 N.C. App. 59, 279 S.E. 2d 889 (1981). Defendant contends that the evidence, viewed in the light most favorable to herself, tends to show that plaintiffs' predecessor in title abandoned the easement. We do not agree. Although the evidence tends to show that the easement had not been used in seventy years, there is not a shred of evidence to indicate that the easement was abandoned. There is absolutely no evidence of any external unequivocal act by plaintiffs, or their predecessors in title, indicating an intent to abandon the easement. The fence, because it was erected by the owner of the servient tenement, was not evidence of abandonment. Moreover, the agreement between Bernard and Williams explicitly stated "that it is not their desire nor intention that the erection and maintenance of this fence is to forfeit the right of easement. . . ." Since neither party introduced any evidence of abandonment, the trial court did not err by granting plaintiffs' motion for directed verdict on the issue of abandonment.

Defendant's second assignment of error is that the trial court erred by failing to submit the issue of adverse possession to the jury. At the outset, we note the following exchange that took place at the close of the evidence:

> Mr. Creech: Your Honor, defendant would move—would renew the motion we made at the conclusion of plaintiff's evidence, for motion under Rule 50 for a directed verdict. We at this time would like to renew that motion.
>
> Court: All right sir, now we will come to the plaintiffs' motion—*there is only one question in this lawsuit as I understand it gentlemen, and that is whether the plaintiff has abandoned its right of easement across 1405.*

Mr. Ponton: We agree with that, your Honor. (Emphasis added.)

Defendant failed to object or indicate in any way that she wanted the trial court to also consider the issue of adverse possession. If she felt that there was evidence to support an issue of adverse possession she should have made it known to the trial judge as required by Rule 46(b) of the North Carolina Rules of Civil Procedure. In any event, the assignment of error must be overruled because there is no evidence to establish the elements of adverse possession. Title may be acquired by adverse possession only if the possession is actual, open, notorious, exclusive, continuous, hostile, for the statutory period, and with intent to claim title to the land occupied. *Wilson County Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970); *Mizzell v. Ewell*, 27 N.C. App. 507, 219 S.E. 2d 513 (1975). An easement may be extinguished by adverse use by the owner of the servient property for the prescriptive period. *Duke Power Co. v. Toms*, 118 F. 2d 443 (4th Cir. 1941); Hetrick, Webster's Real Estate Law in North Carolina § 338 (1981). Possession is presumed permissive until it is proved that the occupant intended to claim against the true owner. *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951). The possession must be "evidenced by such unequivocal acts as will put the true owner on notice of the claim." *Clendenin v. Clendenin*, 181 N.C. 465, 467, 107 S.E. 458, 459 (1921). In this case, however, defendant has failed to show any unequivocal act which put plaintiffs' predecessor on notice of her claim. On the contrary, the agreement between the previous owners of the lots shows, unequivocally, that the use was permissive. The use may have become adverse when plaintiffs bought the property in 1980 and requested defendant to remove the fence, but that falls far short of the required twenty years' statutory period.

For the reasons stated, the judgment is

Affirmed.

Judges HILL and BECTON concur.

LAVERNE DAVIDSON v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, AND CHAIRMAN TOM C. WOMBLE; MARVIN S. CALLOWAY, JR.; ROBERT J. CHILDRESS; GARLENE GROGAN; WILLIAM F. SHEPPARD; DAVEY B. STALLINGS; JOHN W. WOOD; AND NANCY L. WOOTEN; IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION

No. 8221SC591

(Filed 7 June 1983)

Schools § 13.2— dismissal of career teacher proper

There was substantial evidence to support the judgment of the trial judge and an order of a local board of education which dismissed petitioner from her position as a career teacher. Further, the statutes, school board policies, and administrative regulations promulgated by the superintendent were complied with and the constitutional rights of the petitioner were adequately protected.

APPEAL by petitioner from *Martin, Judge.* Judgment entered 3 May 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 May 1983.

The petitioner appeals from dismissal from her position as a career teacher with the respondent for inadequate performance and neglect of duty.

She was first employed by the respondent as a probationary teacher in August, 1975 and was assigned to Walkertown Elementary School. After teaching there for two years and receiving satisfactory evaluations, the petitioner was transferred to Clemmons Elementary School and assigned to teach first grade.

About 20 October 1977, Frank Morgan, the principal at Clemmons, received a complaint from the parent of a child in the petitioner's class about the child's progress in reading. Morgan asked the reading coordinator at Clemmons to investigate the complaint. After that investigation, Morgan and the coordinator concluded that the complaint was valid.

Morgan asked a "helping teacher" to assist the petitioner after discussing his concerns about the problem with the petitioner. That helper visited the petitioner five times to help her improve.

On 26 January 1978, Morgan rated the petitioner's performance as inadequate in an evaluation and discussed the reasons

for his ratings with her. He notified her that he was placing her on "conditional status" in accordance with an administrative regulation of the respondent system.

Two elementary supervisors, who were assigned to assist the petitioner, developed a written plan of assistance in cooperation with her on 8 February 1978. This plan included visits to the petitioner's class, after which the supervisors discussed the petitioner's teaching and offered suggestions on how to improve performance.

In a final evaluation for the 1977-78 school year that Morgan completed on 31 March 1978, he rated her performance in certain areas as unsatisfactory. Morgan recommended to the superintendent that the petitioner's contract not be renewed.

After considering a written recommendation from Superintendent Dr. James A. Adams, the petitioner's written response, and oral arguments from both sides, the respondent Board voted four to four on a motion to uphold the Superintendent's written recommendation not to renew the petitioner's contract.

The Superintendent then notified the petitioner in a 19 May 1978 letter that she had obtained career status by operation of law. He informed her that she was being transferred to another school to work in a new environment and to be evaluated by another principal. The letter also stated that "You shall remain on the list of teachers needing assistance under conditional status for a period of at least one year."

The petitioner was assigned to South Fork Elementary School for the 1978-79 school year. South Fork principal Nancy Braswell was aware of the facts delineated above. After observing the petitioner's classroom performance on three occasions and giving her written suggestions on how to improve, Braswell requested assistance from an assistant superintendent to help the petitioner improve her performance.

Following observations of the petitioner's teaching by two elementary supervisors and Braswell, the principal rated the petitioner's performance unsatisfactory in some areas. A formal plan of assistance was developed and followed in the 1979 spring

semester but Braswell's final evaluation of 22 May 1979 recommended to the superintendent that the petitioner be dismissed.

After Superintendent Adams notified the petitioner of his intent to recommend her dismissal on 20 July 1979, the petitioner requested and was granted review by a panel of the Professional Review Committee. After the hearing, the panel unanimously found that the grounds for dismissal were substantially supported by the evidence submitted.

On 12 September 1979, the Superintendent recommended to the respondent Board that the petitioner be dismissed. The Board met four times to hear evidence and then found that the grounds and reasons for the Superintendent's recommendation were true. It ordered that the petitioner be dismissed effective 30 October 1979.

The petitioner filed a petition for judicial review of the respondents' termination in the Superior Court of Forsyth County on 29 November 1979. The respondents filed a response on 18 December 1979.

After hearing oral arguments and briefs from both parties and consideration of the exhibits and record, the trial judge entered a judgment on 3 May 1982 affirming the respondent Board's dismissal. From that judgment, the petitioner appeals.

David B. Hough for the petitioner-appellant.

Douglas S. Punger for the respondent-appellees.

EAGLES, Judge.

The petitioner was dismissed by the respondent on 30 October 1979 and filed a petition for judicial review on 18 November 1979. G.S. ch. 115 was the public school law in effect on those dates. That chapter was repealed effective 1 July 1981. *See* 1981 N.C. Sess. Laws ch. 423 § 1.

G.S. ch. 115C was the public school chapter when this case was decided by the trial judge. Although two different chapters were the law during this case, our decision is the same under either one because of the substantial similarity in their provisions.

School Board Policy 4118, which was adopted by the respondent Board in compliance with G.S. 115-142 and which was in effect when the petitioner was dismissed, provided that teachers would be evaluated in accordance with administrative regulations promulgated by the Superintendent.

Two regulations promulgated by the Superintendent that are relevant here were AR4117: "Evaluation of Certificated Personnel" and AR4117.1: "Evaluation of Professional Personnel." AR4117 defined conditional status as "simply a warning to a career teacher that his or her performance is inadequate and that if it does not substantially improve, the teacher will be recommended for dismissal or demotion."

The petitioner's primary argument on this appeal is that Superintendent Adams placed her on conditional status when the regulations allocate that duty to the principal. We disagree.

The evidence shows that Clemmons Elementary Principal Morgan placed the petitioner on conditional status in a 26 January 1978 letter to Assistant Superintendent Howard L. Sosne. That letter and the procedure followed by Morgan were in accordance with AR4117.

The petitioner incorrectly asserts that Superintendent Adams placed her on conditional status in violation of the regulations. In a 19 May 1978 letter to the petitioner informing her that the tie vote of the Board meant that she had career status, Adams stated: "You shall *remain* on the list of teachers needing assistance under conditional status for a period of at least one year." (Emphasis added.)

Even if Adams placed the petitioner on conditional status as he said on cross-examination, such power may be implied from the statutory grant of authority to superintendents to dismiss or demote career teachers in G.S. 115-142(h)(1) and G.S. 115C-325(h)(1).

The standard of review on appeal in this case is G.S. 150A-51. The Supreme Court in *Overton v. Bd. of Education*, 304 N.C. 312, 317, 283 S.E. 2d 495, 498 (1981), stated that standard: "[T]he issue presented by this appeal is whether the decision of the Board dismissing plaintiff is unsupported by substantial evidence in view of the whole record. . . ." Under this whole record test, 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." *Thompson v. Bd. of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

After a careful examination of the record, transcript, exhibits, briefs and arguments of counsel, we conclude that there is substantial evidence to support the judgment of the trial judge and order of the respondent Board which dismissed the petitioner from her position as a career teacher. The statutes, school board policies, and administrative regulations promulgated by the Superintendent were complied with and the constitutional rights of the petitioner were adequately protected. As a result, we affirm the judgment below.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

JOHN T. ADAIR v. MARY J. ADAIR

No. 8225DC571

(Filed 7 June 1983)

1. **Appeal and Error § 6.9— dismissal of answer and counterclaim as sanction—immediate appeal**

A default judgment dismissing defendant's answer and counterclaim in a divorce action as a sanction for failure to appear for a deposition affected a substantial right of defendant and was immediately appealable. G.S. 1-277(a); G.S. 7A-27(d)(1).

2. **Rules of Civil Procedure § 30— failure to appear for deposition—sufficient notice—imposing sanctions before ruling on protective order motion**

The trial court did not err in imposing sanctions on defendant for failure to appear for the taking of a deposition before specifically ruling on her motion for a protective order on the ground that she did not receive 10 days' notice of the taking of the deposition since the motion is deemed denied by the court's entry of a judgment which contained a specific finding of fact and conclusion of law that defendant had proper notice of the deposition. G.S. 1A-1, Rules 6(a) and 30(b)(1).

3. Rules of Civil Procedure §§ 6, 37— notice of motion to impose sanctions

Defendant was not prejudiced by the fact that she received less than five days' notice, excluding Saturday and Sunday, of a motion to impose sanctions for defendant's failure to appear for a deposition as required by G.S. 1A-1, Rule 6(d) where defendant had five days' actual notice of the hearing, and where the detailed nature of the answer and counterclaim filed by defense counsel shows that defense counsel had sufficient familiarity with defendant's position adequately to represent her interests given the notice provided.

4. Rules of Civil Procedure § 37— failure to appear for deposition—sanction dismissing answer and counterclaim

The trial court did not abuse its discretion in entering a default judgment dismissing defendant's answer and counterclaim in a divorce action as a sanction for defendant's failure to appear for a deposition where defendant's first motion for a protective order was cured by rescheduling the deposition in another county; defendant's second motion for a protective order and her failure to appear at the deposition were based on the frivolous ground that she was given insufficient notice of the taking of the deposition; and defendant received actual notice of five days that a hearing would be held on plaintiff's motion to impose sanctions but she failed to notify plaintiff's counsel or the court that neither she nor her attorney would attend the hearing. G.S. 1A-1, Rule 37(d).

APPEAL by defendant from *Mullinax, Judge.* Judgment entered 1 October 1981 in District Court, CATAWBA County. Heard in the Court of Appeals 19 April 1983.

This case involves an appeal by defendant-wife from a default judgment imposing sanctions by dismissing her answer and counterclaim and taxing costs against her. The action was commenced on 9 July 1981 by the filing of a complaint for an absolute divorce and the issuance of a summons. Defendant accepted service on 8 August 1981 and filed her answer and counterclaim on 8 September 1981. On 11 September 1981 plaintiff filed notice to take defendant's deposition on 21 September 1981 in Hickory, Catawba County. Defendant filed an amended answer and counterclaim on 14 September 1981 and on the following day filed a motion seeking a protective order against being deposed on the ground that defendant had no contacts and did not reside in Catawba County. Plaintiff's attorney then contacted defendant's attorney by telephone on 17 September 1981 concerning rescheduling the deposition to be taken instead in Charlotte on 28 September 1981. Written notice to take the deposition on the 28th was served upon defendant on 18 September 1981. Defendant filed a second

motion for a protective order on the ground that she had not received ten days' notice of the deposition.

On 25 September 1981 plaintiff filed a notice and motion for imposition of sanctions, expressly advising defendant that if she failed to appear at the deposition, plaintiff would move for imposition of sanctions at a hearing on 29 September 1981, or if the matter could not be reached then, on 1 October 1981. Neither defendant nor her attorney was present at the taking of the deposition. On 1 October 1981 a hearing was held upon plaintiff's motion to impose sanctions. Again, neither defendant nor her attorney was present. Defendant appeals from entry of judgment dismissing her answer and counterclaim as a sanction for failure to appear at the deposition.

Rudisill & Brackett by J. Richardson Rudisill, Jr., for plaintiff appellee.

Richard H. Robertson for defendant appellant.

BRASWELL, Judge.

[1] The initial question which we must consider, although not addressed by either party in their briefs, is whether an appeal lies from the default judgment dismissing defendant's answer and counterclaim. If defendant has no right to appeal, we must dismiss the appeal on our own motion. *Love v. Moore,* 305 N.C. 575, 291 S.E. 2d 141, *reh. denied,* 306 N.C. 393 (1982).

The default judgment clearly determines fewer than all of the claims involved since it does not dispose of the underlying claim for an absolute divorce. An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. G.S. 1-277(a) and G.S. 7A-27(d)(1); *Atkins v. Beasley,* 53 N.C. App. 33, 279 S.E. 2d 866 (1981). We believe that a "substantial right" is involved here, since the dismissal of defendant's answer and counterclaim deprived her of the assertion of affirmative defenses and counterclaims against the claims asserted by plaintiff in his complaint for absolute divorce. *See Quick v. Memorial Hospital,* 269 N.C. 450, 152 S.E. 2d 527 (1967), and *Bank v. Printing Co.,* 7 N.C. App. 359, 172 S.E. 2d 274 (1970), which held that the granting of a motion to strike answer and defense affected a substantial right and was immediately appealable.

[2] Defendant first argues in her brief that the court erred by imposing sanctions against her before considering and passing on her prior motion for a protective order. Defendant moved for a protective order on the ground that she did not receive ten days' notice of the taking of her deposition, as required by G.S. 1A-1, Rule 30(b)(1). However, the record shows that defendant was initially notified of the taking of her deposition on 11 September 1981. After the deposition was rescheduled to be taken in Charlotte, defendant's attorney had oral notice on 17 September and written notice on the following day of the 28 September deposition. Therefore, pursuant to G.S. 1A-1, Rule 6(a), excluding the day of notice, the 18th, and including the last day, the 28th, defendant received the ten days' notice required by G.S. 1A-1, Rule 30(b)(1).

The trial court did not err by failing to rule on defendant's motion for a protective order. Although the judge made no specific ruling on this motion, it is clear that defendant received the required ten days' notice and that the motion should have been denied. Although the better practice would have been for the judge to specifically rule on the motion, his failure to do so was not prejudicial to defendant. *State v. Partin*, 48 N.C. App. 274, 280, 282, 269 S.E. 2d 250, 254-55, *disc. rev. denied*, 301 N.C. 404, 273 S.E. 2d 449 (1980). The court states in the findings of fact and conclusions of law that defendant received proper ten days' notice prior to the taking of the deposition and therefore the motion must be deemed denied as if set forth in a separate order. We find no merit to this assignment of error.

[3] Defendant next argues that she was given only three days' (excluding Saturday and Sunday) notice of the hearing on plaintiff's motion to impose sanctions, in violation of the five days' notice requirement of G.S. 1A-1, Rule 6(d). The notice of hearing was filed on 25 September 1981 and informed defendant that a hearing on the motion would be held on 29 September or, if not reached on that date, on 1 October 1981. The hearing occurred on 1 October 1981. Therefore, defendant had five days' actual notice of the hearing. Defendant has brought forward no argument nor does the record reveal that she was prejudiced by virtue of the length of notice given. *Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975); *Jenkins v. Jenkins*, 27 N.C. App. 205, 218 S.E. 2d 518 (1975). Given the detailed nature of the answer and coun-

terclaim filed in this matter, it is evident that defense counsel had sufficient familiarity with defendant's position to adequately represent her interests, given the notice provided. Instead of furnishing the court with any argument and supporting law in opposition to plaintiff's assertions at the hearing, defendant chose to rest on her contentions as to insufficiency of notice. We find no merit to defendant's argument on this assignment of error.

Defendant contends in her next assignment of error that the record and pleadings were not sufficient to support the judge's findings of fact and conclusions of law that plaintiff was entitled to have sanctions imposed against defendant. Defendant's argument concerning the findings of adequate notice has been discussed earlier in this opinion. Defendant primarily focuses her argument on the court's finding and conclusion that defendant's pleadings, considered in conjunction with her failure to appear at the deposition and the hearing on plaintiff's motion, were designed to delay, frustrate and unnecessarily prolong litigation and were frivolous. The affidavit of plaintiff's counsel, which is a part of the record, and the transcript of what occurred at the taking of the deposition show that defendant failed to appear at the deposition for which she received proper ten days' notice and for which she was subpoenaed. Her motion for a protective order based upon insufficient notice was frivolous and may have been designed to delay litigation, since a reading of Rule 6(a) plainly discloses that in computing time, the first day is excluded and the last day is included. Further, defendant failed to appear at the scheduled hearing on the motion and offered as an excuse for her failure to appear only that she had received inadequate notice of the hearing. Since she had actually received five days' notice of the hearing, her absence at the hearing was unjustified. We hold that the findings were based on competent evidence and that the findings supported the conclusions of law. *Coble v. Coble,* 300 N.C. 708, 268 S.E. 2d 185 (1980).

[4] In her final argument defendant submits that the judge abused his discretion in imposing the most severe sanctions permissible under G.S. 1A-1, Rule 37(d), and that such sanctions were not justified under the circumstances of this case. Rule 37(d) allows a judge to enter default judgment as a sanction for failure to appear for a deposition after having been given proper notice. *Imports, Inc. v. Credit Union,* 37 N.C. App. 121, 245 S.E. 2d 798

(1978). The imposition of this sanction is in the sound discretion of the trial judge. *Carpenter v. Cooke and Carpenter v. Cooke,* 58 N.C. App. 381, 293 S.E. 2d 630, *cert. denied,* 306 N.C. 740, 295 S.E. 2d 758 (1982); *Cutter v. Brooks,* 36 N.C. App. 265, 243 S.E. 2d 423 (1978). We note that the last sentence of Rule 37(d) provides that "[t]he failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)." While it is true that defendant moved for a protective order, we do not believe that the sentence quoted prevented Judge Mullinax from imposing sanctions. Defendant's first motion for a protective order was cured by rescheduling the deposition in Charlotte. In her second motion defendant's only ground presented was that the taking of the deposition put an undue burden on defendant by not giving her ten days' notice. As we have previously discussed in this opinion, defendant's motion for a protective order based upon insufficient notice was frivolous and clearly erroneous as shown by the plain language of Rule 6(a). The motion is deemed denied by entry of the judgment which contained a specific finding of fact and conclusion of law that defendant had proper notice required for the taking of the deposition.

The record discloses that defendant received proper notice of the taking of the deposition, that she never notified plaintiff's counsel she would not attend, that plaintiff's counsel and a court reporter waited over an hour for defendant to appear at the deposition, that she based her refusal to attend on a frivolous claim that notice was inadequate, that she received actual notice of five days that a hearing would be held on plaintiff's motion to impose sanctions and that she failed to notify plaintiff's counsel or the court that neither she nor her attorney would attend the hearing. Based upon these facts, we find no abuse of discretion by the trial court in the imposition of these sanctions.

To clarify the judgment below, we point out that the judgment does not dispose of the underlying action for absolute divorce. The court's ruling that the allegations contained in plaintiff's complaint are deemed admitted does not relieve plaintiff of the burden of appearing in court to prove the grounds alleged in the complaint. In North Carolina a plaintiff cannot obtain judgment by default in a divorce proceeding. A divorce will be granted only after the facts establishing a statutory ground for

divorce have been pleaded and actually proved. G.S. 50-10; *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E. 2d 790 (1961); 1 R. Lee, N.C. Family Law § 62 (4th ed. 1979).

We find that the sanctions imposed by the trial court were proper. The judgment of the trial court is

Affirmed.

Judges WEBB and WHICHARD concur.

DOC HORACE ETHERIDGE, JR., EXECUTOR OF THE ESTATE OF DOC HORACE ETHERIDGE, SR., SUBSTITUTED PETITIONER v. E. RAY ETHERIDGE, UNMARRIED, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ANNIE MAE G. ETHERIDGE, DECEASED; FRED G. ETHERIDGE, AND WIFE, MARY REED ETHERIDGE; DOC HORACE ETHERIDGE, JR., AND WIFE, IRIS ETHERIDGE, SUBSTITUTED PETITIONER

No. 821SC852

(Filed 7 June 1983)

Wills § 61.6— dissent from will—allocation by commissioners—trial findings incorrect

Where a husband dissented from his wife's will, where the Commissioners made allocation of decedent's property, and where the trial judge was required only to determine if the allocations made by the Commissioners were reasonable, fair and just, the trial judge erred in ordering the sale of all the real and personal property of the estate of decedent.

APPEAL by respondents from *Smith, Judge*. Order entered 14 July 1982 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 21 January 1983.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for respondent appellants.

Trimpi, Thompson & Nash, by C. Everett Thompson and John Trimpi, for petitioner appellees.

BECTON, Judge.

I

Introduction

The resolution of this appeal, though simple, requires an understanding of a lengthy, at times bitterly contested, special proceeding which spans eight years.[1]

This action began on 3 July 1975 when Doc Horace Etheridge, Sr., (Doc, Sr.), the surviving spouse of Annie Mae Etheridge, filed a dissent from the will of his wife. Doc, Sr. sought an order (a) establishing his right to dissent from the will of his wife; and (b) partitioning in kind the real property of his wife and "allocating to [him] his intestate's share[,] one third (33 1/3%) of said real property. . . ."

Now, after the appointment of three different sets of Commissioners, the filing of four separate Commissioners' reports, hearings before four different superior court judges, and two prior appeals to this Court, this matter is before us again to determine the propriety of Superior Court Judge Donald Smith's 14 July 1982 findings, conclusions, and Order. In his Order, Judge Smith said: "[t]he Commissioners' Report, filed February 5, 1981, in all respects, is fair, reasonable, just and accurate as to valuation; but in accordance with the case of *Allen v. Allen*, 258 N.C. 305, [128 S.E. 2d 385 (1962)] the Court finds that the properties, both real and personal, cannot be divided, and all of said properties ought to be sold for division." After a thorough review of the facts and applicable law, we conclude that the trial court's reliance on *Allen v. Allen* was done under misapprehension of law and constitutes reversible error.

II

Facts and Procedural History

When Annie Mae Etheridge died on 5 January 1975, she was the owner of at least eleven separate tracts of land totalling ap-

1. According to the appellees, "the controversy this actively litigated case and its offshoots have generated in Currituck County or the tremendous toll it has taken on the citizens of Currituck County, the court system and officials, and the Etheridge family" cannot be adequately described. Moreover, litigation fees and court-related expenses have been substantial.

proximately 2,379 acres. By her will, dated 24 May 1974, Annie Mae Etheridge devised the bulk of her real property to her two sons, Ray and Fred. Her husband, Doc, Sr., was granted a life estate in the "home place and farm, known as the Shaw Farm," and her other son, Doc, Jr., was granted a life estate in a certain portion of the Shaw Farm upon the death of Doc, Sr. Doc, Jr.'s sons, Joe and Owen, were granted a remainder interest in that portion of the Shaw Farm to which their father, Doc, Jr., had been granted a life estate.

Anticipating a possible dissent from her will, and explaining the apparent imbalanced basis upon which she disposed of her land, Annie Mae Etheridge stated in her will:

ITEM X

> If my husband, Doc Horace Etheridge, Sr., dissents from this my Last Will and Testament, then, in such event, my son, Doc Horace Etheridge, Jr. and his sons, Joe Etheridge and Owen Etheridge shall not receive any legacies and devises or any benefits whatsoever under this my Last Will and Testament and such legacies and devises and benefits in the event of such dissent shall pass to my sons, E. Ray Etheridge and Fred G. Etheridge, in fee simple absolute forever, that is to say, my said sons, E. Ray Etheridge and Fred G. Etheridge, shall receive all legacies and devises and benefits, in fee simple absolute forever, which I have hereinbefore bequeathed and devised unto my said son, Doc Horace Etheridge, Jr. and his sons, Joe Etheridge and Owen Etheridge, if my said husband dissents from this my Last Will and Testament.

ITEM XI

> In the preparation of this my Last Will and Testament I have been conscious of the fact that there has been a forced sale of the interests of my sons, E. Ray Etheridge and Fred G. Etheridge in and to the Flora Farm and the Gregory tract, and I have therefore considered it equitable and it is equitable to give and devise my home and home farm, to wit, the Shaw Farm, as I have hereinbefore done in this my Last Will and Testament.

In a petition filed 3 July 1975, the husband, Doc, Sr., in his first cause of action, sought to establish his right to dissent from the Will and, in his second cause of action, sought an actual division of the property so that his one-third intestate share would be allocated to him. Before any action could be taken on his petition, Doc, Sr. died on 15 November 1975; however, his son, Doc, Jr., was substituted as petitioner on 24 November 1975, and the interested parties stipulated, on 26 November 1975, that Doc, Sr. had a right to dissent from the will. The stipulation did not affect the second cause of action in the petition seeking to allocate a one-third intestate share to Doc, Sr.

After filing responsive pleadings, Ray and other parties in interest filed, on 16 March 1976, a motion for summary judgment, contending:

> that they are entitled to judgment as a matter of law declaring the validity of Item X of the Last Will of Annie Mae G. Etheridge . . . declaring that E. Ray Etheridge is entitled to the home, its contents, and the pasture, comprising a part of the Shaw Farm, as called for by Item IV of the Will of Annie Mae G. Etheridge and as explained by Item XI of her Will, and that E. Ray Etheridge and Fred G. Etheridge are entitled to the remainder of the Shaw Farm as called for and explained in said items of said Will . . . following the settled principle that the Will shall be so construed that the dissent shall affect the devisees and legatees to the least possible degree, and that the general scope or plan of distribution be carried out and effectuated so far as possible.

After a hearing on the motion for summary judgment, Judge Herbert Small, presiding judge, found as a fact that "[t]he petitioner prays for an actual partition of said land and it is agreed by all parties and counsel that an actual partition of said lands in accordance with law can be made without injury to any of the parties" and, after making appropriate conclusions of law, "ordered, adjudged and decreed":

> 2. That Item X of the Will of Annie Mae G. Etheridge is valid and therefore Doc Horace Etheridge, Jr. and his sons, Joe Etheridge and Owen Etheridge, shall not receive any devises or other benefits under said Will.

3. That the lands devised to Doc Horace Theridge, Jr. and his sons, Joe Etheridge and Owen Etheridge, under the Will of Annie Mae G. Etheridge, or so much thereof as may be necessary, shall first be allocated toward satisfaction of the intestate share of Doc Horace Etheridge, Sr. in the lands of Annie Mae G. Etheridge, and thereafter if further allocation is necessary and proper to complete the satisfaction of the intestate share of Doc Horace Etheridge, Sr. in the lands of Annie Mae G. Etheridge, then such further allocation shall be borne pro-rate [sic] by E. Ray Etheridge and Fred G. Etheridge.

Doc, Jr. appealed Judge Small's summary judgment order to this Court. This Court affirmed. *See, In the Matter of the Estate of Annie Mae G. Etheridge, Deceased,* 33 N.C. App. 585, 235 S.E. 2d 924 (1977), *disc. review denied,* 293 N.C. 253, 237 S.E. 2d 535 (1977).

Without reciting the interim procedural history from 1977 until May 1982, we turn our attention to Judge Donald Smith's 14 July 1982 order confirming the last Report of Commissioners.

III

Appealing respondents, Ray Etheridge, Fred Etheridge and wife Mary Etheridge, contend that the legal effect of Judge Smith's 14 July 1982 Order is: (1) to vacate and overrule the prior rulings of other superior court judges; (2) to render meaningless this Court's opinion in *In Re Etheridge*; and (3) to set aside the will of Annie Mae Etheridge to the same extent as though a *caveat* to her will had been sustained.

The prior superior court rulings and this Court's opinion in *In Re Etheridge assumed,* without deciding, that an actual partition of the property could be made.[2] Thus, there were no established "law of the case" or *res judicata* principles confronting Judge Smith. Judge Smith's order does, however, effectively

2. Judge Small's initial Order in 1976 merely recited that the parties and counsel "agreed . . . that an actual partition of said land in accordance with law can be made without injury to any of the parties." Because Judge Small was ruling on appealing respondents' Motion for Summary Judgment, he never had before him any Commissioners' Report. *A fortiori,* this Court, in affirming Judge Small's judgment and order did not address the issue whether the property could be divided fairly.

nullify the will of Annie Mae Etheridge. And, it is this feature of the case that distinguishes it from *Allen v. Allen* and *Taylor v. Carrow,*[3] 156 N.C. 6, 72 S.E. 76 (1911).

Both *Allen* and *Taylor* involved partition proceedings among tenants in common who could never agree whether there should be a partition sale or an actual partition. The case *sub judice* is not a proceeding under N.C. Gen. Stat. § 46-1 (1976) among tenants in common to partition land by sale or actual division; it is a proceeding designed solely to allocate and set apart, *by actual partition,* the intestate's share of a dissenting spouse in the lands and personal property in the estate of his deceased wife.

Making specific reference to "[t]he statutory procedure set forth in G.S. Chapter 46, Article I,"—the partition of land between tenants in common statute—the *Allen* Court said:

> Actual partition must be on the basis of the division made by commissioners and not otherwise. In a *de novo* hearing before the judge, where the question is whether the report of the commissioners should be confirmed, the judge may confirm or he may vacate and enter appropriate interlocutory orders. However, the judge may not, based on his findings as to what would constitute an equitable division, adjudge a partition of the land different from that made by the commissioners.
>
> Here, the Clerk had confirmed the report of the commissioners. The question before Judge Carr was whether the division made by the commissioners was fair and equitable. [Citation omitted.] If so, a final judgment or decree confirming the report of the commissioners should have been entered. If not, the report of the commissioners should have been set aside; and, if set aside, the court by interlocutory order, should haave ordered a new division by commissioners or, if the facts justified, a partition sale.

258 N.C. at 309, 128 S.E. 2d at 388.

Again, this is not a proceeding under G.S. Chapter 46, Article I. The *Allen* case itself reminds us that the law discussed in any

3. Spelled *Tayloe v. Carrow* in 72 S.E. 76.

particular case is set within the framework of the facts of that case. *Id.*

The numerous reports of Commissioners, hearings, and appeals do not necessarily suggest that a division in kind cannot be made fairly. They may suggest that the parties will not be satisfied with any particular division, but that provides no legal basis to nullify the will of Annie Mae Etheridge. In *In Re Etheridge*, this Court said that the dominant intent expressed in the Will of Annie Mae Ehteridge is controlling so long as it can be carried out and leave the dissenting spouse with a prescribed fractional interest in value in the estate. *Id.* at 588, 235 S.E. 2d at 927. The reports of all the Commissioners and the rulings by all the superior court judges who heard this matter before it reached Judge Smith were based on this guiding principle.

This case must end at some point. Although Judge Smith commendably sought to eliminate the strife and certain dispute arising about ownership and property lines, he was required only to determine if the allocations made by the Commissioners were reasonable, fair and just. He did more. He ordered the sale of all the real and personal property of the estate of Annie Mae Etheridge. His reliance on *Allen v. Allen* was misplaced, and his order constitutes prejudicial and reversible error. Even though Judge Smith found that the *valuations* of the Commissioners were fair, reasonable, just and accurate, we cannot remand this matter with directions that the Clerk confirm the Commissioners' Report, because Judge Smith did not determine if the *allocation*—the division—was fair. This remains to be done, and this case is remanded for disposition not inconsistent with this opinion.

Remanded.

Judges WEBB and PHILLIPS concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF J. R. OWEN, SR. AND WIFE, MILDRED M. OWEN

No. 8210SC630

(Filed 7 June 1983)

Bills and Notes § 4; Mortgages and Deeds of Trust § 4.1— forbearance to levy on bank account—consideration for new note and deed of trust

Where a husband and wife executed a demand note for $110,000.00 loaned to the husband for use in operating a tobacco warehouse, the promisee's forbearance to levy on a bank account owned by both promisors constituted sufficient consideration for a new note and deed of trust signed by both promisors so as to support the finding of a valid debt in a proceeding to foreclose the deed of trust.

Judge WELLS dissenting.

APPEAL by respondents from *Battle, Judge.* Judgment entered 18 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 21 April 1983.

Morgan, Bryan, Jones & Johnson, by Robert B. Morgan, for respondent appellants.

Blackburn & Gammon, by James L. Blackburn and Richard R. Gammon, for petitioner appellee.

BECTON, Judge.

I

This case concerns the validity of a promissory note secured by a deed of trust, when one of the signers of the note and deed of trust was not involved in the underlying transaction. The question presented is whether forbearance to levy on a bank account owned by both promisors on the note and deed of trust constitutes consideration adequate to support foreclosure on the trust property pursuant to the terms of the note and deed.

We disagree with the Owens' contention that no valid debt existed between them and Charles Wilkins, the promisee on the note and beneficiary of the deed of trust. Because of the complicated factual background in this case, we first examine the transaction giving rise to this dispute.

II

The evidence tended to show that Charles Wilkins loaned a total of $110,000.00 to J. R. Owen in 1978, beginning with a $5,000 advance in August 1978. The Owens, J. R. and his wife, executed and delivered two promissory notes to Wilkins. The first, in the principal amount of $110,000, executed in November 1978, was signed and sealed by both J. R. Owen and his wife, Mildred. Under their signatures was noted: "Makers are doing business as Western Carolina Tobacco Warehouse No. 1." The second, in the principal amount of $90,875 and dated 18 April 1979, was secured by a deed of trust on the Owens' residence. Although Mildred Owen was the sole owner of the property, both she and her husband signed the deed of trust. The beneficiary of the deed of trust was Charles Wilkins; the trustee was Gregory Crampton. Payment on the August 1978 note was to be made "on or before the close of the 1978 Burley Tobacco Market, expected to be during the second week of January, 1979." The April 1979 note was due and payable on demand. Both notes reflected interest charges of 12% per annum.

Wilkins contends that during August of 1978, he loaned J. R. Owen $5,000 to obtain an option on several tobacco warehouses in Asheville, North Carolina, as part of a plan to force the owners already operating warehouses to purchase Owen's interest. Wilkins' $5,000 was to be repaid from the first of the anticipated proceeds. Also, Wilkins was to share any resulting profit with Owen equally. The plan was unsuccessful, and Owen had to operate the warehouse. From August through the latter part of November 1978, Charles Wilkins loaned J. R. Owen and additional $105,000 in five separate advances. The money was to be used to operate the warehouse. In November, when the loans totalled $110,000, Wilkins drafted a note for that amount and asked both Mr. and Mrs. Owen to sign it. Although the note was signed by both the Owens in November, it was erroneoulsy dated 24 August 1978, due to an error by Charles Wilkins.

As of the close of the Burley Tobacco Market in January 1979, the Owens had paid only $25,000 on the note. A portion of the funds constituting the outstanding balance, some $45,000, was in a bank account in Asheville. That account was owned by Mr. and Mrs. Owen, d/b/a Western Carolina Tobacco Warehouses.

Apparently during the latter part of 1978, the Internal Revenue Service (IRS) filed tax liens for $58,484.00 against the Owens in Wake County. Later, on 22 January 1979, the IRS levied on the Asheville bank account. At the time of the levy, the account contained $45,209. J. R. Owen conceded at the hearing that the money in the account was money that Wilkins had loaned him.

Because of the unique nature of the warehouse business, Wilkins contends that he agreed not to claim the funds in the Asheville account so that the outstanding checks to farmers and the IRS levy could be paid. Because of his increased exposure to liability, Wilkins drafted, and had both Owens execute, the new note, dated 18 April 1979, which was secured by a deed of trust on the Owens' residence, and which reflected the then outstanding principal balance and accured interest. That balance included the amount seized by the IRS and was payable on demand.

The Owens had made no further payments to Wilkins as of January, 1982. Wilkins contends that he, at that time, made a proper demand on the Owens to repay the note. They declined. He then instructed the trustee, pursuant to the terms of the deed of trust, to institute foreclosure proceedings against the Owens. A hearing was held on 25 February 1982 by an Assistant Clerk of Superior Court of Wake County. After making findings of fact, the Assistant Clerk concluded, *inter alia*, that a valid debt existed from J. R. Owen and Mildred Owen to Charles Wilkins; that the Owens were in default; that proper notice of the hearing had been given to all interested parties; and that the trustee could proceed to foreclose pursuant to his power of sale. The Owens gave notice of appeal. The Assistant Clerk stayed his order upon execution of a bond in the amount of $10,000.

The matter was then heard by Wake County Superior Court Judge Gordon Battle on 16 March 1982. After having heard the evidence from the trustee and the Owens, Judge Battle entered an order allowing the foreclosure to proceed. The Owens gave notice of appeal, and the order was stayed subject to their execution of a bond in the amount of $17,750.

III

Mr. and Mrs. Owen first argue that, although they both signed the 18 April 1979 note and deed of trust, the trial court

erred when it found as a fact and concluded that that note represents a valid indebtedness from them to Charles Wilkins. Although they admit that Wilkins advanced $110,000 to J. R. Owen, they contend that no benefit accrued to Mildred Owen because of the contract, and that the note is, therefore, invalid because one of its signers received no consideration. The Owens seek support from the facts that: (i) although Mildred Owen owned 10% of the warehouse business, she did not take an active role in its affairs and exercised no managerial control over its operation; and (ii) all of the funds loaned, details of the agreement negotiated, and monies actually transferred, were transferred to, loaned to, and negotiated solely with J. R. Owen. In Mildred Owen's words, "I was just told what to do, and that's what I did." That argument is unpersuasive.

First, findings of fact and conclusions of law based thereon are conclusive on appeal if those findings are supported by competent evidence. *Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). We find plenary competent evidence to support the findings of the trial judge.

Consideration is the glue that binds the parties to a contract together. A mere promise, without more, is unenforceable. However, consideration is present when there is some benefit or advantage to the promisor or loss or detriment to the promisee. *Wolfe v. Eaker*, 50 N.C. App. 144, 272 S.E. 2d 781 (1980), *pet. for disc. review denied*, 302 N.C. 222, 277 S.E. 2d 69 (1981). It has also been held that consideration exists when the promisee, in exchange for the promise, does anything he is not legally bound to do, or refrains from doing anything he has a right to do, whether there is any actual loss to him as a benefit to the promisor. Justice Moore, writing for our Supreme Court, stated the "forbearance rule" thusly:

> It is not necessary that the promisor receive consideration or something of value himself in order to provide the legal consideration sufficient to support a contract. Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is for a third party rather than that of the promisor. [Citation omitted.]

Investment Properties at 196, 188 S.E. 2d at 345.

Competent, uncontradicted evidence introduced by the trustee at the superior court hearing compels the conclusion that forbearance was the consideration in the case *sub judice.* Charles Wilkins testified that he promised J. R. Owen he would not seek to recover his funds in the Asheville account on the condition that Owen and his wife execute a new note and a deed of trust. That Wilkins has the right to levy on the Asheville account for the funds owed him is uncontroverted; that the IRS levy was for tax delinquencies of both J. R. and Mildred Owen is also uncontroverted. *A fortiori,* Wilkins' forbearance to attach the Owens' bank account enured to the benefit of *both* J. R. and Mildred Owen. Therefore, the note and deed of trust dated 18 April 1979 were supported by valuable consideration given at the execution of the contracts.

IV

Because we find a valid indebtedness from both J. R. and Mildred Owen to Charles Wilkins for the reasons set out in Part III of this opinion, we summarily reject the Owens' second argument.

Accordingly, we affirm the order of the trial court.

Affirmed.

Judge EAGLES concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

At the time the second note—the deed of trust note—was executed, no new money was advanced. The new note was a demand note, and, therefore, there was no foreclosure as to the debt. The "foreclosure" relied upon by the majority took place months before the second note and deed of trust were executed. I find the evidence to show a lack of consideration for the second note, and conclude that the trial court's necessary finding (labeled as a conclusion) of a valid debt, *see* G.S. 42-21.16(a) is not supported by the evidence. I must therefore respectfully dissent.

REGINALD G. STALLS v. J. M. PENNY, ACTING COMMISSIONER OF MOTOR VEHICLES

No. 824SC400

(Filed 7 June 1983)

Automobiles and Other Vehicles § 126.5— statement given at scene of accident—Miranda warnings unnecessary

The *Miranda* rule did not apply to a statement made by petitioner at the scene of an accident since the investigating officer merely arrived at the scene of the accident and inquired as to "What happened?" That the officer may have suspected that petitioner had driven the car and even that he was under the influence of some intoxicant makes no difference. G.S. 20-16.2; G.S. 20-26, and G.S. 20-166.1.

APPEAL by respondent from *Lane, Judge.* Order entered 20 January 1982 in Superior Court, JONES County. Heard in the Court of Appeals 17 February 1983.

Shortly after midnight, while patrolling Highway #58 in the Town of Maysville, a police officer saw the petitioner standing alone near a car that was in a roadside ditch with its motor still running. The officer stopped, cut on his blue light, and asked what had happened. Petitioner replied that a truck had run him off the road, but the driver thereafter stopped and had gone to get help. The officer, after observing that petitioner was unsteady on his feet and detecting a strong odor of alcohol on his breath, arrested him for driving under the influence, and at that time read petitoner his *Miranda* warnings.

Petitioner was then taken to the courthouse and asked to submit to a breathalyzer test, but refused to do so. Sometime later, upon receiving an order from the respondent Commissioner suspending his driving privileges pursuant to G.S. 20-16.2, petitioner requested and was granted an administrative hearing, after which the suspension order was affirmed. Then, under the provisions of G.S. 20-16.2 and G.S. 20-26, petitioner filed this special proceeding and after the de novo hearing so obtained, the Superior Court judge entered an order reversing the suspension order and restraining respondent from enforcing it. Respondent Commissioner appealed.

Brock, Foy & Proctor, by Jimmie C. Proctor, for petitioner appellee.

Attorney General Edmisten, by Associate Attorney Jane P. Gray, for respondent appellant.

PHILLIPS, Judge.

In reversing the order suspending petitioner's driving privileges, the trial judge concluded that petitioner's arrest was unconstitutional for the reason that his statement that he was driving the car was elicited by the officer before he was advised of his *Miranda* rights. The propriety of this conclusion is the decisive question presented by this appeal. Before addressing it, a recital of some of the legal principles that apply to accident investigations by police officers is in order.

"One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused." *State v. Hill*, 277 N.C. 547, 553, 178 S.E. 2d 462, 466 (1971). Such rights include the right to be given *Miranda* warnings before being submitted to custodial interrogation. *See generally, Church v. Powell, Comr. of Motor Vehicles*, 40 N.C. App. 254, 252 S.E. 2d 229 (1979). However, *Miranda* warnings are not required when a suspect is not in custody, or otherwise deprived of his freedom of action in any significant way. *State v. Parker*, 59 N.C. App. 600, 297 S.E. 2d 766 (1982); *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974). Nor are *Miranda* warnings required when a mere investigation is being conducted. *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979); *State v. Sykes, supra*. "The questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a 'police dominated' situation or as 'incummunicado' in nature. . . ." *State v. Carlisle*, 25 N.C. App. 23, 26, 212 S.E. 2d 217, 220 (1975), *quoting Lowe v. United States*, 407 F. 2d 1391, 1394 (9th Cir. 1969). And that the interrogation is not conducted at the accident scene but elsewhere later makes no difference. *State v. Gwaltney*, 31 N.C. App. 240, 228 S.E. 2d 764, *appeal dismissed*, 291 N.C. 449, 230 S.E. 2d 767 (1976). In *Gwaltney* the defendant lost control of her car, which ran into a ditch and overturned, and the police officer, after completing the accident scene investigation, went to the hospital

where defendant, who he had not seen, was awaiting treatment. Upon inquiring about the accident, she admitted driving her automobile and gave her version of the occurrence. After she was released from the hospital, she was charged with operating under the influence. In holding that her incriminating statement was properly received, notwithstanding that no *Miranda* warning preceded it, the Court pointed out that the questioning was investigatory, rather than accusatory.

However, as *State v. Lawson*, 285 N.C. 320, 204 S.E. 2d 843 (1974) shows, all interrogations at the accident scene are not immune to the *Miranda* rule. In that case the patrolman arrested the defendant for public drunkenness at the wreck scene, placed him in a patrol car, and warned him of his *Miranda* rights before obtaining an admission that he was the driver of the car. Since the defendant, highly intoxicated and in custody, made no response to the warning, however, it was held that an intelligent waiver of his rights had not been shown and that the statement could not be used against him.

Applying these principles to the record before us, it is plain that the petitioner's constitutional rights were not violated and that the trial court's ruling to the contrary is without foundation. When the officer approached the petitioner and asked him what happened, the petitioner was, at most, a mere suspect in a traffic case and possibly just an uninformed, uninvolved onlooker, standing by a wrecked car. On the other hand, the officer was just beginning to investigate an accident, about which he knew only that there had been one and that petitioner was there at the scene; he did not know who was in the car when it wrecked or how many; whether he, she or they had been hurt and were still in the car obscured from view, or thrown from it; whether another vehicle was involved, and, if so, what had happened to it. In short, the officer had accused no one of anything and knew virtually nothing about an accident that it was his statutory duty to investigate and report on. G.S. 20-166.1.

In beginning the investigation, as he did, with the sensibly appropriate inquiry "What happened?" the officer impinged upon no right of the petitioner of any kind. No one at an accident scene has a legal or constitutional right not to be asked what happened by an investigating officer. In concluding otherwise, the Superior

Court judge misperceived the purpose and scope of the Constitution and the *Miranda* rule. The right, in situations of this kind, that *Miranda* and the Constitution protects is the right that those accused of crime have not to be intimidated by the police, when under their thumb and sway. The main purpose of the *Miranda* rule, on the other hand, is to prevent the police from imposing their will upon and swaying those accused of crime who are under their dominion and control. The *Miranda* rule is not concerned with the routine, investigative questioning of people at the scene of a motor vehicle accident.

That the officer may have suspected that petitioner had driven the car and even that he was under the influence of some intoxicant makes no difference. Any suspicion that he then had was without any evidentiary basis whatever to support it. If officers in such situations were required by the law to proceed as though their suspicions had been verified, and thus treat mere suspects as if they had been accused of violating the law, it would be destructive, rather than protective, of personal rights and the public good. Though the law must be ever alert in protecting personal rights, it must do so with some regard for the rights, activities and concerns of others and society as a whole. Accidents involving damage and injury to property or persons, and possible violations of the law, must be investigated. The investigation conducted here, voluntarily cooperated in by the petitioner, violated no right of the petitioner, constitutional or otherwise.

We, therefore, reverse the Superior Court order appealed from and direct that the respondent's suspension order be reinstated.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

JOHNNY BRADSHAW v. BELLE MCELROY, ADMINISTRATRIX OF THE ESTATE OF F. GRADY DAVIS, L. MEDFORD LEATHERWOOD, JAMES LEATHERWOOD, AND LOUISE PHILLIPS

No. 8230SC802

(Filed 7 June 1983)

1. **Frauds, Statute of § 2.1— agreement to convey land—latently ambiguous description**

A written agreement for decedent to sell plaintiff "my entire woodland. This begins where my road and the main road begin and goes according to the survey done by Keith Gibson" contained only a latently ambiguous description of the land subject to the agreement which was capable of identification by reference to extrinsic matters.

2. **Vendor and Purchaser § 3.1— contract to convey—latent ambiguity in description—genuine issue of material fact as to property to be conveyed**

In an action seeking specific performance of an agreement by decedent to sell plaintiff "my entire woodland. This begins where my road and the main road begin and goes according to the survey done by Keith Gibson," the evidence on motion for summary judgment presented a genuine issue of material fact as to whether a 10.38 acre portion shown on a prior survey of decedent's property constituted the "entire woodland" which decedent owned and contracted to convey to plaintiff where it established that the real property owned by decedent consisted of a single tract containing "some cleared land and some woodland"; the woodland was all together in one place and contained about 10 acres; a prior survey of decedent's property showed a line dividing a 15.36 acre portion, which contained a brick dwelling, from a 10.38 acre portion, which contained no structures; and the survey clearly established the calls and distances for each portion from which a metes and bounds description could readily be prepared. G.S. 1A-1, Rule 56(c).

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 8 July 1982 in Superior Court, JACKSON County. Heard in the Court of Appeals 18 May 1983.

On 26 January 1981 F. Grady Davis signed a handwritten document which, in pertinent part, stated the following: "I . . . agree to sell [plaintiff] my entire woodland. This begins where my road and the main road begin and goes according to the survey done by Keith Gibson." Davis died later that day without having made the conveyance.

Plaintiff instituted this action seeking specific performance of the alleged contract to convey. Defendants answered, admitting, *inter alia*, execution by decedent of the paper writing, but deny-

ing (1) that it constituted a contract to convey real property, and (2) that the "woodland" was described by metes and bounds in an exhibit attached to the complaint.

Plaintiff appeals from summary judgment for defendants.

Frank G. Queen, and Noland, Holt, Bonfoey & Davis, by Richlyn D. Holt, for plaintiff appellant.

Brown, Ward, Haynes & Griffin, P.A., by H. S. Ward, Jr., and William Paul Powell, Jr., for defendant appellees.

WHICHARD, Judge.

[1] The issue is whether the description of the property subject to the contract is patently ambiguous, thus rendering the contract void as a matter of law under the statute of frauds, or whether it is merely latently ambiguous and capable of identification by reference to extrinsic matters. We hold the description merely latently ambiguous. Summary judgment for defendants thus was improper.

The statute of frauds provides that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ." G.S. 22-2 (1965). The writing must contain a description of the land, the subject matter of the contract, either certain in itself or capable of being reduced to certainty by something extrinsic to which the contract refers. *Lane v. Coe,* 262 N.C. 8, 12, 136 S.E. 2d 269, 273 (1964).

A description which leaves the subject of the contract, the land, in a state of absolute uncertainty, and which refers to nothing extrinsic by which it might possibly be identified with certainty, is patently ambiguous. Parol evidence is not admissible to aid such a description, *id.* at 13, 136 S.E. 2d at 273, and the instrument which contains it is void.

A description is "latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *Id.* "In such case plaintiff may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity." *Id.*

In *Carson v. Ray,* 52 N.C. 609 (1860), a deed described property as [m]y house and lot in the town of Jefferson . . . ." The Court held the description not patently ambiguous. It emphasized the word "my," noting that the phrase "my house and lot" imports a particular house and lot. It also stated that when the writing itself does not indicate that the grantor had more than one house and lot, such will not be presumed.

In *Sessoms v. Bazemore,* 180 N.C. 102, 104 S.E. 70 (1920), the Court found no error in a judgment granting specific performance of a contract which stated, "I . . . agree to sell my farm to [plaintiff] . . . ." *Id.* at 103, 104 S.E. at 70. It held that the reference to "my farm" was "sufficiently definite to permit the reception of parol evidence to fit the description to the property claimed as the subject-matter of the contract." *Id.* at 103, 104 S.E. at 71. Compare *Pierce v. Gaddy,* 42 N.C. App. 622, 257 S.E. 2d 459, *disc. rev. denied,* 298 N.C. 569, 261 S.E. 2d 124 (1979), in which the description "[f]or farm," without further identification or reference to an extrinsic source by which the particular farm could be made certain, was held insufficient under the statute of frauds.

In *Norton v. Smith,* 179 N.C. 553, 103 S.E. 14 (1920), a contract for the sale of land described the subject property as "his [the prospective grantor's] entire tract or boundary of land consisting of 146 acres . . . ." *Id.* at 553, 103 S.E. at 14. The Court held this sufficient to permit parol evidence to identify the land or "[fit] the description to the land intended to be conveyed." *Id.* at 556, 103 S.E. at 15.

See also, holding similar descriptions sufficient to be aided by parol evidence, the following: *Gilbert v. Wright,* 195 N.C. 165, 141 S.E. 577 (1928) ("the vacant lot" sufficient description where other parts of the contract, together with attendant circumstances, left no doubt as to lot intended); *Bateman v. Hopkins,* 157 N.C. 470, 73 S.E. 133 (1911) ("the farm on which I now live"); *Janney v. Robbins,* 141 N.C. 400, 53 S.E. 863 (1906) ("all of our land in . . . North Carolina"); and *Garrison v. Blakeney,* 37 N.C. App. 73, 246 S.E. 2d 144, *disc. rev. denied,* 295 N.C. 646, 248 S.E. 2d 251 (1978) ("(½) interest in my farm" in a named township and county, with adjoining landowners listed, etc.).

The question of patent ambiguity is one of law for the court. *See Carson v. Ray, supra,* 52 N.C. at 611. *See also Carlton v.*

Anderson, 276 N.C. 564, 565, 173 S.E. 2d 783, 784 (1970). Pursuant to the foregoing authorities, the ambiguity here was not patent. The description "my entire woodland" is as capable of being made certain as are the descriptions "[m]y house and lot in . . . Jefferson" (*Carson*, *supra*), "my farm" (*Sessoms, supra*), "his entire tract" (*Norton*, *supra*), "the vacant lot" (*Gilbert, supra*), "the farm on which I now live" (*Bateman*, *supra*), "all of our land in . . . North Carolina" (*Janney, supra*), and "(½) interest in my farm" (*Garrison*, *supra*).

[2] The description, while not patently ambiguous, was latently so. Plaintiff thus could offer evidence, parol and other, which tended to identify the property. *Lane v. Coe, supra.* The question becomes, then, whether the pleadings and the forecast of extrinsic evidence in response to defendant's motion for summary judgment sufficed to establish a genuine issue of material fact as to the description of the property subject to the contract to convey. *See* G.S. 1A-1, Rule 56(c) (1969); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533-35, 180 S.E. 2d 823, 829-30 (1971); *Best v. Perry,* 41 N.C. App. 107, 109-10, 254 S.E. 2d 281, 283-84 (1979).

In determining whether a genuine issue of material fact exists, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the party opposing the motion. *Investment Co. v. Greene,* 48 N.C. App. 29, 33, 268 S.E. 2d 810, 813, *disc. rev. denied*, 301 N.C. 235, 283 S.E. 2d 132 (1980). Summary judgment is a "drastic remedy" which should be approached with caution. *Taylor v. Air Conditioning Corp.*, 43 N.C. App. 194, 198, 258 S.E. 2d 399, 402, *disc. rev. denied*, 298 N.C. 809, 262 S.E. 2d 4 (1979). It "should be awarded only where the truth is quite clear." *Volkman v. DP Associates,* 48 N.C. App. 155, 157, 268 S.E. 2d 265, 267 (1980).

Viewing the forecast of evidence, as required, in the light most favorable to plaintiff and with appropriate caution, we find the following:

Defendants, in response to a request for admissions, admitted that the real property owned by the deceased prospective grantor consisted of a single tract. They further admitted that this tract contained "some cleared land and some woodland."

The decedent's brother testified on deposition that the woodland was "all together in one place." He further testified that there were "about ten acres of this woodland."

A 5 May 1981 survey of decedent's property which plaintiffs introduced showed a line dividing a 15.36 acre portion, which contained a brick dwelling, from a 10.38 acre portion, which contained no structures. Further, it clearly established the calls and distances for each portion, from which a metes and bounds description could readily be prepared.

Given, then, that decedent's property consisted of a single tract of "some cleared land and some woodland," that the woodland was "all together in one place," and that there were "about ten acres of this woodland," we believe there was a genuine issue of material fact as to whether the 10.38 acre portion shown on the survey constituted the "entire woodland" which decedent owned and contracted to convey to plaintiff. While plaintiff's forecast of evidence is not a model of clarity, neither is it "quite clear" that the property subject to the contract to convey defies description. Summary judgment for defendants thus was improper under the governing principles set forth above.

We have considered the other arguments favoring summary judgment set forth in defendant's brief, and we find that at most they present questions of fact for the jury.

The judgment is therefore reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. VIRGIL MAYO SANDERSON, SR.

No. 824SC907

(Filed 7 June 1983)

1. Criminal Law § 99.6— cross-examination of defense witness—attorney seated beside witness—no expression of opinion by court

The trial judge did not express an opinion as to the credibility of a defense witness when he appointed an attorney to advise the witness of his Fifth Amendment rights and requested the attorney to sit next to the witness stand upon learning that the prosecutor intended to cross-examine the witness regarding his prior conviction. G.S. 15A-1222.

2. Criminal Law § 86.5— defense witness—evidence of other crimes—properly admitted

The trial court did not err in allowing the prosecutor to cross-examine a witness as to whether he and defendant had been in the drug business for a long time since evidence of other drug violations is relevant and admissible if it tends to show a common plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs were found.

3. Criminal Law § 102.12— prosecutor's argument—no request for precautionary instruction

Where a prosecutor argued to the jury that "you 12 -- if you don't do your job, there's not a thing in the world we can do with [defendant]", where defendant failed to place his argument in the record and where defendant failed to request a precautionary instruction after the court sustained defendant's objection to the prosecutor's remark, there was no merit to defendant's assignment of error.

4. Criminal Law § 124— verdict form missing element of "intent to sell and deliver" considered with indictments and court's charge sufficient

Although the element of "intent to sell and deliver" was not included in the verdict form with regard to three drug related offenses, when the indictments, the court's charge, and the verdict form were considered together, (1) it could be inferred that the jury found the element of "intent to sell and deliver" and (2) the form itself, although improperly omitting that element, sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately.

APPEAL by defendant from *Bruce, Judge.* Judgments entered 21 April 1982 in Superior Court, DUPLIN County. Heard in the Court of Appeals 18 February 1983.

Defendant was indicted for conspiracy to sell and deliver cocaine, conspiracy to possess cocaine with intent to sell and deliver, conspiracy to sell and deliver marijuana, conspiracy to

possess marijuana with intent to sell and deliver, sale and delivery of cocaine, possession of cocaine with intent to sell and deliver, sale and delivery of marijuana, and possession with intent to manufacture, sell and deliver marijuana.

The State's evidence tended to show that an undercover drug officer accompanied an informant to a trailer belonging to defendant's son, Vic. Defendant, Vic, and a white female were present at the trailer when the officer and the informant arrived. The officer talked to defendant about purchasing cocaine and marijuana, and then went with Vic and the informant to defendant's house. Defendant arrived later and gave the officer two plastic bags of marijuana. The officer paid defendant $70 for the marijuana. Defendant told the officer that Vic would weigh out a half ounce of cocaine for him. The officer asked defendant if the price was $1,000, and defendant said yes. The officer gave defendant $1,000, took the cocaine and marijuana and left.

Defendant presented testimony from several witnesses including his son Vic. Vic's testimony tended to show that Vic had sold the marijuana and cocaine to the officer and that defendant was not present when the sale took place.

The jury returned a verdict finding defendant "Guilty as charged" of conspiring to sell cocaine, of conspiring to possess cocaine, of the sale of cocaine, of possession of cocaine with intent to sell or deliver it, of conspiring to sell marijuana, of conspiring to possess marijuana, of the sale of marijuana, and of possession of marijuana. From judgments imposing active prison terms, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Lanier and Hall, by Fredric C. Hall, for defendant appellant.

JOHNSON, Judge.

[1] The first question presented in this case is whether the trial judge expressed an opinion as to the credibility of defense witness Vic Sanderson. The record shows that this witness had previously been convicted of a drug violation. Upon learning that the prosecutor intended to cross-examine the witness regarding his conviction, the trial judge appointed an attorney to advise the

witness of his Fifth Amendment rights. By allowing this attorney to be seated next to the witness stand while the witness testified, defendant contends the trial judge expressed an opinion as to the witness' credibility.

G.S. 15A-1222 prohibits a trial judge from expressing an opinion in the presence of the jury on any question of fact to be decided by the jury. Here, the record reflects that the jury was not present when the decision was made to seat the attorney next to the witness stand. Furthermore, defendant concedes it was proper and necessary for an attorney to be appointed to advise the witness of his constitutional rights. Defendant has suggested no alternative to placing the attorney next to the witness stand and, indeed, did not object to this procedure at trial. We do not believe that the jury could have interpreted the judge's actions as reflecting on the credibility of this witness. Error, if any, was clearly harmless.

[2] Defendant next contends that the trial court erred in allowing the prosecutor to cross-examine this same witness as to whether he and defendant had been in the drug business for a long time. We do not agree.

It is an established rule that evidence of other crimes is inadmissible if its only relevancy is to prove the character of the accused or his disposition to commit the alleged offense. 1 Brandis on North Carolina Evidence § 91 (1982). Where the challenged evidence tends to prove any other relevant fact, it is admissible even though it proves the defendant guilty of a separate crime. *Id.* "In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found." *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1978). We believe the evidence the State sought to elicit was clearly admissible on several of these grounds. This assignment of error is overruled.

Defendant next assigns error to the trial judge's failure to give precautionary instructions, *ex mero motu*, to the jury with respect to certain remarks made by the prosecutor during his closing argument. Defendant brings forth two exceptions on appeal, but the record indicates that objection was made at trial

only with respect to the first exception. Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial judge in time for it to be corrected, unless the impropriety is so gross it cannot be corrected. *State v. Hunter*, 297 N.C. 272, 254 S.E. 2d 521 (1979). When there is a gross impropriety, the court must intervene immediately. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). We find no gross impropriety with respect to the remark to which no objection was made. We shall, therefore, consider only the statement to which an objection was properly taken.

[3] That portion of the prosecutor's argument to which defendant objected at trial reads as follows: "You 12—if you don't do your job, there's not a thing in the world we can do with Virgil Sanderson; not a thing in the world—" We note that the argument of defense counsel has not been placed in the record as it should be when there is a challenge to the prosecutor's argument. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). In the absence of the argument of defense counsel, we are unable to fully consider the context in which the prosecutor's argument was made and to determine whether it was provoked. Moreover, we note that the court sustained defendant's objection to the prosecutor's remark, and defendant thereafter failed to request a precautionary instruction. Under these circumstances, we find no merit to defendant's assignment of error.

[4] Finally, defendant contends that in its instructions to the jury and in the verdict form, the court committed prejudicial error by omitting the essential element of "intent to sell and deliver" from the following charges: (1) conspiracy to possess cocaine with intent to sell and deliver, (2) conspiracy to possess marijuana with intent to sell and deliver, and (3) possession of marijuana with intent to sell and deliver. Defendant contends that it cannot be ascertained whether or not the jury in fact found the element of "intent to sell and deliver" from the verdict form returned.

Although defendant complains that the court's charge in reference to these offenses was erroneous, he did not object at trial to the charge when given the opportunity to do so. He has, therefore, waived his right to have the charge reviewed on appeal. Rule 10(b)(2) of the Rules of Appellate Procedure. We have,

nevertheless, examined the charge and find that with respect to the specific elements of each of the three offenses in question, the court adequately instructed that the State must prove intent to sell and deliver.

Defendant correctly notes that the element of "intent to sell and deliver" was not included in the verdict form with regard to the three enumerated offenses. G.S. 15A-1237, authorizing the use of a written verdict, itself contains no requirement that a written verdict contain each element of the offense to which it refers. *State v. Partin*, 48 N.C. App. 274, 269 S.E. 2d 250, *disc. rev. denied* and *appeal dismissed*, 301 N.C. 404, 273 S.E. 2d 449 (1980). However, the section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself when given orally. Official Commentary, G.S. 15A-1237; *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). A verdict form is sufficient for this purpose if it provides the court a proper basis upon which to pass judgment and sentence the defendant appropriately. *Id.* at 16, 257 S.E. 2d at 580.

The defendant in this case was charged with eight separate counts of drug violations, and the verdict form listed eight offenses. The indictments properly listed "intent to sell and deliver" as to each of the three offenses in question. The trial court adequately instructed the jury that the State must prove intent to sell and deliver. The jury found the defendant "Guilty as charged" as to each of the eight offenses, including the sale and delivery of cocaine and marijuana. When the indictments, the court's charge, and the verdict form are considered together, we believe (1) that it can be inferred that the jury found the element of "intent to sell and deliver" and (2) that the form itself, although improperly omitting that element, sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately. For these reasons, we find no merit to defendant's final argument.

No error.

Judges WELLS and HILL concur.

STYLECO, INC., D/B/A STYLETECH CORPORATION v. STOUTCO, INC.

No. 8228SC538

(Filed 7 June 1983)

Constitutional Law § 24.7; Process § 14.3— foreign corporation—personal jurisdiction—statutory authority—minimum contacts

In an action to recover a $26,000 deposit held by defendant foreign corporation pursuant to a contract for defendant to manufacture woodstoves for plaintiff North Carolina corporation, G.S. 55-145(a)(1) and (3) provided the statutory basis for the exercise of personal jurisdiction over defendant, and defendant had sufficient contacts with this State so that the exercise of personal jurisdiction over it did not offend due process, where plaintiff presented affidavits that the contract was signed in North Carolina; the parties stipulated that some of the stoves manufactured by defendant were to be sold and used in North Carolina; the contract required plaintiff to send defendant glass and blowers each month for use in manufacturing the stoves; two prototypes of the stoves were to be sent to plaintiff in North Carolina for its approval; and the contract contained a sentence anticipating a "long, profitable relationship" between the parties.

APPEAL by defendant from *Friday, Judge.* Judgment entered 25 January 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 April 1983.

Plaintiff brought this action to recover a $26,000.00 deposit held by defendant. Defendant moved to dismiss the action for lack of personal jurisdiction under G.S. 1A-1, Rule 12(b)(2). The following evidence was presented at the hearing.

Plaintiff is a North Carolina corporation with its principal place of business in Asheville, North Carolina. Defendant is a metal fabricating business with principal places of business in Indiana and Michigan. In April 1980, plaintiff and defendant entered into a contract for defendant to manufacture wood stoves for plaintiff. Plaintiff gave defendant a deposit of $26,000.00. The contract, which defendant mailed to plaintiff, provided that plaintiff send defendant glass and blowers every month, defendant would build the stoves, and plaintiff would sell them. Defendant agreed to make two prototype stoves and send them to Asheville, North Carolina for plaintiff's approval. One stove would be retained by plaintiff, and the other would be kept by defendant. All the stoves for sale were to be shipped to plaintiff F.O.B. defendant's plant. Two of defendant's employees said they saw David

McElyea, plaintiff's vice-president, sign the contract in defendant's office in Indiana. McElyea, however, said he signed the contract in North Carolina. The contract concluded with the sentence: "Here's to a long, profitable relationship for both of us." The parties stipulated that "at the time the parties contracted as set forth in Plaintiff's complaint, it was contemplated by them that some of the goods to be produced by Defendant were to be sold and used in the State of North Carolina."

The trial judge denied defendant's motion to dismiss.

Robert J. Deutsch, for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes and Davis, by Albert L. Sneed, Jr., and Shelley M. Pew, for defendant appellant.

VAUGHN, Chief Judge.

G.S. 1-277(b) provides for "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . ." This allows immediate appeals concerning only "minimum contacts" questions: the question of whether the courts of this state have the authority to require defendant to defend the claim. *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982). This question involves a two-fold determination: whether the North Carolina statutes permit the courts of this jurisdiction to entertain this action against defendant, and, if so, whether this exercise of jurisdiction violates due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). *See* Annot., 20 A.L.R. 3d 1201 (1968).

The general statutory basis for jurisdiction is in G.S. 1-75.4. The specific statute which provides grounds for jurisdiction in this case is G.S. 55-145, which provides, in pertinent part:

> (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State; or
>
> . . .

> (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers. . . .

Plaintiff has the initial burden of showing the existence of jurisdiction, the burden is met by a *prima facie* showing that jurisdiction is conferred by the statute. *See Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976); *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *review denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979). Plaintiff has met this burden by showing that both G.S. 55-145(a)(1) and G.S. 55-145(a)(3) were satisfied by its affidavits showing that the contract was signed in North Carolina, and the parties' stipulation that some of the stoves were to be sold and used in North Carolina.

As well as a statutory basis, jurisdiction by the courts of North Carolina must not offend due process in violation of the Fourteenth Amendment to the United States Constitution.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The application of this rule varies with the quality and nature of defendant's activity, but it is essential that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). *Accord, United Buying Group v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979); *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974); *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970).

Defendant argues that it does not have sufficient minimum contacts to satisfy due process. To support this contention it

relies on two federal court decisions, *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974), and *Bowman v. Curt G. Joa*, 361 F. 2d 706 (4th Cir. 1966), where the defendants' motions to dismiss for lack of personal jurisdiction were granted. Defendant contends that the facts of this case are similar to the facts in *Staley* and *Bowman*, and they should be controlling. In those cases, however, the defendants had far fewer contacts with North Carolina than defendant Stoutco has in this case. In *Staley*, the plaintiffs were two military servicemen who had previously been stationed in Pensacola, Florida but were stationed in North Carolina at the time they brought the lawsuit. Defendant, a Florida corporation, had sold each of the plaintiffs a mobile home. The plaintiffs alleged that defendant had made fraudulent misrepresentations to induce them to buy the mobile homes. Defendant's motion to dismiss for lack of personal jurisdiction was granted because the contracts were made in Florida, and were completely performed in Florida when they were subsequently assigned to a bank. The defendant had absolutely no contacts in North Carolina, the mere likelihood that the servicemen would be stationed in North Carolina, and would bring the mobile homes with them to North Carolina, was not sufficient to satisfy due process. In *Bowman*, the appellant, a North Carolina corporation, had a contract to buy a machine from appellee, a Wisconsin corporation, to be shipped F.O.B. appellee's plant. Appellee allegedly breached the contract. The District Court granted appellee's motion to dismiss for lack of personal jurisdiction, and the Fourth Circuit Court of Appeals affirmed, holding that appellee's two contacts with North Carolina were insufficient to satisfy due process. One contact consisted of a contract, at least a year before appellant's contract was entered into, with a North Carolina furniture company for engineering consulting which was not shown to have been performed in North Carolina and was totally unrelated to appellant's contract. The second contact was the contract with appellant which was a single-item sales contract and performance was not in North Carolina; the machine was to be manufactured in Wisconsin and shipped F.O.B. seller's plant.

This case, however, is different from *Staley* and *Bowman* in that it was for a large amount of goods, and the manufacturing process was, in essence, a joint undertaking between the parties. If these elements were absent, this case would be similar to

Phoenix America Corp. v. Brissey, 46 N.C. App. 527, 265 S.E. 2d 476 (1980). In *Phoenix*, plaintiff, a North Carolina corporation, alleged that defendants, South Carolina residents, ordered ten fireplace inserts. Plaintiff shipped the goods, defendants issued a check, and defendants subsequently stopped payment on the check. Plaintiffs brought the action in North Carolina, and defendants' motion to dismiss for lack of personal jurisdiction was denied by the District Court. In reversing the District Court, this Court held that defendants did not have minimum contacts with North Carolina because the facts tended to show that they had not been in North Carolina for two years, the sale was initiated by plaintiff's agent who lived in South Carolina, the contract was accepted in South Carolina, the stoves were delivered to South Carolina, they were accepted in South Carolina, and payment was tendered in South Carolina. *Phoenix* is a good example of the situation where a defendant obviously does not have minimum contacts with the forum state. In this case, however, defendant had more contact with North Carolina than the defendant in *Phoenix*. The evidence indicates defendant had sufficient minimum contacts in North Carolina to satisfy due process: according to plaintiff the contract was signed in North Carolina; plaintiff was to ship the components to defendant from North Carolina; the prototypes were to be shipped to North Carolina; the parties contemplated that some of the stoves would be sold and used in North Carolina; and this was not a single-item contract but the parties anticipated they would have a "long, profitable relationship."

We hold that the assertion of *in personam* jurisdiction over defendant does not violate due process. The trial court's denial of defendant's motion to dismiss is

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE DISTRIBUTING CORPORATION v. G. E. BOBBITT & ASSOCIATES, INC.

No. 8210SC431

(Filed 7 June 1983)

Accord and Satisfaction § 1— contract dispute—offer of settlement—acceptance—action for breach of contract properly dismissed

The trial court properly entered a directed verdict in favor of defendant at the close of the plaintiff's evidence where plaintiff's evidence showed that plaintiff agreed to absolve defendant from further liability in exchange for additional cost-free repairs made to concrete which defendant installed and where there was no allegation nor proof of fraud, mutual mistake, or other legal basis for invalidating the agreement or settlement.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 2 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 9 March 1983.

This suit for breach of contract arose out of the construction of an office and warehouse facility for the plaintiff by the defendant and is based upon allegations that the concrete floor for the facility was defectively installed. The defendant denied the breach and alleged that plaintiff's claim was barred by the statute of limitations and a settlement made between the parties. Upon the trial of the case, a directed verdict was entered in favor of the defendant at the close of the plaintiff's evidence.

Hatch, Little, Bunn, Jones, Few & Berry, by John B. Ross, for plaintiff appellant.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for defendant appellee.

PHILLIPS, Judge.

In directing verdict against the plaintiff, the trial judge ruled that the plaintiff's claim was barred both by the statute of limitations and settlement made between the parties. Since the dismissal of plaintiff's action on the second ground was so clearly justified, it is not necessary to discuss the first.

That differences did develop between the parties about the concrete flooring and defendant's responsibility for it, and that

these differences were compromised and settled in June, 1978, the record leaves no room for doubt.

The evidence showed that in August, 1976, three months after the building was completed, cracks began to appear in the concrete floor and between then and June, 1978, the defendant undertook to repair the floor a number of times without cost to the plaintiff, though only a one-year warranty provision was in the contract. The repairs were largely unavailing and the defective condition of the floor continued to be a problem for both parties. During the long period involved, because of the worsening condition of the floor and the frequent need for repairs, the parties were in touch with each other many times, only a few of which need to be recited here. In December, 1977, defendant wrote the plaintiff as follows:

> We are going to cut out and repair the (3) existing bad places in the concrete floor at no charge to you. After reviewing this situation it is my opinion that the floor, itself is not the real problem. It is evident to me that the equipment being used on the floor is having a detrimental effect on this concrete. I strongly suggest that you place a high-quality polyurethane sealer on the floor in order to combat this rough usage.

In January, 1978, at defendant's suggestion, plaintiff had the floor tested by experts and was advised that the trouble was caused by a failure to properly compact the ground that the floor was poured on, as the contract required. But the defendant, still pointing to the floor's misuse, continued to recommend that plaintiff treat the floor by either applying an epoxy-like coating or by the induction of certain hardening chemicals, and sent plaintiff informative materials about both procedures, which plaintiff discussed with several flooring contractors and obtained prices from them. By letter dated April 3, 1978, plaintiff's counsel notified defendant that their tests showed that the defendant was responsible for the flooring defects, demanded that defendant defray the $6,625,87 cost of repairing 54 square feet of spalled areas of concrete and of sealing the entire floor, and stated that legal action would be taken unless suitable redress was made. Defendant also had the floor tested by experts and advised plaintiff by letter dated May 12, 1978 that their tests showed that the concrete complied with the contract terms.

After further discussions between the parties about the floor, on June 12, 1978, defendant wrote the following letter to plaintiff:

> We agree to make the necessary repairs to the approximately 216 square feet of damaged floor area and 217 lineal feet of joints at no charge to you.
>
> We understand your people will work with ours in scheduling the work in order to cause as little inconvenience as possible.
>
> Further, it is important to note that the damages are a result of wear on the surface, and upon completion of this work you will exonerate us from any liability whatsoever.
>
> You propose to put a new wearing surface on this floor and will maintain it accordingly so that this situation will not occur again.

At the bottom of the letter were the words "Accepted By" and a place for plaintiff to sign if it decided to do so. After considering this proposal, on June 15, 1978, plaintiff's president affixed his signature in the space provided and returned the letter to the defendant, who accomplished the repairs described.

Thus, the plaintiff's own evidence showed, without contradiction, that several months after defendant began contending that it was not responsible for the defective concrete, after plaintiff received expert advice to the contrary, and after plaintiff had counsel demand redress of the defendant, plaintiff agreed to absolve defendant from further liability in exchange for some additional cost-free repairs. Upon receiving the repairs bargained for and there being neither allegation nor proof of fraud, mutual mistake, or other legal basis for invalidating the agreement or settlement, the plaintiff's rights in this matter came to an end under elementary principles of law. Whether the transaction involved is dubbed an accord and satisfaction, or a compromise and settlement, and whether there are any significant differences between the two doctrines, about which legal scholars differ, are immaterial for the purposes of this appeal. Both doctrines are favored by the law, which encourages disputing parties to amicably adjust their differences, and since plaintiff's evidence established that there was a dispute between the parties, an offer was made in satisfaction or settlement, it was accepted in writing,

and the terms were fully performed, plaintiff's case is barred under both doctrines. *See generally*, 1 C.J.S., Accord and Satisfaction (1936); 15A C.J.S., Compromise and Settlement (1967); N.C. Gen. Stat. 1-540; Strong's N.C. Index 3d, Vol. 1, pp. 24-33, Vol. 3, pp. 132-39 (1976); *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E. 2d 678 (1963); *Moore v. Greene*, 237 N.C. 614, 75 S.E. 2d 649 (1953); *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43 (1921).

Though the defendant had the burden of proving this affirmative defense, since the plaintiff's own evidence fully established it and failed to undermine it in any way approved by the law, it was appropriate for the trial judge to so rule and dismiss the action. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970).

The judgment appealed from is therefore

Affirmed.

Judges WELLS and JOHNSON concur.

MAUDE SAULS v. CHARLOTTE LIBERTY MUTUAL INSURANCE CO.

No. 828DC601

(Filed 7 June 1983)

Insurance § 18.1— life insurance—misrepresentation as to high blood pressure—genuine issue of fact

In an action to recover on two life insurance polices, a genuine issue of material fact was presented as to whether insured made a material misrepresentation in his insurance application where defendant insurer presented evidence that a question on the application as to whether insured had ever had high blood pressure had been answered "no" and that insured had been treated for high blood pressure from a date three years prior to the application until his death, and where plaintiff presented evidence that defendant's agent filled out the application for insured without asking any questions about insured's health and that insured did not tell defendant's agent that he did not have high blood pressure.

APPEAL by plaintiff from *Jones, Judge.* Judgment entered 31 March 1982 in District Court, WAYNE County. Heard in the Court of Appeals 20 April 1983.

This is an action by a named beneficiary to recover on two insurance policies issued by the defendant in 1978 on the life of Reginald Sauls, the plaintiff's husband. Sauls died on 26 February 1980.

In his application for the two 1978 policies, the deceased answered "no" to question 18 which asked if he had ever had heart trouble or high blood pressure. The defendant seeks to avoid payment under the two 1978 policies on the ground that this answer was a material misrepresentation.

To support its motion for summary judgment, the defendant filed two affidavits. In one affidavit, Dr. Jesse Blackman stated that he treated the deceased for high blood pressure from 4 August 1975 until his death. Tillman D. Little, Jr., the defendant's vice-president, stated in the other affidavit that whether an applicant suffers from high blood pressure is material to the defendant's decision to insure him. He concluded that the defendant would not have insured Sauls if it knew about his high blood pressure.

The plaintiff filed an affidavit in opposition to the defendant's motion. She stated that her husband took out the 1978 policies after Leo Nasekos, who collected premiums for the defendant, told him that he could cash in two 1973 policies that he had with the defendant and receive their cash surrender value. The deceased did that and then took out the two 1978 policies.

According to the plaintiff, neither she nor her husband provided any additional information to Nasekos when he filled out the 1978 applications. She said that her husband did not know that he was suffering from high blood pressure, and that her husband never told Nasekos that he did not have heart trouble or high blood pressure.

After considering the affidavits and evidence before him, the trial judge granted the defendant's motion for summary judgment. From that judgment, the plaintiff appealed.

Duke and Brown, by John E. Duke, and Braswell and Taylor, by Ronald C. Braswell, for the plaintiff-appellant.

Barnes, Braswell & Haithcock, by Tom Barwick, for the defendant-appellee.

ARNOLD, Judge.

Summary judgment under G.S. 1A-1, Rule 56(c) is proper when there is "no genuine issue as to any material fact. . . . It is a drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). This remedy "does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists." *Vassey v. Burch,* 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980) (emphasis in original). Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Spector Credit Union v. Smith,* 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

In *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied,* 281 N.C. 516, --- S.E. 2d --- (1972), the court defined two terms that are determinative on a summary judgment question.

> An issue is *material* if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "*genuine*" if it may be maintained by substantial evidence.

280 N.C. at 518, 186 S.E. 2d at 901 (emphasis added). In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed., Phillips Supp. 1970). *See also,* W. Shuford, N.C. Civil Practice and Procedure § 56-7 (2d ed. 1981).

Through the pleadings and admissions, the plaintiff has established the execution and delivery by the defendant of a life insurance policy issued to the deceased with plaintiff as beneficiary, the death of the insured, and payment of premiums. Nothing else appearing, plaintiff has established a *prima facie* case of her right to the insurance proceeds. *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952); *Willetts v. Insurance Co.*,

45 N.C. App. 424, 263 S.E. 2d 300, *disc. rev. denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980).

After the plaintiff made a *prima facie* case, the burden of proof shifted to the defendant insurer to establish the misrepresentations relied on by it to avoid the policy. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614 (1961). An insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his insurance application which were material and false. *Tolbert*, 236 N.C. at 418, 72 S.E. at 917; *Willetts*, 45 N.C. App. at 428, 263 S.E. 2d at 304; *see* G.S. 58-30.

A representation in a life insurance application is material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk. *Carroll v. Insurance Co.*, 227 N.C. 456, 42 S.E. 2d 607 (1947). In an application for a life insurance policy, written questions and answers relating to health are deemed *material as a matter of law*. *Rhinehardt*, 254 N.C. at 673, 119 S.E. 2d at 616 (emphasis in original).

Because the plaintiff's affidavit raises a question of fact, we reverse the entry of summary judgment. A jury should have been allowed to decide who filled out the blanks on the 1978 applications. The plaintiff's contention that no questions about health were asked by Nasekos when the 1978 applications were filled out raises a question about who answered "no" to the relevant question. We note that the record contains no affidavit from Nasekos on this point.

We recognize the principle that a person is deemed to have read and understood what he signs. *See, e.g., Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 175, 180, 221 S.E. 2d 499, 503 (1976). What is apparently the deceased's signature appears on the 1978 applications. But this case presents an issue of fact that cannot be resolved on the evidence that is before us.

As a result, we reverse entry of summary judgment for the defendant and remand for a trial.

Reversed and remanded.

Chief Judge VAUGHN and Judge HEDRICK concur.

HIGHLANDS TOWNSHIP TAXPAYERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION v. HIGHLANDS TOWNSHIP TAXPAYERS ASSOCIATION, INC., A NORTH CAROLINA CORPORATION, ALLAN R. TARLETON, HERBERT L. HYDE, JERRIE F. BARKLEY, GREGORY ALAN BARKER, THOMAS B. CRUMPLER, ELIZABETH WORLEY, RALPH DEVILLE, INDIVIDUALLY

No. 8230SC546

(Filed 7 June 1983)

Rules of Civil Procedure § 9— unincorporated association—failure to plead capacity to sue—summary judgment proper

G.S. 1-69.1 requires that before an unincorporated association may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by G.S. 66-68 and then allegation of its specific location. The provisions of G.S. 1-69.1 control over G.S. 66-71 which allows recovery in a civil action in spite of the statutory noncompliance. Therefore, under G.S. 1A-1, Rule 9(a), where defendants specifically put into issue plaintiff's capacity to sue by their allegation that plaintiff "has not complied with the laws which may allow an unincorporated association to sue and has failed properly to allege registration as required by law," and where plaintiff failed to present a forecast of evidence showing that there was a triable issue on this question, the trial court properly entered summary judgment for defendants.

APPEAL by plaintiff from *Thornburg, Judge.* Order entered 5 January 1982 in Superior Court, MACON County. Heard in the Court of Appeals 14 April 1983.

Plaintiff instituted this action alleging that it was an unincorporated association and that defendants had misappropriated the name and assets of plaintiff. Defendants filed answers which specifically denied that plaintiff was the Highlands Township Taxpayers Association and contained motions to dismiss the complaint under Rule 12(b)(6), Rule 17 and Rule 9(a). From an order granting defendants' motions, plaintiff appeals.

J. Edwin Henson for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for defendant-appellees Highlands Township Taxpayers Association, Inc., Allan R. Tarleton, Jerrie F. Barkley, Gregory Alan Barker, Thomas B. Crumpler, Elizabeth Worley and Ralph Deville.

Herbert L. Hyde for defendant-appellee Herbert L. Hyde.

EAGLES, Judge.

Since matters outside of the pleadings, in the form of requests for admissions and answers, were presented to and not excluded by the trial court, defendants' motions to dismiss must be treated as motions for summary judgment under Rule 56. G.S. 1A-1, Rule 12(b). Summary judgment is properly entered where the movant shows that there is no genuine issue as to any material fact and he is entitled to a judgment as a matter of law. Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). "Summary judgment is designed to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980).

Viewing the evidence presented in the light most favorable to the plaintiff and drawing all inferences of fact against the defendants, we find such a fatal weakness in plaintiff's claim which would compel the entry of summary judgment in defendants' favor.

As alleged in its complaint, plaintiff is an unincorporated association formed in 1973 for the purpose of influencing various government policies of the Town of Highlands and Macon County. At common law such an unincorporated association could not sue or be sued as a legal entity since it had no existence separate and distinct from its members. *See, Youngblood v. Bright*, 243 N.C. 599, 91 S.E. 2d 559 (1956). However, G.S. 1-69.1 now provides, in pertinent part, access to the courts as follows:

> All unincorporated associations, . . . whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. . . . Any unincorporated association . . . bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

G.S. 66-68 requires that a business operating under an assumed name file a certificate, stating the name of the business and name

and address of the owner(s), in the office of the register of deeds of the county in which business is conducted.

Under G.S. 1A-1, Rule 9(a) the issue of the capacity to sue or the lack thereof is to be pleaded as a special matter:

> (a) *Capacity.*—Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. . . . When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued. . . , he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

In the motions to dismiss contained in their answers, defendants specifically put into issue plaintiff's capacity to sue by their allegation that plaintiff "has not complied with the laws which may allow an unincorporated association to sue and has failed properly to allege registration as required by law." After defendants effectively challenged plaintiff's capacity to sue in their converted motions for summary judgment, it became incumbent upon the plaintiff to present a forecast of evidence showing that there was a triable issue on this question. *See Poston v. Morgan-Schultheiss, Inc.*, 46 N.C. App. 321, 265 S.E. 2d 615 (1980). Plaintiff has failed to do so.

The record before us contains no evidence of plaintiff's compliance with the directives of G.S. 1-69.1 to file the certificate as set out in G.S. 66-68. The statutory language of G.S. 1-69.1 is very clear and specific, i.e., any unincorporated association desiring to commence litigation in its commonly held name *must* allege the location of the recordation required by G.S. 66-68. Applying the well-settled principle that statutes in derogation of the common law must be strictly construed, we find the action of the trial court correct in dismissing plaintiff's complaint for failure to comply with these statutory mandates. *See, Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). Strict construction of G.S. 1-69.1 requires that before an unincorporated association may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by G.S. 66-68 and then allegation of its specific location.

We are not unaware of the seeming contradiction between the specific mandate of recordation prior to filing an action which

is set out in G.S. 1-69.1 and the provisions of G.S. 66-71. This last statute classifies the failure to record under G.S. 66-68 as a misdemeanor which may result in a penalty collectible in a civil action and states in subsection (b) that the "failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State." Applying settled rules of statutory construction, we conclude that the provisions of G.S. 1-69.1 control in this case. What is now G.S. 66-71, allowing recovery in a civil action in spite of statutory noncompliance, came into being by the enactment of chapter 2, Public Laws 1919 which added the proviso in C.S., 3291. The amendment to G.S. 1-69.1, which added the requirement of an allegation of G.S. 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. Therefore, in the face of any irreconcilable conflict between the provisions of these two statutes, G.S. 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. *See*, *State v. Hutson*, 10 N.C. App. 653, 179 S.E. 2d 858 (1971). We reach the same conclusion when the subject matter of the two statutes is examined, since the more particular directives of G.S. 1-69.1 would prevail over the general recordation provisions of G.S. 66-68 *et seq. See*, *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). The requirements of G.S. 1-69.1 are mandatory and failure to satisfy them is not exonerated by G.S. 66-71.

For the foregoing reasons, we hold the dismissal of plaintiff's action to be proper.

Affirmed.

Judges WELLS and BECTON concur.

MONTE ENTERPRISES, INC. v. F. PATRICK KAVANAUGH, CRAVEN RENDERING COMPANY, A CORPORATION, AL BATTLE, WILLIAM BEST AND N. C. CONSOLIDATED HIDE COMPANY, A CORPORATION

No. 823SC535

(Filed 7 June 1983)

Mortgages and Deeds of Trust § 13.2— purchase money deed of trust—foreclosure sale—purchase by beneficiary for amount of debt—no action for waste

Where plaintiff had a security interest in land as the holder of a purchase money deed of trust, and plaintiff purchased the secured property at a foreclosure sale by bidding the amount of the obligation owed to it plus the costs of the sale, plaintiff could not recover damages for alleged waste by defendant debtor and others, since plaintiff could not establish any impairment of security.

APPEAL by plaintiff from *Reid, Judge.* Order entered 29 January 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 13 April 1983.

The plaintiff's action against the several defendants for tortious damage done to three tracts of real estate that plaintiff had a security interest in as holder of a purchase money deed of trust was dismissed pursuant to the provisions of Rule 12(b)(6) for failure to state a claim upon which relief could be granted, and the plaintiff appealed.

Ward, Ward, Willey & Ward, by Joshua W. Willey, Jr., for plaintiff appellant.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr. and John Turner Walston, for defendant appellees Al Battle, William Best, and N.C. Consolidated Hide Company.

PHILLIPS, Judge.

In suing the defendants for damage done to the real estate involved, the plaintiff, in substance, made the following allegations:

(1) That it was the holder of a purchase money deed of trust on said property.

(2) After said deed of trust and the note it secured was in default and while the foreclosure sale was being adver-

tised, the defendants committed certain wasteful acts which damaged the property and diminished its value in various amounts.

(3) That thereafter the property "which was the plaintiff's sole security for that debt owed by the defendant Kavanaugh" to the plaintiff was sold at foreclosure on the 27th day of February, 1981; that there being no bidders at said foreclosure sale "*the property was sold to plaintiff for the indebtedness due on said note together with the cost of the proceeding.*" [Emphasis supplied.]

Manifestly, the plaintiff suffered no legal detriment because of the defendants' wasteful acts against the secured property, and the judgment dismissing its action was correct. The allegations plainly show that plaintiff's only interest in the land—a security interest to enforce collection of the debt due—was still of sufficient value even after the waste to enable the debt due it to be paid in full from the sale, along with the costs and expenses of foreclosure. Since that was all that the law and its security interest entitled it to, the defendants' otherwise tortious acts did no legal harm to the plaintiff and the suit was therefore deficient in that essential respect. That the plaintiff's interest in the property began and ended with the secured debt, and was limited to it, is made plain by the following principles of law long followed by our courts:

> When a mortgage or deed of trust secures the payment of a specific debt the determinable estate of the mortgagee or trustee terminates the very instant the debt is paid. *Barbee v. Edwards,* 238 N.C. 215, 77 S.E. 2d 646 (1953).
>
> "The debt secured is the life of the mortgage and gives it vigor and efficacy. The essential effect and consequence of the discharge of the mortgage debt is the discharge of the mortgage itself." *Liberty Mfg. Co. v. Malloy,* 217 N.C. 666, 668, 9 S.E. 2d 403, 404 (1940).
>
> "A mortgagee has no right to possession except to assure payment of the debt or performance of other conditions of the mortgage." *Gregg v. Williamson,* 246 N.C. 356, 359, 98 S.E. 2d 481, 484 (1957).

Upon taking possession the mortgagee must apply any rents and profits received to the debt. *Hemphill v. Ross*, 66 N.C. 477 (1872).

Nor was the deficiency in the plaintiff's claim remedied by the fact that the property was damaged extensively, which we necessarily assume was the case for the purposes of this appeal. The right to recover for that damage, if it belonged to anybody, belonged, of course, to the owner of the land. But since, according to the complaint, the defendant Kavanaugh both owned and damaged the land, there was no right in anybody to recover for the damage done. In all events, the allegations show that plaintiff's right was to recover only for damage done to its security interest, of which there was none, and no approved doctrine of the law that we are aware of entitles the plaintiff to recover for damage done to the property interest of another, as the complaint requests.

Suits for damage done to secured property are maintainable, however, under various circumstances; indeed, if the circumstances in this case had differed from those alleged in any of several respects the suit would not be dismissable. If the waste had occurred after the plaintiff bought the property under foreclosure, or even after the plaintiff's bid was submitted (if no upset occurred and its bid was approved), the plaintiff could properly sue on its own account for all damage done to the land under the theory that its contract was for the property in its undamaged state and that the waste wrongfully deprived it of its bargain. *Tech Land Development Company v. South Carolina Insurance Company*, 57 N.C. App. 566, 291 S.E. 2d 821 (1982). If the price obtained for the property at foreclosure had been less than the amount of the debt, the plaintiff's suit for the deficit would be maintainable. *Edwards v. Meadows*, 195 N.C. 255, 141 S.E. 595 (1928). If the foreclosure sale had not occurred, upon suitable proof at trial, the plaintiff could recover up to the amount of the debt. *Stevens v. Smathers*, 124 N.C. 571, 32 S.E. 959 (1899). But under the law as it has been laid down and enforced in this state for generations, an enforceable claim cannot be made out of the circumstances alleged in the complaint.

Though no reported North Carolina decision involving the precise question presented has been found, other courts in similar

situations have reached the same decision we do. The cases of *Sloss-Sheffield Steel and Iron Company v. Wilkes*, 231 Ala. 511, 165 So. 764, 109 A.L.R. 385 (1936), *Allstate Finance Corporation v. Zimmerman*, 272 F. 2d 323 (5th Cir. 1950), and *Cornelison v. Korbluth*, 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P. 2d 981 (1975) all involved circumstances very similar, indeed, to those alleged in the complaint. In each case the plaintiff was a mortgage holder whose debt had been paid by its own bid at the foreclosure sale, the suit was for prior damage done to the secured property, and the action was dismissed. No decision or authority to the contrary has been found or called to our attention. The decisions relied upon by the plaintiff, instead of supporting his position, tend to undermine it. In *The Federal Land Bank of Columbia v. Jones*, 211 N.C. 317, 190 S.E. 479 (1937), foreclosure had not begun, the debt had not been paid, and the only question presented was the mortgage holder's right to sue for damage done to the security, which the law clearly sanctions. And in *Stevens v. Smathers*, *supra*, though the mortgage holder's recovery for damage done to the secured property was affirmed, the Court took pains to direct that the sum so recovered be credited against the mortgage debt.

The judgment appealed from is therefore

Affirmed.

Judges HILL and JOHNSON concur.

DENISE PATTERSON, WIDOW AND GUARDIAN AD LITEM OF RICHARD WAYNE PATTERSON AND THOMAS EUGENE PATTERSON, JR., MINOR CHILDREN; THOMAS E. PATTERSON, DECEASED, EMPLOYEE v. GASTON COUNTY, EMPLOYER; INSURANCE COMPANY OF NORTH AMERICA, CARRIER

No. 8210IC626

(Filed 7 June 1983)

Master and Servant § 55.4— accident while leaving employment site for lunch —arising out of and in course of employment

Where decedent worked as a bulldozer operator at a county landfill, where he caught a ride on a dragpan driven by a co-worker for the purpose of leaving the landfill pit for lunch, and where he fell off the dragpan and was

killed when the machine ran over him, the Industrial Commission properly concluded that decedent's injury did arise out of and in the course of his employment.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 19 April 1982. Heard in the Court of Appeals 21 April 1983.

Thomas Patterson was employed by Gaston County and worked as a bulldozer operator at the county landfills. On 18 September 1980 he caught a ride on a dragpan driven by a co-worker for the purpose of leaving the landfill pit for lunch. Patterson fell off the dragpan and was killed when the machine ran over him. His widow thereafter filed a claim with the North Carolina Industrial Commission. From an award of the Commission, defendants appealed.

Gray & Stroud, by Charles D. Stroud, III, for plaintiff appellees.

Mullen, Holland & Cooper, P.A., by James Mullen, for defendant appellants.

EAGLES, Judge.

Defendants argue that the Full Commission erred in finding that Thomas E. Patterson sustained an injury by accident arising out of and in the course of his employment that caused his death.

Our review of an award of the Industrial Commission is limited to whether there was any competent evidence before the Commission to support its findings and whether the conclusions reached are legally supported by the findings in the order. *Perry v. Furniture Company,* 296 N.C. 88, 249 S.E. 2d 397 (1978).

The basic issue before us is whether decedent's death was the result of (1) an accident, (2) arising out of and (3) in the course of employment. G.S. 97-2(6). As used under the Workers' Compensation Act an "accident" is "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 428, 124 S.E. 2d 109, 110-11 (1962). There is no dispute concerning the accidental nature of Patterson's fall from the machine.

The phrase "in the course of employment" refers to "the time, place, and circumstances under which an accidental injury occurs. . . ." *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350, 353 (1972). The accident occurred at the employer's work site at approximately 11:56 a.m. as decedent was traveling to a point for his 12:00 lunch break. Although decedent had completed his morning's work as a bulldozer operator, he was part of a three-person team which was required to take the same lunch hour and which had not ended its work at the time of the accident. Patterson's supervisor testified that decedent was still subject to performing requested duties in the landfill until 12:00 noon. We find that the Commission correctly concluded that the accident occurred in the course of Patterson's employment.

An injury is deemed to be "arising out of the employment" when there is a causal connection between the employment and the injury. *Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979). This type of accident occurs when

> there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Harden v. Furniture Co., 199 N.C. 733, 735, 155 S.E. 728, 729-30 (1930).

We do not agree with defendants' argument that the causal connection between decedent's employment and injury was broken because he disobeyed his employer's directive not to ride on the dragpan. The evidence reveals that, although the employees, including decedent, had been warned orally not to ride

on the dragpans, the rule was not strictly followed. Employees on occasion did the very act in which Patterson was engaged at the time of the accident, *i.e.*, catch a ride on a dragpan in order to leave the work site.

Although the act of the decedent may be deemed a negligent one, such negligence would not necessarily bar the award of compensation. The facts of this case are very similar to those in *Archie v. Lumber Co.*, 222 N.C. 477, 481, 23 S.E. 2d 834, 836 (1942), where the Court stated that "[we] do not think compensation should be denied his dependents because he made an error of judgment and attempted to use a more hazardous means of transportation, . . . nor because in so doing he violated a rule which was not always observed by the employees." *See also Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979); *Hartley v. Prison Dept.*, 258 N.C. 287, 128 S.E. 2d 598 (1962). We find no evidence of "thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired" or "disobedience of a direct and specific order by a then present superior" which would break the causal connection between the employment and resulting injury. *See, Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 259, 293 S.E. 2d 196, 202 (1982). Defendants acknowledge that the activity of riding on a dragpan was not the subject of a rule or regulation adopted by the employer and approved by the Commission which would justify a ten percent reduction in the award of compensation. *See*, G.S. 97-12.

We hold that the Industrial Commission was correct in concluding that the decedent's injury did arise out of and in the course of his employment. The Opinion and Award is

Affirmed.

Judges WELLS and BECTON concur.

ED COCHRAN v. PIEDMONT PUBLISHING COMPANY INC., AN AFFILIATE OF MEDIA GENERAL, INC.; AND JOE GOODMAN; AND RAY DOWNEY-LASKOWITZ, INDIVIDUALLY, AND IN THEIR RESPECTIVE CAPACITIES AS THE PUBLISHER, CITY EDITOR, MANAGING EDITOR, AND PHOTOGRAPHER OF THE WINSTON-SALEM JOURNAL AND SENTINEL

No. 8221SC580

(Filed 7 June 1983)

Libel and Slander § 18— libel—punitive damages—actual malice—genuine issue of material fact

The trial court erred in entering summary judgment for defendants on the issue of punitive damages in a libel action where a genuine issue of material fact was presented as to whether defendants were guilty of "actual malice" in publishing a newspaper photograph of plaintiff and others with a caption stating that the persons in the photograph were hungry and were waiting for money to enable them to get something to eat.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 17 March 1982 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 19 April 1983.

Plaintiff filed a complaint on 2 March 1981 alleging that defendants had libeled him, and requesting compensatory and punitive damages. Specifically, plaintiff alleged that on or about 8 November 1980 defendants had published, on the front page of the Winston-Salem Journal and Sentinel, a picture of plaintiff sitting on a bench with three other people. The printed caption beneath the picture read "Waiting for Godot. For these people, sitting on a bench on Marshall Street, much of life seems to be waiting. They are hungry, they say, and are waiting for some money to get something to satisfy their hunger. And tomorrow? That will be a day for more waiting."

Prior to trial defendants filed a motion for summary judgment. The trial court granted partial summary judgment in favor of defendants as to plaintiff's claim for punitive damages. From this partial summary judgment plaintiff immediately appealed.

Harbinson, Harbinson & Parker, by Joel C. Harbinson and Kimberly T. Harbinson, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., W. Andrew Copenhaver and M. Ann Anderson, for defendant-appellees.

EAGLES, Judge.

The lower court's ruling left for trial the issue of whether plaintiff is entitled to compensatory damages for libel. The sole issue presented on this appeal is whether the trial court properly entered partial summary judgment in favor of defendant on plaintiff's claim for punitive damages. The record in this case indicates a factual dispute as to the content of the verbal exchange between the persons in the photograph and the defendants' photographer at the time the photograph was taken. Because of this factual dispute, the resolution of which would bear on the punitive damages issue, we must hold that the trial court improperly granted partial summary judgment in favor of defendant. We hold that the issue of punitive damages should be submitted to the jury.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." In order to recover compensatory damages for libel, plaintiff must first establish that the caption beneath the photograph contained false information, *Brown v. Boney*, 41 N.C. App. 636, 255 S.E. 2d 784 (1979), and that the false information was published through the fault or negligence of the defendant. *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E. 2d 766 (1976). To recover punitive damages plaintiff, a private figure, faces the additional burden of proving "actual malice" on the part of the defendants, by showing that the defendants published the libelous material with knowledge of its falsity or with reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed. 2d 789, 94 S.Ct. 2997 (1974); *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E. 2d 852 (1982). The plaintiff may also show "actual malice" by establishing that the publication of libelous material was made with a high degree of awareness of probable falsity. *Taylor v. Greensboro News Co., supra.*

Whether defendants published the picture and caption with "actual malice" is a fact material to the issue of punitive damages

under the holding in *Gertz*. If a genuine issue exists as to that fact, summary judgment would be improper.

We hold that in the case *sub judice* the absence or presence of "actual malice" on the part of the defendants is a genuine issue as to a material fact. Plaintiff's deposition contained the statement: "That's false, what they've got under that picture. There's no such thing, there was nothing said like that. We didn't tell that photographer we were hungry." It would be possible for the jury to find for the plaintiff on the issue of punitive damages if plaintiff is able to prove at trial that the persons in the photograph did not tell the photographer that they were hungry and were waiting for money to enable them to go get something to eat.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the *intentional lie* nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. [Citation omitted.] [Emphasis added.]

Brown v. Boney, 41 N.C. App. at 648, 255 S.E. 2d at 791, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed. 2d 789, 805 (1974). "[M]edia defendants can[not] escape liability where the evidence discloses the publication of false factual statements under the guise of editorializing." *Id.*

Since there is a factual dispute between the parties and since summary judgment is not favored where proof of actual malice is required of the plaintiff, *Hall v. Piedmont Publishing Co.*, 46 N.C. App. 760, 266 S.E. 2d 397 (1980), we hold that the trial court improperly granted partial summary judgment in favor of the defendant on the issue of punitive damages.

Reversed.

Judges WELLS and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JUNE 1983

Case	County	Disposition
ASHEVILLE CONSTR. EQUIPMENT, INC. v. JIM WALTER HOMES, INC. No. 8218DC336	Guilford (80CVD6252)	Reversed and Remanded
BARRIOS v. BARRIOS No. 8210DC327	Wake (79CVD5855)	Reversed and Remanded
BENNETT v. BENNETT No. 8218DC664	Guilford (73CVD9684)	Affirmed
BUCHANAN CHEVROLET, INC. v. TERRELL No. 8215DC758	Alamance (81CVD1036)	No Error
CHAUCER ASSOCIATES v. YOUNG No. 8226DC556	Mecklenburg (81CVD5880)	Affirmed
GLOVER v. GLOVER No. 8214DC809	Durham (81CVD3552)	*Dismissed*
IN RE BROOME No. 8226DC763	Mecklenburg (81J137)	Affirmed
IN THE MATTER OF THE ESTATE OF ANGELIKA KATSOS No. 8220SC829	Moore (78E69, 81CVS302)	Affirmed
JESSE RAY FUNERAL HOME, INC. v. OUTERBRIDGE No. 8228DC651	Buncombe (80CVD2414)	Dismissed
MAHAUN v. MAHAUN No. 8230DC1185	Macon (81CVD154)	Affirmed
PENN COMPRESSION MOULDING, INC. v. MAR-BAL, INC. No. 8211SC673	Johnston (80CVS1414)	Affirmed
STATE v. DEESE No. 8220SC1257	Union (82CRS3266)	No Error
STATE v. EDMONDS No. 826SC411	Halifax (79CRS12975)	No Error
STATE v. EUBANKS No. 8229SC894	Transylvania (81CRS97)	No Error

CASES REPORTED WITHOUT PUBLISHED OPINION

STATE v. GREEN No. 8211SC1329	Harnett (82CRS3407) (82CRS3591) (82CRS3436) (82CRS3590)	No Error
STATE v. HARRIS No. 8212SC1162	Cumberland (81CRS3986) (81CRS3987) (81CRS3988)	No Error
STATE v. LITTLE No. 8226SC1281	Mecklenburg (80CRS40507)	No Error
STATE v. MALLOY No. 8220SC1242	Moore (82CRS5369)	Vacated and Remanded
STATE v. MITCHELL No. 823SC1042	Craven (82CRS577)	Affirmed
STATE v. NICHOLSON No. 826SC1093	Halifax (81CRS13523) (81CRS14123)	No Error
STATE v. RUSSELL No. 8226SC1236	Mecklenburg (82CRS029784)	No Error
STATE v. SANDERSON No. 824SC1270	Duplin (81CRS6007) (81CRS6011) (81CRS6010) (81CRS6009) (81CRS6008) (81CRS6140)	No Error
STATE v. STONE No. 8211SC1197	Lee (82CR1732)	No Error in Trial but Remanded for Resentencing
WEBER v. BUNCOMBE CO. BD. OF EDUC. No. 8228SC537	Buncombe (81CVS659)	Affirmed

COPY PRODUCTS, INC. v. CLYDE C. RANDOLPH, JR., INDIVIDUALLY; DORIS GREEN RANDOLPH, INDIVIDUALLY; AND RANDOLPH AND RANDOLPH, ATTORNEYS AND COUNSELLORS AT LAW, A PARTNERSHIP

No. 8221DC502

(Filed 7 June 1983)

Contracts § 27.1— lease of copying machine—directed verdict for defendant improper

In an action brought by plaintiff to recover unpaid rental payments for a copying machine leased to the defendants, the trial court erred in entering a directed verdict for defendants since the lease agreement between the parties could be seen as a valid contract and since at least four terms of the lease agreement pointed to a recovery by the plaintiff.

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 21 January 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 17 March 1983.

Plaintiff brought this action to recover unpaid rental payments for a copying machine leased to the defendants.

Defendants signed a lease with the plaintiff on 21 May 1976. They agreed to make 60 monthly payments of $100.55 for the copier. The lease contained a number of relevant provisions.

First, the defendants could not terminate the lease without the plaintiff's permission. Second, default in the lease payments entitled the plaintiff to terminate the lease and accelerate all unpaid payments.

Third, if the plaintiff terminated the lease prior to the end of its stated term, it could recover all unpaid rent and liquidated damages equal to the difference between the unpaid lease payments and proceeds from the sale of the copier. Fourth, the defendants could not assign or sublet the machine without the plaintiff's prior consent.

The defendants made timely rental payments until December, 1978. On 29 December 1978, they wrote to the plaintiff about terminating the lease or, in the alternative, buying the machine.

In February, 1979, the defendants proposed an assignment of the lease to which the plaintiff did not agree.

The plaintiff filed a complaint on 7 May 1979 seeking the $2,815.40 balance due under the lease and liquidated damages as defined in the lease. Defendants denied the plaintiff's allegations and counterclaimed that the lease was not a binding contract, that the plaintiff has not mitigated damages, and that the defendants suffered $2,909.97 in damages as a result of the plaintiff's breach of contract, which they contend should be recovered from the plaintiff.

The plaintiff replied, denying the allegations of the defendants' counterclaim and moved to dismiss it. A motion for summary judgment by the plaintiff was denied on 22 October 1981.

When the case came for trial on 18 January 1982, the trial judge granted the defendants' motion for a directed verdict at the close of the plaintiff's evidence. The defendants took a voluntary dismissal without prejudice of their counterclaim.

The plaintiff then appealed to this Court.

Paul A. Sinal for plaintiff-appellant.

David F. Tamer for defendant-appellee.

ARNOLD, Judge.

The plaintiff lost this case on a G.S. 1A-1, Rule 50(a) motion for a directed verdict. On a directed verdict motion,

> the court must consider the evidence in the light most favorable to the non-movant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the non-movant the benefit of all inferences reasonably to be drawn in his favor.

Daughtry v. Turnage, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978). W. Shuford, N.C. Civil Practice and Procedure § 50-5 (2d ed. 1981).

When considering the evidence in the light most favorable to the plaintiff, including resolving evidentiary conflicts in its favor, we conclude that the entry of a directed verdict for the defendants was improper.

First, the lease agreement between the parties could be seen as a valid contract. The essential contract elements of offer, acceptance, consideration, and no defenses to formation can be established by the evidence considered in the light most favorable to the plaintiff. As a result, we need not address the defendants' arguments that the lease was not executed in accord with corporate formalities, or that it was only an acceptance of an offer that the plaintiff made in a letter two months earlier. In addition, the defendants' contention that the earlier letter is part of the contract between the parties may fail under the parol evidence rule. *See* 2 Brandis, N.C. Evidence §§ 251-260 (2d rev. ed. 1982).

Second, assuming that the lease is a valid contract, as we must on this directed verdict motion, four terms of the lease point to a recovery by the plaintiff.

First, the defendants could not terminate the lease without the plaintiff's permission. They never had that permission and may be liable for liquidated damages as a result.

Second, not paying rent is default under the lease. Third, one remedy for default is accelerating the time for all unpaid rent. Finally, the lease provides that when the plaintiff terminates the lease, it can recover all due and unpaid rent *and* liquidated damages.

Our reversal of the grant of the directed verdict does not prohibit the defendants from raising their counterclaim at the new trial if they comply with the provisions of G.S. 1A-1, Rule 41. They also may argue any failure of the plaintiff to mitigate its damages.

Reversed and remanded.

Judges HILL and BECTON concur.

WILLIE H. GRIFFIN v. HOUSING AUTHORITY OF THE CITY OF DURHAM, NORTH CAROLINA

No. 8214SC759

(Filed 7 June 1983)

1. **Master and Servant § 10— employment at will—effect of personnel policies**

Where the personnel policies of defendant municipal housing authority were not expressly incorporated in plaintiff's contract of employment at will, defendant was not obligated to follow its personnel policies in dismissing plaintiff. In any event, defendant did in fact follow its personnel policies when it dismissed plaintiff.

2. **Master and Servant § 10— discharge from employment—due process**

Plaintiff's contract of employment with defendant municipal housing authority, which was terminable at will, did not give plaintiff a Fourteenth Amendment property right or a vested interest in continued employment. Furthermore, if plaintiff was dismissed from his employment with defendant for reasons that would damage his reputation, plaintiff was given sufficient notice and an opportunity at a hearing to refute charges against him so as to comply with due process requirements.

APPEAL by plaintiff from *Brannon, Judge.* Judgment entered 16 February 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 May 1983.

Plaintiff was hired as Director of Operations of the Housing Authority of Durham in March 1976. The uncontradicted facts are as follows. Plaintiff was offered the job by Executive Director James E. Kerr. In his offer, Kerr said the starting annual salary would be $18,144.00 and after successful completion of a three to six months' probationary period plaintiff would receive an automatic five percent salary increase. On 16 April 1979, plaintiff was told that due to reorganization of the Housing Authority his job would be eliminated. He received a letter from Kerr notifying him that his employment would end on 18 May 1979. At that time, his annual salary was $25,540.20. Plaintiff eventually found another job on 1 January 1980, with the City of Durham, at a salary of $16,655.00. He brought this action alleging defendant breached its contract, and caused him to suffer damages: $17,827.52 for the breach of contract, $16,541.25 for economic damages, $32,573.87 for back pay, and $100,000.00 for damage to his reputation.

Defendant's motion for summary judgment was granted.

Haywood, Denny and Miller, by George W. Miller, Jr., for plaintiff appellant.

Daniel K. Edwards, for defendant appellee.

VAUGHN, Chief Judge.

The sole question is, assuming plaintiff's evidence is true, whether defendant was entitled to summary judgment as a matter of law. The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of trial when no material facts are at issue. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). Since the evidence was uncontradicted, there is no issue of material fact. The only question is whether defendant was entitled to judgment as a matter of law.

[1] Plaintiff's argument is, in essence, that even though he was an employee at will, his termination was a breach of contract because it was not in compliance with defendant's personnel policies. Plaintiff's contract, which was incorporated in defendant's advertisement, plaintiff's job application, and the exchange of letters between plaintiff and Kerr, had no mention of a term of employment. In general, a contract of employment for an indefinite period of time is terminable by either party at will. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Roberts v. Wake Forest University*, 55 N.C. App. 430, 286 S.E. 2d 120, *review denied*, 305 N.C. 586, 292 S.E. 2d 571 (1982); *Humphrey v. Hill*, 55 N.C. App. 359, 285 S.E. 2d 293 (1982). Defendant's personnel policies, which were amended after plaintiff was hired, were not expressly incorporated in plaintiff's contract, and without such inclusion defendant was not obligated to follow its personnel policies in dismissing plaintiff. *See George v. Wake County Opportunities, Inc.*, 26 N.C. App. 732, 217 S.E. 2d 128, *cert. denied*, 288 N.C. 393, 218 S.E. 2d 466 (1975), *cert. denied*, 425 U.S. 975, 48 L.Ed. 2d 800, 96 S.Ct. 2176 (1976). Moreover, defendant, although not obligated to do so, did in fact follow its personnel policies when it fired plaintiff. The record shows that Kerr told plaintiff on 16 April 1979 that due to a reorganization and reduction in personnel he would be terminated as of 18 May 1979. This was

confirmed by letter dated 23 April 1979. This complies with the policy on "separations":

3. Reduction in Force.

a. If it is necessary to reduce personnel, the selection of employees to be retained shall be based primarily on their relative efficiency and the necessity of the job entailed. Other things being equal, length of service shall be given consideration.

b. At least two weeks notice prior to termination shall be given an employee except for persons employed for a specific period.

[2] Plaintiff also argues that defendant violated his civil rights giving him a cause of action under 42 U.S.C. Section 1983. Section 1983 provides a cause of action for any person who is deprived of "rights, privileges, or immunities secured by the Constitution and laws" under "color of any statute, ordinance, regulation, custom, or usage, of any State. . . ." Plaintiff has not alleged which of his constitutional rights were violated. Presumably, he is contending that he was not afforded procedural due process. The requirements of procedural due process apply only to deprivation of interests which are encompassed by the protection of liberty and property in the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972); *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). Plaintiff's employment contract, which was terminable at will, did not provide him with a Fourteenth Amendment property right or a vested interest in continued employment. *Presnell v. Pell, supra.*

As to his liberty interest, if defendant fired plaintiff for reasons that would damage his reputation, then notice and a hearing to give plaintiff an opportunity to refute the charges would be required by due process. *Board of Regents v. Roth, supra; Presnell v. Pell, supra.* Plaintiff alleges that his reputation was besmirched by statements made by the Chairman of the Board of Commissioners in a public speech before he was fired. He, however, was present at a hearing on 17 May 1979, and spoke at length refuting the charges. Thus, all due process requirements were met.

For the reasons stated above, we find there was no issue of material fact, and defendant was entitled to judgment as a matter of law. The trial court's entry of summary judgment for defendant is

Affirmed.

Judges HILL and BECTON concur.

WALTER L. MATTHEWS, JR. AND WIFE, VIRGINIA G. MATTHEWS v. FREDDY T. BROWN AND GEORGIA-PACIFIC CORPORATION

No. 8211SC689

(Filed 7 June 1983)

1. **Deeds § 28— timber deed—violation of—sufficiency of evidence**

Plaintiffs offered sufficient evidence of a violation of a timber deed to support the trial judge's findings of fact, conclusions of law and award to plaintiffs of actual damages of $1,193.20 for the cost of timber cut unlawfully or destroyed.

2. **Trespass § 8.2— violation of timber deed—error to award double damages**

The trial judge erred in awarding double damages to plaintiffs pursuant to G.S. 1-539.1(a) where plaintiffs proved a violation of a timber deed since defendant was not a trespasser to the land, and therefore, the statute did not apply.

APPEAL by defendant Georgia-Pacific Corporation from *Britt, Judge.* Judgment entered 17 January 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals 11 May 1983.

Action by plaintiffs based on a breach of condition in a timber deed from plaintiffs to defendant Brown and assigned by him to Georgia-Pacific Corporation.

James F. Penny, Jr., for plaintiffs-appellees.

Lytch & Thompson, by R. Allen Lytch and Benjamin N. Thompson, for defendant-appellant.

HILL, Judge.

Plaintiffs executed two timber deeds to the defendant, Freddy T. Brown, the second deed extending the term of contract set out in the first. Brown assigned the two deeds to Georgia-Pacific Corporation. Brown answered plaintiffs' complaint, denying liability and filed a crossclaim against Georgia-Pacific Corporation for any damages plaintiffs would recover from him. Georgia-Pacific Corporation answered plaintiffs' complaint, denying negligence and Brown's crossclaim denying liability. In addition, Georgia-Pacific Corporation counterclaimed against Brown, charging liability based on warranty of title. At the conclusion of plaintiff's evidence, the trial judge allowed Brown's motion to dismiss, and at the end of all the evidence twice denied Georgia-Pacific Corporation's motion for involuntary dismissal pursuant to Rule 41(b). The trial judge made findings of fact and conclusions of law and awarded plaintiffs actual damages of $1,193.20 for the cost of timber cut unlawfully or destroyed, and then doubled this sum pursuant to G.S. 1-539.1. Brown was absolved of all liability. Georgia-Pacific Corporation appealed.

Georgia-Pacific Corporation brings forth four assignments of error. The first two assignments of error assert that the trial judge erred in failing to dismiss plaintiff's cause of action pursuant to G.S. 1A-1, Rule 41(b): first, because the evidence was insufficient to show a violation of the terms of the timber deed; and, second, because the evidence was insufficient to show negligence on the part of the Georgia-Pacific Corporation. We disagree.

[1] The trial judge's findings of fact support his award. Adequate evidence was offered by plaintiff which, if taken as true, supports findings upon which the trier of fact could properly base a judgment for the plaintiff. *See* Shuford, North Carolina Civil Practice and Procedure 2d, § 41-7, p. 327. Further, there was evidence, though disputed, that Georgia-Pacific's agent had cut 119.32 cords of trees eight inches or less valued at $1,193.20. The contract permitted Georgia-Pacific to cut such trees as were necessary to remove the timber contracted for, but Georgia-Pacific offered no evidence that defined the portion of trees that had to be cut to allow removal of the remaining timber. Such an argument is an affirmative defense that must be pleaded and

proved by Georgia-Pacific; only Georgia-Pacific is in a position to know how many trees, if any, were necessarily destroyed in removing the remaining timber.

We find no error in the amount of the initial award of $1,193.20 for timber cut and destroyed in violation of the timber deed. There was direct evidence by an expert forester that 119.32 cords were "left on the ground, cut or destroyed," having a value of $1,193.20. The Court's findings of fact are conclusive if supported by any competent evidence, and the judgment supported by such findings will be affirmed, even though there is contrary evidence, or even though some incompetent evidence may also have been admitted. 1 Strong N.C. Index 3d, Appeal and Error, § 57.2, p. 342.

[2] We conclude, however, that the trial judge erred in awarding double damages to plaintiffs pursuant to G.S. 1-539.1(a) which states:

> Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub, or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

In order for this statute to apply, two requirements must be met. The defendant must: (1) be a trespasser to the land and (2) injure, cut or remove wood, timber, shrubs, or trees thereon or therefrom. In this case, the first part of the test has not been met. In no way was Georgia-Pacific a trespasser; it had a legal right to be on the land under the contract and the assignment. There is no evidence Georgia-Pacific cut any timber outside the boundary described in the timber deed.

The trial judge erred in doubling the award of damages. The judgment in this case is vacated and the cause remanded to the Superior Court of Harnett County for entry of a new judgment awarding the plaintiffs $1,193.20.

Remanded for entry of judgment in accordance with this opinion.

Judges JOHNSON and PHILLIPS concur.

WALTER D. THOMPSON AND WIFE, RACHEL J. THOMPSON v. THE HOME INSURANCE COMPANY

No. 8218SC711

(Filed 7 June 1983)

Insurance § 130— fire insurance—notarized proof of loss—"sworn to" requirement

Plainitffs complied with the requirements of G.S. 58-176(c) and a fire insurance policy that a proof of loss "be signed and sworn to by the insured" when they signed a proof of loss before a notary public who recited that the proof of loss was "sworn to" before her even though plaintiffs were not administered oaths by the notary before they signed the proof of loss.

APPEAL by plaintiffs from *Davis, Judge.* Judgment entered 26 February 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 May 1983.

This is an action on a fire insurance policy. Evidence at a jury trial showed that the plaintiffs owned a building insured by the defendant which was destroyed by fire on 11 August 1980. On 18 August 1980 the plaintiffs submitted a proof of loss to the defendant. The proof of loss was signed by both plaintiffs. It was notarized by Janet Rossler with the statement, "Subscribed and sworn to before me this 18th day of August 1980" above her signature. Defendant demanded, pursuant to the provisions of the insurance policy, that the plaintiffs submit to an examination before a notary public, which the plaintiffs did on 29 September 1980. Both plaintiffs testified before the notary public that they signed the proof of loss before a notary public who notarized it for them. Each of them testified that neither of them took an oath at the time they signed the proof of loss. They testified that the statements made in the proof of loss were true.

The court granted the defendant's motion for directed verdict at the end of the plaintiff's evidence. The plaintiffs appealed.

Short and Simpson, by W. Marcus Short; and Nichols, Caffrey, Hill, Evans and Murrelle, by Lindsay R. Davis, Jr. and Harold W. Beavers, for plaintiff appellants.

Tuggle, Duggins, Meschan, Thornton and Elrod, by J. Reed Johnston, Jr. and Joseph E. Elrod, III, for defendant appellee.

WEBB, Judge.

Plaintiffs and defendant agree that the resolution of this appeal depends on whether the plaintiffs properly executed the proof of loss. The insurance policy, as required by G.S. 58-176(c), contained the following provision:

> "within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss signed and sworn to by the insured. . . ."

The evidence showed that the plaintiffs signed the proof of loss before a notary public who recited that the proof of loss was "sworn to" before her. The defendant contends this was not sufficient since the plaintiffs were not administered oaths by the notary public before they signed the proof of loss. The plaintiffs were examined under oath by a notary public within sixty days of the fire, at which time the plaintiffs testified the statements in the proof of loss were true, but the defendant argues this does not cure the defect. We hold that the execution of the proof of loss by the plaintiffs complied with the terms of the policy. We do not believe that the intention of the General Assembly, as expressed in G.S. 58-176(c) and made a part of the fire insurance policy, is that a claimant on a policy should be denied coverage if he or she executes the proof of loss before a notary without raising his or her hand and swearing to the truth of the statements in the proof of loss. We hold that evidence that the parties in fact signed before a notary public who then recited that the proof of loss was sworn to before her is sufficient.

The defendant relies on *Brandon v. Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980) and *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957). We do not believe either of these cases controls. In *Brandon*, the insurance company refused to accept a proof of loss because it was incomplete. In *Boyd*, the plaintiff did

not file the action within twelve months as required by the policy. Neither case dealt with the execution of a proof of loss by swearing to it before a notary public.

The defendant also argues that the policy provides that it shall be void "in case of any fraud or false swearing by the insured relating thereto" and that the defense of false swearing could be avoided by a plaintiff testifying that he did not swear to the proof of loss. We do not believe the holding of this case eliminates any defense based on a false statement by a claimant in a proof of loss. The defendant, relying on G.S. 10-5, points out that there is a difference between verifying an acknowledgement and administering an oath. We recognize this as true, but we hold that in this case the provision in the policy that the proof of loss be sworn to was satisfied when there was proof that the parties signed in the presence of a notary public who recited the proof of loss was sworn to before her.

We hold it was error to grant the defendant's motion to dismiss.

Reversed and remanded.

Judges WHICHARD and BRASWELL concur.

BETTY CAROLE SHARPE v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, A CORPORATION, A MEMBER OF THE NATIONWIDE GROUP OF INSURANCE COMPANIES

No. 8225SC790

(Filed 7 June 1983)

Accord and Satisfaction § 1— fire insurance policy—acceptance of check—condition on endorsement ineffectual

Where defendant insurance company mailed plaintiff a sworn statement and proof of loss which defendant signed, and where defendant then issued to plaintiff a draft in full payment of all claims and where plaintiff typed over the line which read "full payment unless otherwise indicated on stub," and wrote the following: "This check (or draft) is accepted as partial payment of the claim for the total loss of the property involved and payees' endorsement hereon is

limited to that purpose," plaintiff's cashing of the check tendered in full payment of the disputed claim established an accord and satisfaction as a matter of law.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 8 March 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 18 May 1983.

Plaintiff instituted this action to recover the face amount of an insurance policy issued by defendant on plaintiff's house, which was destroyed by fire. She also seeks damages for alleged fraud and unfair trade practices.

The complaint alleged that defendant failed to inform plaintiff of the "inflation coverage endorsement" and "replacement cost coverage" provisions of her policy, and misrepresented that $15,531.23, the amount of a sworn statement in proof of loss, was its total liability to her. Defendant answered, denying the allegations of fraud and asserting, *inter alia,* the affirmative defense of accord and satisfaction or compromise and settlement.

Plaintiff appeals from summary judgment for defendant.

W. P. Burkhimer for plaintiff appellant.

Todd, Vanderbloemen and Respess, by William W. Respess, Jr., for defendant appellee.

WHICHARD, Judge.

> An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a "satisfaction" is the execution or performance, of such agreement.

Allgood v. Trust Co., 242 N.C. 506, 515, 88 S.E. 2d 825, 830-31 (1955). While normally the existence of an accord and satisfaction is a question of fact for the jury, if the only reasonable inference is its existence or nonexistence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record. *Construction Co. v.*

Coan, 30 N.C. App. 731, 737, 228 S.E. 2d 497, 501, *disc. rev. denied*, 291 N.C. 323, 230 S.E. 2d 676 (1976).

The following facts are undisputed: On 3 June 1979 a dwelling owned by plaintiff and insured by defendant was totally destroyed by fire. Plaintiff duly notified defendant of the loss and filed a claim. Defendant, through its adjuster, mailed plaintiff a completed sworn statement in proof of loss, which stated that the whole loss and damage was $15,581.23, less a $50 deductible. Plaintiff read the proof of loss, signed it before a notary public, and returned it to defendant. Defendant then issued to plaintiff a draft in the amount of $15,531.23 in full payment of all claims. Plaintiff, through her attorney, typed over the line which read "Full payment unless otherwise indicated on stub," the following: "THIS CHECK (or draft) IS ACCEPTED AS PARTIAL PAYMENT OF THE CLAIM FOR THE TOTAL LOSS OF THE PROPERTY INVOLVED AND PAYEES' ENDORSEMENT HEREON IS LIMITED TO THAT PURPOSE." She then negotiated the draft.

The cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. *Barber v. White*, 46 N.C. App. 110, 112, 264 S.E. 2d 385, 386 (1980). In such case the claim is extinguished, regardless of any disclaimers which may be communicated by the payee. *Brown v. Coastal Truckways*, 44 N.C. App. 454, 455, 261 S.E. 2d 266, 267 (1980). G.S. 25-1-207 (1965) does not change the common law rule regarding acceptance of a "full payment check." *Id.* at 458, 261 S.E. 2d at 269.

Plaintiff contends defendant was liable to her for the entire face amount of her policies. The contention is without merit. A claim on a fire insurance policy is, by its very nature, unliquidated. The policy here provided coverage for the actual cash value of the dwelling at the time of loss up to a maximum limit. The actual cash value could not be resolved by a predetermined mathematical formula, and it was not agreed to prior to the date of loss.

Execution of the sworn statement in proof of loss, which established the value of the loss, constituted an accord as to the unliquidated claim. The statement confirmed that plaintiff agreed to the sum stated therein as the amount of her loss. Plaintiff ex-

pressed no disagreement to defendant regarding the amount set forth.

A satisfaction occurred upon plaintiff's acceptance and negotiation of the draft. Her attempt to alter its terms is unavailing. She had to accept it on the terms offered by defendant or not at all, and her acceptance and negotiation of it constituted an accord and satisfaction despite her attempt to characterize it otherwise. *Brown, supra,* 44 N.C. App. at 455, 261 S.E. 2d at 267.

Plaintiff contends defendant acted in bad faith, in violation of G.S. 58-54.1-.13, by failing to inform her of her coverage, her rights, and its liability to her; by not attempting to settle promptly, fairly, and equitably; and by attempting to settle for less than the amount "to which a reasonable man would have believed he was entitled." The record reveals no concealment of facts, however. Plaintiff had a copy of her policy and had opportunity to ascertain the facts. *See Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962). She also was represented by counsel. The record is equally devoid of evidence to support plaintiff's other contentions.

It appears that defendant issued, and plaintiff paid premiums on, two policies covering the subject property. Plaintiff contends that she thus should recover the full face amount of both policies.

Plaintiff may be entitled, upon seeking same, to cancellation of the second policy and restitution of the premiums paid thereon. *See generally* 3 *Strong's North Carolina Index 3d,* Cancellation and Rescission; D. Dobbs, *Remedies* §§ 4.1-.9 (1973) (particularly § 4.8, at 298). As to her loss from the fire, however, she can only recover the actual value thereof; and in that regard she is bound by an accord and satisfaction.

The undisputed facts indicate no genuine issue of material fact, and establish that defendant is entitled to judgment as a matter of law. Summary judgment for defendant thus was proper. G.S. 1A-1, Rule 56(c) (1969); *Kidd v. Early,* 289 N.C. 343, 365, 222 S.E. 2d 392, 399 (1976).

Affirmed.

Judges BRASWELL and EAGLES concur.

CITY OF SANFORD v. DANDY SIGNS, INC., AND DANIEL C. RICHARDSON

No. 8211DC657

(Filed 7 June 1983)

Municipal Corporations § 30.13— zoning ordinance—outdoor advertising sign structures—nonconforming use

Outdoor advertising sign structures consisting of vertical poles with horizontal slats were lawful "structures" under a 1965 zoning ordinance and should have been allowed to continue as a nonconforming use under a 1980 zoning ordinance.

APPEAL by defendants from *Greene, Judge*. Judgment entered 11 March 1982 in District Court, LEE County. Heard in the Court of Appeals 9 May 1983.

The plaintiff brought this action seeking a permanent injunction to prevent the defendants from maintaining outdoor advertising signs within the plaintiff's zoning jurisdiction. The complaint alleged violations of the Sanford City Zoning Ordinance, which was adopted on 19 October 1965 and replaced by a new ordinance effective 21 October 1980.

Stipulations were entered into at trial after the plaintiff began presentation of its case to the jury. The parties stipulated that the defendants erected three sign structures consisting of vertical poles with horizontal framing on them. It was stipulated that poles and slats were present and in place on the sites in question prior to 21 October 1980, the effective date of the new ordinance, and that no sign was affixed to the slats prior to that date.

After the stipulations of fact were entered, the trial judge withdrew the case from the jury on the ground that only questions of law remained to be decided. The plaintiff presented no further evidence.

Don Pearce, a division president of Naegele Advertising, was the only witness for the defendants. Pearce stated that it is the usual practice in the outdoor advertising industry to erect sign structures without simultaneously adding the sign area to the structure. He also testified that the sign area is periodically changed as the advertising message is changed.

In his judgment, the trial judge held that the structures erected prior to 21 October 1980 were not outdoor advertising signs as defined by the 1965 Zoning Ordinance because they did not convey "information, knowledge, or ideas to the public. . . ." As a result, they did not fall within section 26-10-1A of the 1980 Ordinance, which allows continuation as a nonconforming use any use which was "lawfully existing on the day before the effective date" of the 1980 Ordinance.

After finding other violations, the trial judge ordered that the plaintiff be granted a mandatory injunction requiring removal of the signs in question. The defendants' motions for judgment notwithstanding the verdict and a new trial were denied. From the judgment and denial of their motions, the defendants appealed.

Love & Wicker, by Jimmy L. Love, and David L. Clegg, for plaintiff-appellee.

Staton, Perkinson, West & Doster, by Stanley W. West, for defendant-appellants.

EAGLES, Judge.

The issue on this appeal is whether the defendants' structures existing on the effective date of the 1980 zoning ordinance were lawful under the 1965 zoning ordinance. If so, they are protected by section 26-10-1A of the 1980 ordinance which allows continuation of nonconforming uses that were "lawfully existing on the day before the effective date of this Ordinance."

Ordinances like the ones in this case must be strictly construed because they are in derogation of the common law. *See Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E. 2d 422 (1972). Everything not clearly within the scope of the language used shall be excluded from the operation of the ordinances, taking the words in their natural and ordinary meaning. *See Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269 (1940). Our application of these principles leads us to reverse the judgment below.

The 1965 ordinance defines sign as "a standard structural poster panel or painted sign either free-standing or attached to a building, for the purpose of conveying information, knowledge, or

ideas to the public. . . ." The defendants' structure did not technically meet that definition on the day before the effective date of the 1980 ordinance.

But their structures met the definition of "structure." The 1965 ordinance defined that term as "anything erected or constructed which has a relatively permanent ground location or is attached to something which has a relatively permanent ground location." The vertical poles and horizontal slats that were lawfully in place on the day before the effective date of the 1980 ordinance should have been allowed to continue as a section 26-10-1A nonconforming use.

We note the recent case of *Bracey Advertising Co., Inc. v. N.C. Dep't of Transp.*, 62 N.C. App. 197, 302 S.E. 2d 490 (1983). That case held that poles in place without signs before the effective date for the enforcement of North Carolina's Outdoor Advertising Control Act would be allowed to continue as nonconforming uses. Quoting from *Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E. 2d 782, 786-87 (1964), *Bracey* said "[t]he law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy."

On appeal, an ordinance will be construed as a whole. *Jackson v. Bd. of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969). This rule of construction and our application of the principles stated above leads us to reverse the judgment of the trial court.

Because of our disposition of this case, it is unnecessary to discuss the defendants' other arguments.

Reversed.

Chief Judge VAUGHN and Judge HEDRICK concur.

IN THE MATTER OF JOHN DIMATTEO, III

No. 822DC781

(Filed 7 June 1983)

Parent and Child § 6.1 — custody order — failure to determine child's best interest

An order determining child custody could not be affirmed where the trial judge failed to give a clear indication that his decision rested on a determination of what would be in the child's best interest.

APPEAL by respondent from *Ward, Judge.* Order entered 25 March 1982 in District Court, BEAUFORT County. Heard in the Court of Appeals 17 May 1983.

This proceeding was instituted by the Beaufort County Department of Social Services to obtain temporary custody of two minor children, Brian Keith Mann and John DiMatteo, III, for the purpose of placing them in a foster home. The petition was filed by the Department on 5 October 1981 after Gwendolyn DiMatteo, the child's mother, voluntarily sought the Department's help in caring for the children. Mann's status is not before us on this appeal.

A 13 October 1981 hearing resulted in an order requesting information from New Jersey, where the father lived, to investigate his home with a view of placing John with his father.

Another hearing was held on 25 March 1982. Gwendolyn testified that she went to the Department about temporary care of her children because she was physically and emotionally exhausted. She added that her husband had no contact with John for a long period of time and that it would be very harmful to separate him from his half-brother Brian or to move him from the foster home that the Department had placed him in.

Mabel Cutter, the foster parent, testified that John was adjusting well to the foster home but was heavily dependent on his half-brother Brian. She said that John had been in three different schools during the 1981-82 school year.

Elizabeth Moore, an employee of Beaufort County Social Services, testified that Gwendolyn's mother could not care for the children due to poor health.

A report from John Goodman, a social worker with the Atlantic County Department of Social Services in New Jersey, tended to show that the father's home would provide an adequate environment for John. This report indicated that the father lives with a woman to whom he is not married. Both the father and the woman have jobs. John would be cared for by his grandmother, who lives next door, when the father and the woman are at work.

The trial judge then entered an order placing John in the custody of his father. The order concluded on the basis of the report from Goodman that "the home of the father is reported to be a fit and proper place for said child, that he is a proper person to have custody and is economically able to provice [sic] for said child." From this order, the respondent Gwendolyn appealed.

No brief filed for John DiMatteo, III.

Franklin B. Johnston for respondent-appellant.

ARNOLD, Judge.

G.S. 50-13.2(a) provides:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. An order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child.

The rule in these cases in North Carolina is that the welfare of the child is the polar star by which the court's decision must be governed. 3 R. Lee, N.C. Family Law, Sec. 224 (4th ed. 1981); *e.g., Green v. Green,* 54 N.C. App. 571, 572, 284 S.E. 2d 171, 173 (1981).

The respondent attacks the order on the basis of the trial judge's statement that:

> [I]t is not a question of whether these two children have been cared for in the best possible manner since October of 1981, and it's not even a question as to whether or not the present foster care arrangement might be better than the custody of the father. The evidence is that the father's home is fit and proper. He is the proper person. That being the

case, isn't he, as a matter of law, entitled to custody of this child?

Although this statement expressed the principle that the natural parent of a child is presumed to be the appropriate custodian of that child, *In re Kowalzek*, 37 N.C. App. 364, 367, 246 S.E. 2d 45, 47, *disc. rev. denied*, 295 N.C. 734, 248 S.E. 2d 863 (1978), the trial judge's statement reflected a misapprehension of the law. We cannot affirm an order without a clear indication that it rested on a determination of what would be in John's best interest. That is the paramount consideration in custody cases.

Reversed.

Judges WEBB and BRASWELL concur.

GLENDA FAYE DAVIS v. MACK DEAN DAVIS

No. 8215DC818

(Filed 7 June 1983)

Divorce and Alimony §§ 16.9, 18.16— award of alimony and counsel fees—sufficiency of findings

The trial court's findings were sufficient to support its conclusions and order directing defendant to pay permanent alimony to plaintiff in an amount of $200.00 per month; however, the court's findings were insufficient to support its order requiring defendant to pay $250.00 in counsel fees for plaintiff's attorney where there was no finding that plaintiff was unable to defray the expense of prosecuting the suit. G.S. 50-16.3; G.S. 50-16.4.

APPEAL by defendant from *Washburn, Judge*. Judgment entered 20 April 1982 in District Court, ALAMANCE County. Heard in the Court of Appeals 19 May 1983.

This is a civil action wherein plaintiff seeks permanent alimony and counsel fees from defendant.

After a trial the trial judge made findings of fact which are set out below:

1. That plaintiff and defendant are citizens and residents of Alamance County, North Carolina, and were married each

to the other on or about the 22nd day of December 1974, and that there were no children born to the marriage.

2. That plaintiff is employed and currently earns $4.90 per hour and has an average net take home pay of approximately $150.00 per week; that defendant is employed as a salesman and earns a salary plus commissions and owns an interest in two hosiery mills; that during 1980 defendant earned approximately $32,000.00 and had net earnings in excess of $25,000.00 after all business expenses; that in 1981 defendant had salaries and commissions and other earnings of approximately $26,000.00.

3. That during 1982 through the month of March, the defendant had received no commissions but had received salaries in the sum of $1,065.00 per month for the months of January, February and March of 1982.

4. That for several months prior to the date of separation of plaintiff and defendant on October 15, 1980, defendant became an excessive user of alcohol, which although said use of alcohol did not interfere with the work of defendant, it did interfere with the relationship existing between plaintiff and defendant in their married life and on several nights during the months immediately preceding October 15, 1980, defendant remained away from home all night long without making any explanation to plaintiff as to his whereabouts and, in fact, on the night of September 19, 1980, defendant remained away from home all night and was seen early the next morning at approximately 7:00 a.m. in the neighborhood of the residence of one Sue Williams.

5. That on at least one occasion during the months immediately preceding October 15, 1980, defendant physically abused and assaulted plaintiff.

6. That as a result of the continuing course of conduct of the defendant toward plaintiff, plaintiff left the house wherein plaintiff and defendant had resided on October 15, 1980.

. . .

9. That plaintiff has reasonable monthly living expenses of approximately $1,000.00 and has no indebtedness except

her mobile home payments in the sum of $198.00 per month and her automobile payment in the sum of $204.00 per month, and that plaintiff is in substantial need of support from defendant.

Based on its findings of fact, the trial court made the following conclusions of law:

. . .

2. That the plaintiff is the dependent spouse within the meaning of Chapter 50 of the General Statutes of North Carolina and that the defendant is the supporting spouse within the meaning of Chapter 50 of the General Statutes of North Carolina.

3. That plaintiff is substantially in need of support from defendant.

4. That the actions of defendant in excessively using alcohol, physically abusing plaintiff, remaining away from home overnight without offering any explanation to plaintiff constitute such indignities to the person of the plaintiff so as to render her life burdensome and her condition intolerable, and that the act of the defendant of padlocking the residence of plaintiff and defendant from the home of plaintiff and defendant revives said indignities even had there been any condonation of the same on the part of the plaintiff as a result of the acts of sexual intercourse between plaintiff and defendant which took place during November, 1980.

5. That plaintiff is entitled to permanent alimony and counsel fees as by law provided.

The trial court then ordered defendant to pay $200.00 per month in alimony and $250.00 in attorney's fees to the Clerk of Superior Court of Alamance County for disbursement to plaintiff and her attorney. From this order, defendant appealed.

Edwards & Atwater, by Phil S. Edwards for plaintiff, appellee.

David I. Smith for defendant, appellant.

HEDRICK, Judge.

The only question raised by defendant's several exceptions and assignments of error is whether the findings of fact support the conclusions of law and whether the conclusions of law support the order entered by the trial court.

Quick v. Quick, 305 N.C. 446, 290 S.E. 2d 653 (1982), directs the trial court, when making a determination of alimony under N.C. Gen. Stat. Sec. 50-16.5(a), to make conclusions of law to the effect that (a) the "circumstances render necessary" a designated amount of alimony, (b) the supporting spouse has the ability to pay the designated amount, and (c) the designated amount is fair and just to all parties. *Id.* at 453, 290 S.E. 2d at 659.

Having carefully reviewed the record on appeal, we are of the opinion that the findings of fact in the trial court's order support the conclusions of law and that the conclusions of law support the order directing defendant to pay permanent alimony to plaintiff in the amount of $200.00 per month.

However, the findings of fact and conclusions of law drawn therefrom are insufficient to support the trial court's order that defendant pay counsel fees of $250.00. Specifically, there is no finding that plaintiff is unable to defray the expense of prosecuting the suit. Such a finding is required both by statutes N.C. Gen. Stat. Secs. 50-16.4 and 50-16.3, and case law, *Guy v. Guy*, 27 N.C. App. 343, 219 S.E. 2d 291 (1975).

The result is: That portion of the trial court's order requiring defendant to pay permanent alimony to plaintiff at the rate of $200.00 per month is affirmed. That portion of the trial court's order requiring defendant to pay counsel fees in the amount of $250.00 is vacated.

Affirmed in part, vacated in part.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JAMES MONROE HUNTLEY

No. 8226SC1052

(Filed 7 June 1983)

1. **Larceny § 7.7— larceny of automobile—exclusion of testimony harmless error**

In a prosecution for stealing an automobile in violation of G.S. 14-72, *the* trial court erred in failing to allow a man to testify that he saw a drunk give defendant a car key and $10.00 and heard him tell the defendant that he wanted him to go pick up some lady; however, the error was harmless since the car was not stolen until more than an hour later than the conversation and the alleged key that the drunken man gave defendant could not possibly have been to the stolen car that the defendant was caught driving an hour and a half later.

2. **Criminal Law § 138— fair sentencing act—aggravating factor improperly considered**

In a prosecution for stealing an automobile, the trial court improperly considered as an aggravating factor that the offense was committed for pecuniary gain since the only evidence of record which bears on defendant committing the offense for pecuniary gain was the evidence that he committed the larceny for which he was indicted. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Howell, Judge.* Judgment entered 10 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 March 1983.

After a jury trial the defendant was convicted of stealing an automobile in violation of G.S. 14-72. The car, left momentarily in front of the owner's place of business with the motor running while the owner was locking up for the night, was stolen about 10:15 o'clock at night. About fifteen minutes later the car was spotted by the Charlotte police with the defendant driving it, and his arrest immediately followed. The defendant was sentenced to prison for a term of eight years.

Attorney General Edmisten, by Special Deputy Attorney General Daniel C. Oakley, for the State.

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

PHILLIPS, Judge.

[1] The defendant, who did not take the stand during the trial, cites as error the court's refusal to admit the testimony of his

witness, Samuel Buford, concerning a conversation that he purportedly heard the evening of the crime between the defendant and an unidentified third party. Buford's proffered testimony, in substance, was that: While in a Charlotte liquor house with the defendant before 9 o'clock, he saw a drunken man, who asked if anybody had a driver's license, and upon defendant saying that he did, he saw the drunk give him a car key and ten dollars, and heard him tell the defendant that he wanted him to go pick up some lady, after which the defendant and the drunk man left. The evidence was rejected as hearsay.

Since the purpose in offering this testimony was not to establish the truth of the matters discussed, but only that such a conversation occurred and that pursuant to it the defendant received a car key and left, it was not inadmissible hearsay. 1 Brandis §§ 138, 141 (2d rev. ed. 1982). But the rejection of this evidence, though erroneous, was not prejudicial to the defendant, even though his hope was, of course, that the jury would conclude from it that the car referred to was the stolen vehicle and that he was driving it in good faith because this drunken stranger asked him to. This was a vain hope, however, since Buford said it was before 9 o'clock that night when the incident and conversation occurred, whereas the car was not stolen until more than an hour later than that. Thus, the key that the drunken man gave the defendant, if he gave him one, could not possibly have been to the stolen car that the defendant was caught driving about an hour and a half later; and if the testimony had been permitted it could not have caused the jury to reach a different verdict. Therefore, the error was harmless. G.S. 15A-1443(a).

[2] But the defendant's contention that the trial judge did not comply with the Fair Sentencing Act (G.S. 15A-1340.1 *et seq.*) in sentencing him to prison for eight years is well taken. In assessing and classifying the different felonies according to each one's gravity and establishing for each classification a presumptive sentence, the General Assembly placed the offense that defendant was convicted of in Class H and established for it a presumptive sentence of three years. Under the Act, except when pursuant to plea bargaining, deviations from the presumptive sentence must be based on aggravating or mitigating factors properly found from evidence. The longer sentence given the defendant was based upon two aggravating factors—defendant's prior conviction

of an offense punishable by more than sixty days confinement, and that the offense was committed for pecuniary gain. The first aggravating factor was properly found and considered, but the second was not, and the defendant will have to be resentenced with that factor not being taken into account.

This is because G.S. 15A-1340.4(a)(1) provides in pertinent part,

> "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . .",

and the only evidence of record which bears on defendant committing the offense for pecuniary gain was the evidence that he committed the larceny for which he was indicted. Manifestly, if the very elements of an offense, which caused it to be assessed and classified for sentencing purposes in the first place, could also be used as aggravating factors in imposing longer sentences, the assessments and classifications made by the General Assembly, the very foundation of the Act, would be meaningless. Too, since desire for pecuniary gain is inherent in all thievery, as the General Assembly no doubt considered in establishing presumptive sentences for the different larcenies, using it as an aggravating factor in any larceny case would not seem to be in keeping with either the letter or spirit of the Act.

Upon remand, therefore, after weighing the one aggravating factor that was properly found against the one mitigating factor also found, the punishment that is appropriate for the defendant under the circumstances will be redetermined in accord with this opinion and the Fair Sentencing Act.

In the defendant's trial, no error.

Remanded for sentencing.

Judges ARNOLD and BECTON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND KENNETH BALFOUR v. DIANA BALFOUR

No. 8220DC467

(Filed 7 June 1983)

Rules of Civil Procedure § 13; Insurance § 75.2— collision insurance—insurer's subrogation action against insured's wife—child support counterclaim barred by res judicata

Defendant wife's counterclaim for child support pursuant to a separation agreement was a compulsory counterclaim in the husband's action against defendant to determine the rights of the parties under the separation agreement, and defendant was precluded by the doctrine of *res judicata* from asserting the child support claim as a counterclaim in plaintiff insurer's action against defendant to recover an amount it had paid the husband under a motor vehicle insurance policy for damages which defendant had intentionally inflicted upon the husband's pickup truck with an ax.

APPEAL by plaintiffs from *Burris, Judge*. Judgment entered 9 April 1982 in District Court, UNION County. Heard in the Court of Appeals 14 March 1983.

Plaintiff Kenneth Balfour and defendant Diana Balfour were married on 18 August 1973. During the latter period of their marriage, plaintiff Kenneth Balfour owned a 1979 Dodge pickup truck. On 22 November 1980 defendant "used an ax or other similar implement to intentionally strike the truck in numerous places, causing it to be bent, torn and otherwise damaged." On 23 January 1981 plaintiff Kenneth Balfour, having previously obtained comprehensive and collision automobile insurance for the truck, was reimbursed for the resulting damage by the insurer, plaintiff North Carolina Farm Bureau Mutual Insurance Company (hereinafter Farm Bureau). Plaintiff Farm Bureau, as subrogee to plaintiff Kenneth Balfour's claim of property damage against defendant, filed suit against defendant on 24 June 1981 to recover the $1,522.00 which it had paid plaintiff Kenneth Balfour under the insurance policy. Plaintiff Kenneth Balfour was joined as a potential necessary party. On the same day, plaintiff Kenneth Balfour had filed suit against defendant (No. 81CVD481, Union County) to resolve certain questions concerning child support, child custody, alimony and a 24 February 1981 separation agreement signed by both Balfours.

Defendant filed an answer in response to Farm Bureau's complaint, admitting that she had, in fact, intentionally damaged Kenneth Balfour's truck. She counterclaimed alleging that she was not liable to Farm Bureau for the cost of repairs to the truck, since Farm Bureau, as the subrogee to plaintiff Kenneth Balfour's right to recover for property damage, was subject to defendant's defense that Kenneth Balfour had breached the 24 February 1981 separation agreement in the amount of $1,800.00.

The trial court denied plaintiffs' motion to sever defendant's counterclaim in the property damage suit and consolidate it for trial with the action entitled *Kenneth Balfour v. Diana J. Balfour*, 81CVD481, which dealt with the 24 February 1981 separation agreement. The trial court then granted summary judgment in favor of defendant and against Farm Bureau. From this judgment, plaintiffs appeal.

Caudle, Underwood & Kinsey, by Lloyd C. Caudle and Thad A. Throneburg, for plaintiff-appellants.

Harry B. Crow, Jr., for defendant-appellee.

EAGLES, Judge.

The facts of this case raise a question of first impression, that being whether plaintiff insurer's recovery against defendant for intentional damage to property can be offset by defendant's claim for child support owed to her by the insured. We answer that question in the negative since we hold that defendant's counterclaim for child support was a compulsory counterclaim in the action entitled *Kenneth Balfour v. Diana J. Balfour*, 81CVD481. The trial court erred when it granted summary judgment in favor of defendant and against Farm Bureau on the basis of defendant's counterclaim for unpaid child support.

Rule 13 of the North Carolina Rules of Civil Procedure, provides that

> Rule 13. Counterclaim and crossclaim.
>
> (a) Compulsory counterclaims.—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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

When defendant filed her counterclaim on 17 July 1981, there were two suits pending against her. One action, brought by Farm Bureau, was instituted to recover from defendant $1,522.00 in property damages resulting from defendant's attack on Kenneth Balfour's truck. The other action, brought by Kenneth Balfour against the defendant, sought to determine the parties' legal rights under the 24 February 1981 separation agreement. Defendant's counterclaim was compulsory to the action brought by Kenneth Balfour since 1) defendant's claim was in existence at the time of serving defendant's answer against plaintiff Kenneth Balfour in the separation agreement action, 2) the counterclaim arose out of the transaction or occurrence that is the subject matter of Kenneth Balfour's claim, 3) the counterclaim would not require the presence of third parties of whom the court could not acquire jurisdiction, and 4) the counterclaim was not the subject of another pending action. *Faggart v. Biggers*, 18 N.C. App. 366, 197 S.E. 2d 75 (1973). Both Kenneth Balfour's action and defendant's counterclaim were related to the 24 February 1981 separation agreement. Since defendant's claim for child support was a compulsory counterclaim to Kenneth Balfour's action arising out of the separation agreement, 81CVD481, defendant is precluded by the doctrine of *res judicata* from asserting the claim as a counterclaim in plaintiff Farm Bureau's action to recover the $1,522.00 in property damage to Kenneth Balfour's truck. *See Jocie Motor Lines v. Johnson*, 231 N.C. 367, 57 S.E. 2d 388 (1950).

Plaintiffs' other assignments of error need not be addressed, as we hold the trial court erred in granting summary judgment for the defendant.

For the above reasons we

Reverse.

Chief Judge VAUGHN and Judge WEBB concur.

GENE B. BRIDGERS; JUNE B. WARREN ET VIR, G. WINSTON WARREN; ANNE B. HOWELL ET VIR, C. WAYNE HOWELL; WALTER M. BRIDGERS; AND BEATRICE BRIDGERS v. DEWEY W. BRIDGERS ET UX, FRANCES L. BRIDGERS

No. 826SC769

(Filed 7 June 1983)

Partition § 6— judgment ordering actual partition—proper

A trial judge did not abuse his discretion by holding that property should be partitioned rather than sold where he based his decision upon a correct interpretation of G.S. 46-25 and the Court's prior opinion in the case.

APPEAL by petitioners from *Tillery, Judge.* Judgment entered 10 June 1982 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 17 May 1983.

This is a special proceeding first brought by petitioners on 3 May 1979 seeking a sale of timber upon two tracts of land, pursuant to N.C. Gen. Stat. Sec. 46-25. The defendants counterclaimed, seeking an actual partition of the tracts of land into two shares of equal value. The petitioners, Gene B. Bridgers, June B. Warren, Anne B. Howell, and Walter M. Bridgers, are cotenants in remainder of a one-half (1/2) undivided interest in each tract. Their remainder interest is subject to a life estate in the petitioner, Beatrice M. Bridgers. The defendants own the other one-half (1/2) undivided interest in each tract of land.

The Clerk of Superior Court of Northampton County concluded that the petitioners were entitled to the relief they demanded. The respondents appealed to the Superior Court, which set aside the clerk's judgment and remanded the cause to the clerk for an order appointing Commissioners to partition the property. The petitioners appealed.

This court, in an earlier opinion, found the trial judge had misconstrued the applicable statute; therefore, it vacated and remanded the case. For a complete factual background see *Bridgers v. Bridgers*, 56 N.C. App. 617, 289 S.E. 2d 921 (1982). At the second hearing, the trial judge held that the respondents were entitled to a partition of the real estate. From a judgment entered in favor of the respondents, the petitioners appealed.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr. for the petitioners, appellants.

Allsbrook, Benton, Knott, Cranford & Whitaker, by L. McNeil Chestnut for the respondents, appellees.

HEDRICK, Judge.

The petitioners argue the trial judge abused his discretion by holding that the property should be partitioned and by failing to follow this court's opinion in *Bridgers v. Bridgers*, 56 N.C. App. 617, 289 S.E. 2d 921 (1982). In the first appeal, this court held that under N.C. Gen. Stat. Sec. 46-25 there could be an actual sale of the timber on both tracts, but that the trial judge had discretion as to whether to order a sale or an actual partition.

On retrial, Judge Tillery reached the same result as the previous trial judge but based his decision upon a correct interpretation of the statute and this court's opinion in the first appeal. Judge Tillery declared:

> That North Carolina G.S. 46-25 does not require the sale of the interest of respondent, Dewey W. Bridgers, in said timber but permits the Trial Court to exercise its discretion as to whether or not the sale of said timber should be ordered or denied, and it is the opinion of this Court in its discretion that the sale of said timber from the lands of Dewey W. Bridgers, et ux, should be denied. . . . and respondents should be granted the relief sought in their counterclaim. . . .

Judge Tillery's judgment is consistent both with N.C. Gen. Stat. Sec. 46-25 and with this court's opinion in *Bridgers v. Bridgers*, *id.* Therefore, we find that he did not abuse his discretion by denying the petition and granting the respondents' counterclaim.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PERRY BROWN THOMPSON

No. 8213SC1140

(Filed 7 June 1983)

Criminal Law § 138— felonious uttering—pecuniary gain aggravating circumstance

In imposing a sentence for the felonious uttering of a forged check, the trial court erred in considering as an aggravating circumstance that the offense was committed for pecuniary gain since pecuniary gain was inherent in the offense of uttering where defendant was not hired or paid for committing the offense.

APPEAL by defendant from *Preston, Judge.* Judgment entered 3 March 1982 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 14 April 1983.

Defendant was indicted by a Columbus County Grand Jury, for allegedly committing two felonies: forgery and uttering. The indictment charged that defendant, on 2 July 1981, forged the name of Tom Ludlum on a check payable to Paul Baldwin, drawn in the amount of $150.00, and uttered it to Todd's Furniture Store. It was established at trial that defendant presented the check to a Todd's employee as payment for a lamp costing $51.88, and received $98.12 in change. The lamp was to have been picked up later, but was never claimed. Todd's sold the lamp to another customer.

The jury acquitted defendant of forgery but found him guilty of felonious uttering. From a judgment imposing an active sentence of five (5) years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Jerry A. Jolly, for defendant appellant.

BECTON, Judge.

Defendant's sole assignment of error relates to his sentencing hearing. He argues that the trial court erred when it found that the offense of felonious uttering was committed for pecuniary gain and, thereby, improperly found that the factors in aggravation outweighed the factors in mitigation of defendant's sentence. We agree.

The issue raised by defendant's argument is whether pecuniary gain is inherent in the offense of felonious uttering. That offense comprises three essential elements: (1) the offer of a forged check or other instrument to another; (2) with knowledge that the instrument is false; and (3) with the intent to defraud or injure another. N.C. Gen. Stat. § 14-120 (1981). *See also, State v. Hill,* 31 N.C. App. 248, 229 S.E. 2d 810 (1976).

First, as we said in *State v. Morris,* 59 N.C. App. 157, 296 S.E. 2d 309 (1982), "if the pecuniary gain at issue in a case is inherent in the offense, then that 'pecuniary gain' should not be considered an aggravating factor." *Id.,* at 161-62, 296 S.E. 2d at 313.

Additionally, the General Assembly recently amended the Fair Sentencing Act, N.C. Gen. Stat. § 15A-1340.4(a)(1)(c) (1981), to more clearly define pecuniary gain. Effective 1 October 1983, that factor will read: "The defendant was hired or paid to commit the offense." That amendment, in our view, clearly evinces the Legislature's intent to avoid the enhancement of a defendant's sentence simply because money or other valuable items were involved in the crime charged. Bound as we are fairly to interpret legislative enactments, and charged both to divine and carry out the intent of the Legislature, we are compelled to hold that the trial court erred in considering pecuniary gain as a factor in aggravation of defendant's sentence.

We note that it is difficult to imagine an uttering case in which a defendant utters or passes a fraudulent instrument for gain other than pecuniary; indeed, except for the aggrandizement of one's financial resources, uttering a defective instrument is pointless. We therefore determine that, unless a defendant is hired or paid for the commission of the offense, any other pecuniary gain is inherent in the offense of uttering a fraudulent instrument.

Because one of the findings in aggravation of defendant's sentence was improperly entered, and a sentence in excess of the presumptive imposed, this case is remanded for a new sentencing hearing. *State v. Ahearn,* 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judges WELLS and EAGLES concur.

CLARE R. HEATER v. JOSEPH R. HEATER

No. 8228DC830

(Filed 7 June 1983)

Divorce and Alimony § 16.9— separation agreement—gain on sale of property as "gross income"

Although a separation agreement did not define "gross income," the trial court did not err in including a gain on the sale of property as part of defendant's gross income.

APPEAL by defendant from *Styles, Judge.* Judgment entered 22 March 1982 in District Court, BUNCOMBE County. Heard in the Court of Appeals 19 May 1983.

This is an action seeking specific performance of a separation agreement. The case has previously been in this Court. *See Heater v. Heater*, 53 N.C. App. 101, 280 S.E. 2d 19, *cert. denied,* 304 N.C. 194, 285 S.E. 2d 99 (1981). After the case was returned to the district court, a dispute arose as to the definition of "gross income." The separation agreement provides that after three years, the defendant will pay alimony which "shall be an amount equivalent to thirty percent (30%) of the Husband's then gross income." The court held that gross income included an amount the defendant had realized as a gain on the sale of real property. The defendant appealed.

Riddle, Shackelford and Hyler, by Robert E. Riddle, for plaintiff appellee.

Erwin, Winner and Smathers, by Dennis J. Winner, for defendant appellant.

WEBB, Judge.

The only question on this appeal is whether gross income includes a gain realized from the sale of property. We hold that it does. The separation agreement does not define gross income, but we believe it is ordinarily understood to include a gain on the sale of property. The defendant argues that although a capital gain is considered income under the Internal Revenue Code, it is not actually income but the transfer of value of something to the value of something else. Whatever the technical economic meaning of

the sale of property may be, we believe that most people consider a gain in the sale of property as income. Our thinking may be influenced by the Internal Revenue Code, but we believe that knowledge of the Code is so pervasive that the use of words "gross income" includes in the minds of most people a gain on the sale of property.

The defendant submitted an affidavit in which he stated that when he signed the separation agreement, he did not intend to include gains on the sale of property as income. We do not believe this uncommunicated understanding can alter what we hold are the plain words of the contract. The defendant also argues that the gain on the sale of the real property should not be included in his gross income because he received an interest from the plaintiff in the property by way of a deed executed contemporaneously with the separation agreement. He advances no reason why this is so and we cannot find such a reason.

Affirmed.

Judges ARNOLD and BRASWELL concur.

IN RE: ANNEXATION ORDINANCE NO. 1219 ADOPTED BY CITY OF ASHEVILLE, MAY 14, 1981

No. 8228SC524

(Filed 21 June 1983)

1. Municipal Corporations § 2.4— annexation ordinance—service of petition for judicial review

Service of a petition for review of an annexation ordinance on respondent city by certified mail, return receipt requested, accomplished the same basis for proof of service as would have been accomplished by use of registered mail as is required by G.S. 160A-50 and sufficiently complied with that statute. G.S. 1A-1, Rule 4(j)(5) and G.S. 1-75.10.

2. Municipal Corporations § 2.3— annexation—sufficiency of metes and bounds description

The metes and bounds description in a notice of hearing and an annexation ordinance, when considered with maps included in the report for extending services to the annexed area, provided a boundary description of the annexed area which could be established on the ground in substantial com-

pliance with G.S. 160A-49(b)(2) and G.S. 160A-49(e)(1), notwithstanding the description contained a reference to the "right-of-way" of a private road.

3. **Municipal Corporations § 2.3— annexation—following natural and topographical features**

The trial court did not err in finding that an annexation ordinance met statutory requirements that natural and topographical features be used in fixing new municipal boundaries whenever practical.

4. **Municipal Corporations § 2.6— extension of services to annexed area—public transportation and recreational facilities not included**

A city was not required by G.S. 160A-47(3) to include public transportation and parks and recreation facilities in its plans for extension of services to an annexed area.

Judge EAGLES concurring in result.

APPEAL by respondent City of Asheville from *Jolly, Judge.* Judgment entered in BUNCOMBE County Superior Court 30 January 1982. Heard in the Court of Appeals 12 April 1983.

This action was instituted seeking review of an annexation ordinance adopted by respondent City of Asheville. After being served with the petition, by certified mail, Asheville made a special appearance in which it moved to dismiss for insufficiency of process. That motion was overruled. When the matter came on for hearing on the merits, the parties entered into the following stipulations.

1. That the Petitioners herein are the owners of property within the area proposed for annexation.

2. That the Respondent City of Asheville is a municipal corporation organized and existing under the laws of the State of North Carolina and is located within Buncombe County, North Carolina.

3. That the Respondent City of Asheville is a city of more than 5,000 persons according to the last Federal Decennial Census and therefore subject to the provisions of Part 3, Article 4A, Chapter 160A of the General Statutes of North Carolina.

4. That on March 26, 1981, the City of Asheville passed a Resolution of Intent, being Resolution No. 81-65, stating the intent of the City of Asheville to consider the annexation of a

portion of an area lying in Buncombe County, North Carolina including land owned by the Petitioners herein.

5. That on April 9, 1981, the Respondent City of Asheville passed a Resolution adopting and approving a plan for the extension of city services into said area being Resolution No. 81-81.

6. That on May 14, 1981, the Respondent City of Asheville passed a Resolution amending the plan for extension of city services into the area proposed for annexation being Resolution No. 81-103.

7. That on May 14, 1981, the Respondent City of Asheville passed Ordinance No. 1219 providing for the annexation to the City of Asheville effective June 30, 1981 certain land adjoining the City of Asheville including property owned by the Petitioners herein.

8. That the Respondent City made no finding that the area to be annexed was or is in need of greater governmental services than those being provided prior to annexation.

After hearing extensive evidence for petitioners, Judge Jolly entered an order containing findings of fact and conclusions of law and a judgment that the annexation ordinance was invalid and void. From that order, Asheville has appealed.

William F. Slawter for petitioner-appellees.

Redmond, Stevens, Loftin & Currie, P.A., by John S. Stevens and Thomas R. West; and Herbert L. Hyde, P.A., for respondent-appellant.

WELLS, Judge.

[1] The first issue we must address is whether petitioners' petition for review was properly served on Asheville. It is Asheville's contention that the provisions of G.S. 160A-50(a) and (b) are controlling, and require service by registered mail, return receipt requested. The statute, in pertinent part, is as follows:

Sec. 160A-50. *Appeal.*

(a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person own-

ing property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within five days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

. . .

Petitioners contend that under the provisions of G.S. 1A-1, Rule 4(j)(5), they were allowed the alternative method of service by certified mail, return receipt requested. That statute, in pertinent part, is as follows:

Rule 4. *Process*

. . .

(j) *Process-manner of service to exercise personal jurisiction.* —

In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

. . .

(5) *Counties, Cities, Towns, Villages and Other Local Public Bodies.* —

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.

There is no dispute that the petition was sent by certified mail addressed to the City of Asheville, in care of its City Manager (by name), and was received by the City's mail clerk, who signed the return receipt acknowledging its delivery. In addition, on Asheville's motion to dismiss, the trial court heard the testimony of Lawrence Hoote, a 28 year veteran of the Asheville Post Office, who testified that he was familiar with the postal service methods and regulations pertaining to registered and certified mail; that both are "accountable" mail; and that generally, the only distinction between the two is that with registered mail, the post office retains a record of the transaction, while with certified mail, a duplicate of the customer receipt is not retained by the post office.

G.S. 1-75.10 provides in pertinent part as follows:

> Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . .
>
> (4) Service by Registered or Certified Mail.—In the case of service by registered or certified mail, by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested.
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

The affidavit of service and receipt required by G.S. 1-75.10(4) was properly filed and presented at the hearing on Asheville's motion to dismiss.

We are persuaded that the use of certified mail in this case accomplished exactly the same basis for proof of service as would have been accomplished by use of registered mail and that the trial court properly denied Asheville's motion to dismiss.

[2] In the second issue raised by Asheville, it contends that Judge Jolly erred in declaring the annexation ordinance to be invalid and void. We agree. Our appellate courts have consistently held that the scope of judicial review of annexation ordinances is limited in scope.

> The superior court's review of the annexation ordinance of a municipal governing body is limited by statute. *Moody v. Town of Carrboro,* 301 N.C. 318, 271 S.E. 2d 265 (1980). Upon review the judge may examine the annexation proceedings to determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes. *Id.; Humphries v. City of Jacksonville,* 300 N.C. 186, 265 S.E. 2d 189 (1980); *Food Town Stores v. City of Salisbury,* 300 N.C. 21, 265 S.E. 2d 123 (1980).
>
> G.S. 160A-50(f) provides in effect that on judicial review the court may hear oral arguments, receive written briefs, and may take evidence intended to show:
>
> (1) that the statutory procedure was not followed, or
>
> (2) that the provisions of G.S. 160A-47 were not met, or
>
> (3) that the provisions of G.S. 160A-48 have not been met.
>
> This section clearly specifies the inquiries to which the court is limited. *In re Annexation Ordinance,* 284 N.C. 442, 202 S.E. 2d 143 (1974).
>
> This Court described the limitations of a court's review of an annexation ordinance in *In re Annexation Ordinance,* 278 N.C. 641, 180 S.E. 2d 851 (1971). There the Court said:
>
> "Thus, the court's review is limited to these inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners 'suffer material injury' by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirement of G.S. 160-453.16 as applied to petitioners' property? G.S. 160-453.18(a) and (f)."
>
> *Id.* at 646-47, 180 S.E. 2d at 855.

In re Annexation Ordinance, 303 N.C. 220, 278 S.E. 2d 224 (1981); *see also McKenzie v. High Point,* 61 N.C. App. 393, 301 S.E. 2d 129 (1983).

Our task is to determine whether the trial court's findings of fact, conclusions of law, and judgment are supported by the record before us.

Judge Jolly voided the ordinance in this case based on his perception that the description of the area to be annexed failed to meet statutory requirements. The following findings of fact in Judge Jolly's order speak to that issue:

> 2. The aforesaid ordinance purports to contain a "metes and bounds" description of the territory intended to be annexed by the annexation ordinance, as follows:
>
> BEGINNING at a point, said point being the intersection of the southern right-of-way margin of U.S. 19-23 and the existing City Limit boundary of the City of Asheville; thence in a southeasterly direction following said City Limit boundary a distance of approximately 3,960 feet to a point, said point being 10 feet east of the eastern right-of-way margin of Sand Hill Road (SR 3412); thence in a southwesterly direction following a line 10 feet east of the eastern right-of-way margin of Sand Hill Road and running parallel with said right-of-way margin and crossing Interstate 40, a distance of approximately 4,380 feet to a point 10 feet south of the southern right-of-way margin of I-40; thence in a westerly direction following a line 10 feet south of the southern right-of-way margin of I-40 and running parallel with said right-of-way margin, a distance of approximately 4,540 feet to the intersection of said line with the southern right-of-way margin of Southern Railroad; thence in a northwesterly direction crossing Southern Railroad and U.S. 19-23, a distance of approximately 690 feet to a point 10 feet north of the northern right-of-way margin of U.S. 19-23 said point also being 10 feet northwest of the southwest corner of Lot 67, Sheet 23, Lower Hominy Ward; thence in an easterly direction following a line 10 feet north of the northern right-of-way margin of U.S. 19-23 and running parallel with said right-of-way margin, a distance of approximately 730 feet to a point, said point being 10 feet west of the western right-of-way margin of Old

Haywood Road (SR 1404); thence in a northerly direction following a line 10 feet west of the western right-of-way margin of Old Haywood Road and running parallel with said right-of-way margin, a distance of approximately 2,130 feet to a point, said point being 10 feet north of the northern right-of-way margin of Starnes Cove Road (SR 1255); thence in an easterly direction following a straight line across Old Haywood Road, a distance of approximately 70 feet to a point being 10 feet north of the northern right-of-way margin of Old Starnes Cove Road; thence in an easterly direction following a line 10 feet north of the northern right-of-way margin of Old Starnes Cove Road and running parallel with said right-of-way margin, a distance of approximately 830 feet to a point at which said line merges with a private road; thence in a southeasterly direction following a line 10 feet north of the northern right-of-way margin of said private road and running parallel with said right-of-way margin, a distance of approximately 980 feet to a point 10 feet west of the western right-of-way margin of U.S. 19-23; thence in a northwesterly direction following a line 10 feet west of the western right-of-way margin of U.S. 19-23 and running parallel with said right-of-way margin a distance of approximately 440 feet to a point at which said line intersects the western right-of-way margin of Southern Railroad; thence in a northerly direction following the western right-of-way margin of Southern Railroad a distance of approximately 1,760 feet to the Asheville City Limits; thence following the Asheville City Limits in an easterly direction a distance of approximately 1,070 feet to the point of BEGINNING.

3. The same description was used by Respondent City in its published Notice of Hearing relative to the proposed annexation.

4. Notwithstanding the aforesaid "metes and bounds" description contained in the annexation ordinance, the Court finds that:

(a) The purported description, among other things, calls for the new boundary to the property intended to be annexed to follow a line 10 feet north of the northern right-of-way margin of a private road; a distance of approximately 980

feet from the end of Old Starnes Cove Road to U.S. Highway 19-23. The width of the right-of-way of said road cannot be ascertained; in addition, said road splits and forks into two branches, and the branch being referred to in the "metes and bounds" description is not capable of determination.

(b) Said description calls for lines of estimated and indeterminate distances, to points that cannot reasonably be determined.

5. The area intended to be annexed is not reasonably ascertainable on the ground by reference to the "metes and bounds" description contained in the ordinance.

Based on those findings of fact, Judge Jolly reached the following pertinent conclusions of law:

1. In its annexation ordinance, the City of Asheville was required, by North Carolina G.S. Sec. 160A-49(e)(1), to describe the external boundaries of the area to be annexed by "metes and bounds."

2. Further, in its Notice of Hearing relative to the proposed annexation the City of Asheville also was required, by North Carolina G.S. Sec. 160A-49(b)(2), to "describe clearly the boundaries of the area under consideration."

3. The description of the external boundaries of the property to be annexed contained in Ordinance No. 1217 [sic] substantially fails to comply with the requirement of a "metes and bounds" description of the property. Further, it substantially fails to comply with the requirement that the proposed boundaries be "clearly" described in the Notice of Hearing.

4. Except as hereinbefore provided, Respondent City complied with the requirements of G.S. Sec. 160A-45, *et seq.*

5. Accordingly, the annexation ordinance materially fails to comply with the requirements of G.S. Sec. 160A-49, and said ordinance, and the annexation proceeding it supports, are invalid and void.

First, we address the question of whether Judge Jolly's findings and conclusions with respect to the adequacy, or validity, of

the boundary description (used in the notice of hearing and the ordinance) are supported by the record that was before him. The notice of hearing contained the metes and bounds description appearing in the trial court's order and the following paragraph:

> The report of plans for extending services to said territory required in Chapter 160A, Section 47 of the General Statutes of North Carolina will be available for public inspection of the office of the City Clerk at least fourteen (14) days prior to the date of said public hearing.

The record discloses that the report referred to in the notice included reference to three maps located in the office of the City Planning Department on the fifth floor of the City Hall, as follows:

Map 1

Existing City Limits

Proposed Annexation Boundary

Existing Land Use

Map 2

Existing City Limits

Proposed Annexation Boundary

Existing and Proposed Water Lines

Map 3

Existing City Limits

Proposed Annexation Boundary

Existing and Proposed Sewer Lines

The record shows that all three of the maps referred to in the plans follow in substantial detail the metes and bounds description by reference to and depiction of public roads and highways, railroads, and existing city limits boundaries, all recognizable monuments. While we recognize that the reference used in the metes and bounds description to the "right-of-way" of a private road was unfortunate, the location of that road is clearly shown on the maps. Additionally, the testimony of one of petitioners'

witnesses, Wayne Cooper, through whose land the private road runs, indicates that Mr. Cooper clearly understood where the boundary line was with respect to such road; that the road had previously (and for many years) been used by the public; and that he clearly understood which portions of his property were within or without the proposed boundary. It is appropriate to note at this point that the same map boundary used and established in the notice of hearing was used in the ordinance when adopted.

Our appellate courts, in reviewing annexation procedures, have consistently held that substantial compliance is all that is required in meeting the boundary requirements set forth in the statutes. *See Moody v. Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980), *reh. denied*, 301 N.C. 728, 274 S.E. 2d 230; *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979); *McKenzie v. High Point, supra*, and cases cited therein. We are persuaded that the metes and bounds description and the maps provided a boundary description which could be established on the ground in substantial compliance with the applicable statutes and that Judge Jolly erred in his findings and conclusions to the contrary.

Additionally, we note that Judge Jolly's order contained no finding or conclusion that the irregularities he saw in the boundary description had "materially prejudiced the substantive rights of any of the petitioners." G.S. 160A-50(g)(1). *See In re Annexation Ordinance*, 303 N.C. 220, *supra*. We also note that none of the evidence adduced by petitioners at trial would support any such finding or conclusion.

By cross-assignments of error, petitioners assert that the trial court erred in certain other respects which would have provided alternative support for his judgment.

[3] First, petitioners contend that the trial court erred in finding that Asheville, in fixing its new municipal boundaries, followed natural and topographical features where it was practical to do so. We disagree. Our courts have consistently held that in a case such as the one now before us, the enactment of the ordinance carries with it a presumption of validity and that the burden is on those who challenge the ordinance to show by competent and material evidence a failure to meet statutory requirements or an irregularity that materially prejudices their substantial rights. *In re Annexation Ordinance*, 303 N.C. 220, *supra*; *In re Annexation*

Ordinance, 296 N.C. 1, 249 S.E. 2d 698 (1978). While petitioners' evidence in this case did tend to establish the presence of topographical features, such as ridge lines, and natural boundaries, such as creeks, near the new boundaries, none of their evidence spoke to the issue of the practicality of the use of such features nor to how they may have been prejudiced by the non-use of such features. This assignment is overruled.

In their next two cross-assignments of error, petitioners contend that the trial court erred in failing to find that Asheville had failed to comply with statutory requirements with respect to plans for extension of water and sewer service and fire protection in the annexed area. We have carefully reviewed the record and conclude that petitioners failed to meet their burden of showing substantial non-compliance with the statutory requirements as to these services, and that the evidence, in fact, reflects substantial compliance. These assignments are overruled.

[4] In another assignment, petitioners contend that the trial court erred in failing to find that Asheville did not comply with the provision of G.S. 160A-47(3) in failing to include public transportation and parks and recreation in its plans for extension of services to the annexed area. The statute, in pertinent part, is as follows:

> Sec. 160A-47. *Prerequisites to annexation; ability to serve; report and plans.*
>
> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> . . .
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substan-

tially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines.

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.

. . .

We hold that the legislative intent expressed in G.S. 160A-47(3) is clear, that it requires extension of a variety of municipal services, all of which are required for the public health and safety, and that public transportation and parks and recreational facilities do not fall within this classification of service. This assignment is overruled.

Finally, petitioners contend that the provisions of Chapter 160A under which this annexation was accomplished deny them equal protection of the law, in violation of the constitutions of the United States and the State of North Carolina and that the trial court erred in not making such a conclusion. As petitioners concede, this issue was considered and answered against their position by our Supreme Court in *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). This assignment is overruled.

For the reasons stated, the judgment of the trial court must be reversed.[1]

Reversed.

1. The result we have reached does not require us to reach the question raised by Asheville as to whether the trial court exceeded its authority by declaring the ordinance to be null and void and that his authority was limited to remand to the municipal governing authority for statutory compliance.

Judge BECTON concurs.

Judge EAGLES concurs separately.

Judge EAGLES concurring in result.

I am concurring in the result reached by the majority. I wish to express a different position on the issue of whether petitioners' method of service of process on respondent was proper.

G.S. 160A-50(b) is a specific statute regulating service of process procedure in annexation suits against municipalities, while G.S. 1A-1, Rule 4(j)(5)a regulates service of process upon local governments in general. "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provisions, as the General Assembly is not to be presumed to have intended a conflict." *Utilities Comm. v. Electric Membership Corp.*, 3 N.C. App. 309, 164 S.E. 2d 889 (1968), *citing Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335 (1963).

Even though I am persuaded that G.S. 160A-50(b) controlled the method of service of process in the case *sub judice*, since it is the more specific statute, I still find petitioners' service of process by certified mail permissible and valid under the facts of this case. "It is generally held that slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law [citations omitted]. 'Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required . . . . The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations where no one has been or could be misled.'" *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971), *quoting State v. Town of Benson, Cochise County*, 95 Ariz. 107, 108, 387 P. 2d 807, 808. Unlike the service of process requirements of G.S. 1A-1, Rule 4, which must be strictly followed in order to obtain proper service of process, *Lynch v. Lynch*, 302 N.C. 189, 274 S.E. 2d 212 (1981), the requirements of G.S. 160A-50(b), need only be substantially complied with.

Respondent's claim of injury will have merit only where the irregularity in the proceedings materially prejudiced respondent's substantive rights. *In re Annexation Ordinance,* 303 N.C. 220, 278 S.E. 2d 224 (1981). The petition was sent by certified mail addressed to the City of Asheville in care of its City Manager, and was received by the City's mail clerk who signed the return receipt acknowledging its delivery. During the hearing on respondent's motion to dismiss, Lawrence Hoote, a 28 year veteran of the Asheville Post Office, testified that the only distinction between registered and certified mail was that the post office retained a record of the transactions in the former but not in the latter. Since respondent can show no material prejudice to their substantive rights where they actually received timely notice of the petition, I find that the method of service of process was in substantial compliance with G.S. 160A-50(b) and therefore valid.

ERVIN S. SANDERS, JR., BY HIS GUARDIAN AD LITEM, ERVIN S. SANDERS AND ERVIN S. SANDERS, INDIVIDUALLY v. GEORGE A. YANCEY TRUCKING COMPANY, IVEY VANCE RIGGS, WILLIAM C. LAWTON, ADMINISTRATOR OF THE ESTATE OF JOHN GULLEY, DECEASED, AND LOIS VONNIE GULLEY

THOMAS JUNIOR JOHNSON v. GEORGE A. YANCEY TRUCKING COMPANY, IVEY VANCE RIGGS, WILLIAM C. LAWTON, ADMINISTRATOR OF THE ESTATE OF JOHN GULLEY, DECEASED, AND LOIS VONNIE GULLEY

JERRY GULLEY, BY HIS GUARDIAN AD LITEM, CHARLES B. MORRIS, JR. v. GEORGE A. YANCEY TRUCKING COMPANY, IVEY VANCE RIGGS, WILLIAM C. LAWTON, ADMINISTRATOR OF THE ESTATE OF JOHN GULLEY, DECEASED, AND LOIS VONNIE GULLEY

N0. 8210SC666

(Filed 21 June 1983)

1. Appeal and Error § 6— judgment on one issue—mistrial on another issue—appealability of decision

In a negligence action, where the trial judge separated the issues of negligence from the issues of damages, where the jury answered that one defendant was not negligent while being unable to reach a verdict on the issue of whether another defendant was negligent, and where the judge accepted the verdict and entered judgment on the issue which was determined while

declaring a mistrial on the other issue, the judgment was immediately reviewable on appeal. G.S. 1-277(a), and G.S. 1A-1, Rule 54(b).

2. **Witnesses § 8.2— prior convictions—conclusiveness of witness's answer—sifting the witness**

Where a witness denied three times in the presence of the jury a conviction for misdemeanor assault on a female, the judge sufficiently allowed counsel to "sift" the witness. The fact that, at a voir dire "a couple of days" later, the witness answered that he had been convicted of the crime and explained why he assumed he had not been convicted of it before did not show that the witness was trying to be evasive. In his renewed efforts at impeachment, the cross-examiner was held to be bound by the negative answers of the original examination.

3. **Evidence § 50— expert witness—not named in answers to interrogatories—allowed to testify—proper**

The trial court did not err in allowing a medical expert witness to testify concerning one defendant's diabetic condition even though his name, address, and the basis of his opinion had not been provided to appellants by answers to interrogatories. Ten days before the witness testified, appellants' counsel produced for defendant medical records of lab results of the blood sugar level of the diabetic defendant, the witness's name was on the witness list furnished appellants on Friday before Monday's trial, and although the jury was impaneled on Wednesday, 16 September 1981, the doctor did not testify until 24 September 1981.

4. **Evidence § 49.3— hypothetical question—use of "would" instead of "could" or "might"**

When hypothetical questions are used, it is not required that the witness be first asked the question of causation using "could" or "might" language before he is asked in the phraseology of "would." If the expert has such an opinion, both the question and answer may be properly phrased in "would."

5. **Trial § 42— sufficiency of verdict**

It was proper for the trial judge to receive and accept a verdict on one issue and to render judgment accordingly and to grant a new trial on another issue concerning negligence when the jury was unable to agree upon an answer.

APPEAL by defendants George A. Yancey Trucking Company and Ivey Vance Riggs from *Herring, Judge.* Judgment entered 19 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1983.

Two motor vehicles collided on U.S. Highway No. 64 in Tyrrell County on 13 July 1979. Three cases alleging negligent operation of motor vehicles have been consolidated for trial and were tried in Wake County. All plaintiffs were injured passengers in a

pickup truck going east. The driver of the pickup truck, John Gulley, was killed. His estate is represented by William C. Lawton, Administrator, as a defendant. John Gulley and his wife, Lois Vonnie Gulley, were the owners of the pickup truck. The dump truck, owned by defendant George A. Yancey Trucking Co., and driven by defendant Riggs, was going west.

Because of the complex nature of the claims, counterclaims, and cross claims, Judge Herring held extensive pre-trial conferences and ruled on numerous motions. A bifurcated trial resulted, in which damages were separated from actionable negligence.

In the first phase of the proceedings, Judge Herring submitted two issues to the jury: (1) Was the driver of the dump truck (Riggs) negligent? (2) Was the driver of the pickup truck (John Gulley) negligent? The jury answered the second issue "No," and were unable to reach a verdict as to the first issue. A judgment on the verdict was granted as to the second issue, with a mistrial declared on the first issue.

Defendants Yancey Trucking and Riggs appealed. Defendants William C. Lawton, Administrator of the Estate of John Gulley, deceased, and Lois Vonnie Gulley did not appeal. Plaintiffs did not appeal. On 14 September 1981, plaintiff Jerry Gulley took a voluntary dismissal of his action against the Gulley defendants.

Barringer, Allen & Pinnix by M. Jean Calhoun and William D. Harazin for plaintiff appellee, Thomas Junior Johnson.

Moore, Ragsdale, Liggett, Ray & Foley by George R. Ragsdale, Jane Flowers Finch and John N. Hutson, Jr., for defendant appellants, Ivey Vance Riggs and George A. Yancey Trucking Company; and Clifton & Singer by Ben F. Clifton, Jr., for defendant appellant Riggs.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by James G. Billings for appellees, William C. Lawton, Administrator of the Estate of John Gulley, Deceased, and Lois Vonnie Gulley.

BRASWELL, Judge.

Two trucks, traveling in opposite directions met and collided upon U.S. Highway #64 in Tyrrell County. The major factual issue

in this negligence action is: which truck crossed the center line of this two-lane highway? The question presents a factual dispute which lies within the province of a jury to resolve.

Defendant Riggs, driver of defendant Yancey's dump truck, testified that the Gulley pickup truck "darted" across the center line directly into his path. Mabel Davenport, an alleged eyewitness, corroborated Riggs' testimony. Ervin Sanders, Jr., and Johnny Gulley, passengers in the Gulley pickup truck, testified that it was the Riggs dump truck which crossed the center line and that the crash took place on the pickup truck's side of the road. Ronald Wilson and Donald Wilson, driver and passenger in the vehicle immediately ahead of Gulley, testified that the collision occurred on the pickup truck's side of the road. Thomas Junior Johnson, one of the plaintiffs, corroborated the testimony that the collision occurred on the pickup truck's side of the road. Photographic exhibits of each vehicle illustrate extensive property damage to the respective vehicles and some of the photographs illustrate scuff markings in the surface of the roadway on the dump truck's side of the center line.

Based on the proceedings below, there are four basic areas of assignments of error that now require appellate review: (1) the immediate appealability of an otherwise interlocutory judgment, (2) the cross-examination of Thomas Junior Johnson, (3) evidentiary and jury instruction questions relating to witness Dr. Arthur Davis and (4) the denial of defendants' post-trial motions.

I.

APPEALABILITY

[1] Confronted with multiple claims and multiple parties, Judge Herring and trial counsel attempted to make the task of the jury and parties less complicated by separating the issues of negligence from the issues of damages. G.S. 1A-1, Rule 42(b); *Pinner v. Southern Bell*, 60 N.C. App. 257, 259, 298 S.E. 2d 749, 751 (1983). With multiple claims involved, it was commendable to resolve the problem of negligence first. This was to be accomplished by submitting to the jury the alleged actionable negligence of each driver. The jury answered that John Gulley, now deceased, driver of the pickup, was not negligent. The jury was unable to reach a verdict on whether defendant Riggs was negli-

gent. Thereupon, over objection, Judge Herring accepted a verdict and entered judgment on the second issue of Gulley's negligence.

As to the defendants William C. Lawton, Administrator of the Estate of John Gulley, deceased, and Lois Vonnie Gulley, there is a final judgment in their favor on all matters in the lawsuit. As to the first issue on which there was no verdict, Judge Herring declared a mistrial and ordered a new trial. Because the judgment does affect a substantial right of the defendants Riggs and Yancey Trucking in that it fully and finally determined their indemnity and contribution claims against the Estate of Gulley, and because the judgment affects the individual rights of Riggs for his claim for personal injuries against the Estate of Gulley, and because the verdict has absolved John Gulley, deceased, of any negligence as driver of the pickup truck, we hold the judgment is immediately reviewable on appeal. G.S. 1-277(a); G.S. 1A-1, Rule 54(b); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

II.

CROSS-EXAMINATION OF THOMAS JUNIOR JOHNSON

[2] It must first be remembered that Thomas Junior Johnson is a plaintiff, that he was riding in the Gulley pickup truck, that Lois Vonnie Gulley, widow of John, was a party-defendant. Counsel for defendants Riggs and Yancey Trucking sought to impeach Johnson as a witness by cross-examining him as to his prior criminal offenses. Johnson admitted, after the objection to the form of the question was overruled, that he was convicted in District Court of larceny on 7 April 1981. To the follow-up question of whether he had been convicted on 16 June 1980 of assault on a female, Johnson answered: "Yes, that's true—back up. What you say?" In the succeeding cross-examination, Johnson twice flatly denied the conviction with his "No, sir, I wasn't." Then when asked if he had pleaded guilty to it, Johnson answered, "No, sir, I didn't."

At a *voir dire* hearing "a couple of days" later, additional facts were revealed about the charge of assault on a female. When asked, "Is it true that you have not been convicted of assault on a female?" Johnson answered, "Well, the lawyer that I

had, J. Michael Weeks, he didn't tell me that I was convicted, so I just assumed that I wasn't convicted of it." Later, on *voir dire* Johnson admitted that on 8 July 1980 he had been initially charged with rape of Lois Gulley. Johnson then testified that he recalled going into court and tendering a plea to assault on a female, that his attorney was J. Michael Weeks, that the judge sentenced him to 90 days and gave him credit for the same time spent in jail, and that he walked out of court. Counsel's motion to be permitted to ask the *voir dire* questions in the presence of the jury was denied in the "discretion" of the judge.

Judge Herring exercised his power of choice between two courses of action. Had he chosen to allow the further character impeachment questions, we perceive that there would have been no abuse of discretion. Nor do we perceive any abuse of discretion in denying the requested additional cross-examination. The record shows an absence of arbitrary action. After Johnson had denied three times in the presence of the jury the misdemeanor assault on a female, the judge had sufficiently allowed counsel to "sift" the witness. As expressed by the court in *State v. Currie*, 293 N.C. 523, 528, 238 S.E. 2d 477, 480 (1977),

> "The scope of cross-examination rests largely in the discretion of the trial judge because he is present, hears the testimony, observes the demeanor of the witnesses, knows the background of the case, and is in a favored position to determine the proper limits of cross-examination. For these reasons his rulings thereon will not be disturbed absent abuse of discretion amounting to prejudicial error." [Citations omitted.]

To like effect is *State v. Waddell*, 289 N.C. 19, 26, 220 S.E. 2d 293, 298-99 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976): "The scope of cross-examination rests largely in the trial judge's discretion and his rulings thereon will not be disturbed unless it is shown that the verdict is improperly influenced thereby." No such showing has been made in this case.

Here, the original cross-examination came when Johnson was a witness for the plaintiffs. There was no request for any *voir dire* at any point while the witness was being asked about his prior convictions. The *voir dire* which leads to this assignment of

error came "a couple of days" later. The testimony appears in the transcript as rebuttal evidence for defendant-appellants Yancey Trucking and Riggs. Counsel for appellants said: "I have additional evidence. If you would like for me to call a witness, I will do so, Thomas Junior Johnson." After numerous questions about the collision, counsel then returned to the subject of assault on a female: "Thomas, I understood you to tell me a couple of days ago, when we last were together, that you had not been convicted of assault on a female in Raleigh, is that correct?" The sustaining of the objections led to the *voir dire.* Johnson clarified his answer of "yes" by explaining: "Well, the lawyer I had, J. Michael Weeks, he didn't tell me that I was convicted, so I just assumed I wasn't convicted of it." Even though Johnson's assumption was wrong, the record does not show that the witness was trying to be evasive. In his renewed efforts at impeachment the cross-examiner is held to be bound by the negative answers of the original examination, since no abuse of discretion has been shown.

Defendant-appellants contend that a new trial is mandated on this issue. They argue that since Johnson was an eyewitness, his testimony that the dump truck crossed the center line was given great emphasis by the jury. If appellants had been allowed to pursue before the jury evidence elicited by cross-examination or *voir dire,* they speculate that the jury might not have believed Johnson's testimony. However, other eyewitnesses for the plaintiffs also testified that the dump truck crossed the center line: Ervin Sanders, Jr., and John Gulley, Jr. Ronald Wilson and Donald Wilson, driver and passenger in the vehicle immediately ahead of Gulley, both gave testimony indicating that the dump truck had its front tire just over the center line, and then the collision occurred instantly behind them, as their own vehicle took evasive action by pulling to the right. Thus, Johnson's testimony as to the accident was cumulative, even though substantive, and does not show that the jury verdict on the second issue was improperly influenced by the witness Johnson. This assignment of error is overruled.

III.

DR. DAVIS AS A WITNESS AND RELATED JURY INSTRUCTIONS

[3] Dr. Arthur Davis testified as a witness for the Gulley defendants. Dr. Davis is a physician employed as Director of Im-

munopathology and Research for Biomedical Laboratories, which is the third largest medical reference laboratory in the world. After an extensive *voir dire* Dr. Davis testified before the jury about the medical condition of diabetes, about insulin, and about their effects on the human system. Dr. Davis testified in response to a hypothetical question that it was his medical opinion that defendant Riggs' mental and physical faculties were impaired at the time of the collision from a diabetic condition, to the extent that Riggs' judgment, reaction time, and coordination were decreased. Earlier, Riggs had testified that he had had a diabetic condition for 27 years, took insulin regularly, and had taken insulin in the early morning of the date of collision. The hospital records of Riggs concerning his admission and condition after the collision were in evidence.

Appellants contend that it was error to permit Dr. Davis' name to remain on the pre-trial order as a medical expert witness or to allow him to testify, because his name, address, and the basis of his opinion had not been provided to appellants by answers to interrogatories; that a hypothetical question was improperly framed and that the answer was unresponsive and irrelevant; that the trial court should not have allowed evidence on Riggs' diabetic condition; and that the judge should not have instructed the jury by giving a summation of Dr. Davis' opinion testimony about Riggs' condition. We disagree that error occurred; and, if there were error, it is now moot because the jury did not answer the issue of Riggs' negligence. A new trial on this issue has already been ordered in the trial division by the trial judge. All of the testimony of Dr. Davis related to the condition of Riggs and not to any other party.

The appellants concede that the decision of the trial judge allowing Dr. Davis to testify can only be overturned if we find an abuse of discretion. Having read the 17 assignments of error on this question and the numerous exceptions in support thereof, we find no abuse of discretion.

While appellants contend Dr. Davis was one of eleven surprise witnesses listed for the Gulleys, the record fails to show that any of the other ten persons listed in the addendum to the pre-trial order was ever called as a witness. Monday, 14 September 1981, was the first day of trial. It was devoted to pre-trial

conferences. On the previous Thursday, appellants' counsel produced for Gulley's counsel medical records of lab results of the blood sugar level of driver Riggs made subsequent to the collision. During morning recess of the first day of conferences and trial, additional medical documents of Riggs were made available to Gulley's counsel. Dr. Davis' name was on the witness list furnished appellants on Friday before Monday's trial. The jury was not impaneled until Wednesday, 16 September 1981. Dr. Davis did not testify until 24 September 1981. The trial judge allowed appellants a *voir dire* prior to Dr. Davis' testifying in the presence of the jury. And, as the record reflects, when Dr. Davis' name as a witness was discussed on the first day of trial, appellants' counsel stated: "I am not asking for a continuance."

[4] The hypothetical question to Dr. Davis to which objection was made contained the word "would" instead of "could" or "might," as to causation and opinion. Our Supreme Court in *Mann v. Transportation Co. and Tillett v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973), discussed with approval Professor Henry Brandis' comments on the formula of hypotheticals in 1 Stansbury, North Carolina Evidence § 137 (Brandis rev. 1973)[1] and held that in causal relations the purpose of using expert witnesses might be "thwarted or perverted unless the expert witness is allowed to express a positive opinion (if he has one) on the subject." *Id.* at 748, 198 S.E. 2d at 568. This holding was supported in *Taylor v. Boger*, 289 N.C. 560, 223 S.E. 2d 350 (1976). When hypothetical questions are used, it is not required that the witness be first asked the question of causation using "could" or "might" language before he is asked in the phraseology of "would." If the expert has such an opinion, both the question and the answer may be properly phrased in "would." Because Dr. Davis' testimony was relevant to the issue of proximate cause of Riggs' negligent driving, and because the state of Riggs' diabetic condition led to expert opinion evidence as to his probable impaired mental and physical condition, it was competent evidence to be received and to be evaluated by the jury itself.

Regardless of choice of words in this case, the record shows that substantially the same answer was given without appellants' objection during the examination of the same witness by both at-

1. Now cited as 1 Brandis on North Carolina Evidence § 137 (1982).

torneys Douglass and Calhoun, and the error, if any, was cured. *Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735, 43 A.L.R. 3d 591 (1968); *Williams v. Power Co.*, 26 N.C. App. 392, 216 S.E. 2d 482 (1975).

As to the jury instructions regarding Dr. Davis, we find them to have been a fair summary of the evidence. The judge's concluding summary was "that by 9:15 p.m. on that evening there would have been sufficient ketones in Ivey Vance Riggs' body to result in slowed reaction, judgment and coordination." The closing words of the hypothetical to Dr. Davis, and the first part of his answer, follow:

> "[A]s to whether or not there would have been sufficient ketones in Ivey Vance Riggs' body at approximately 9:45 p.m. on the evening of July 13, 1979 to have appreciably affected his mental or physical faculties?
>
> . . . .
>
> In my opinion, based on this information that you have read, that on the basis of reasonable medical certainty that he had these ketone bodies . . . the first change they produce are reaction time. That's slowed down, judgment, that's slowed down, and coordination, that is decreased."

This assignment of error is overruled.

IV.

POST-TRIAL MOTIONS

[5] Appellants complain that it was error for the trial court to refuse to set aside the jury verdict, to refuse to grant a new trial on all issues, and to enter and sign the judgment. We disagree and find no error for the reasons given.

Basically, appellants contend that the verdict was incomplete because the jury failed to render a positive answer to both of the issues submitted to it, and that the verdict was incomplete because it failed to dispose of the controversy of joint and concurrent negligence as alleged by all plaintiffs in their complaints. First, we note that none of the plaintiffs appealed. Second, the issues as submitted were the appropriate ones for this bifurcated trial. And, lastly, the jury did render a complete verdict on the

second issue, finding driver John Gulley not negligent. The wording of the second issue, "Was the collision on July 13, 1979, between the vehicle operated by John Gulley and the vehicle operated by Ivey Vance Riggs, and resulting damages, caused by the negligence of John Gulley?" clearly placed the factual issue before the jury. The jury's answer of "no" contains nothing repugnant or unresponsive. It is sensible and complete. *See Allen v. Yarborough*, 201 N.C. 568, 160 S.E. 833 (1931). Thus, it was proper for the trial judge to receive and accept the verdict on the second issue and to render judgment accordingly. The judge exercised his discretion in this area consonant with the law.

As to the court's alleged refusal to grant a new trial, this contention is only half correct. A mistrial was declared on the first issue when the jury was unable to agree upon an answer. A new trial was awarded the defendants Riggs and Yancey Trucking on the first issue of Riggs' alleged negligence. While it is understandable that Riggs and Yancey Trucking would greatly prefer having the Gulleys remain as codefendants in the new trial, the evidence and record do not allow it to be. The jury has spoken on a factual issue that lay within its exclusive province in a trial without prejudicial error as to the appellants.

No error.

Judges WEBB and WHICHARD concur.

JUANITA NASH, EMPLOYEE, PLAINTIFF v. CONRAD INDUSTRIES, INC., EMPLOYER, AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC776

(Filed 21 June 1983)

1. Master and Servant §§ 72, 96.1— workers' compensation—award for back disability—appeal to Full Commission—basis for award for knee disability

In a workers' compensation proceeding in which the Hearing Commissioner awarded plaintiff compensation for permanent partial disability to her back, plaintiff's exception to the Hearing Commissioner's finding regarding the extent of plaintiff's disability and her assignment of error to the Hearing Commissioner's failure to determine whether there had been a change of condition

constituted a sufficient basis to permit the Full Commission to hear expert evidence concerning disability to plaintiff's knees and to award plaintiff additional compensation for permanent partial disability to her knees.

2. **Master and Servant § 72— workers' compensation—permanent partial disability**

The evidence supported a determination by the Industrial Commission that plaintiff suffered permanent partial disability to her knees.

3. **Master and Servant § 94.1— workers' compensation—temporary total disability—remand for findings**

A workers' compensation proceeding is remanded for findings as to whether plaintiff was temporarily totally disabled for any employment between 2 May 1980 and 1 October 1981 where plaintiff presented unrebutted evidence that she stopped working on 2 May 1980 and was rated for permanent partial disability on 1 October 1981; that after she became disabled from performing her usual job, she later tried working at "lighter work," but could not physically endure such work; that in June 1980 her physician advised her not to return to any industrial work; and that plaintiff's condition in June 1980 was such that she was physically able to do only light housework.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiff and defendants from an order of the North Carolina Industrial Commission entered 1 April 1982. Heard in the Court of Appeals 17 May 1983.

The record in this proceeding under the North Carolina Workers' Compensation Act discloses the following:

Plaintiff sustained a compensable injury on 7 June 1977. Plaintiff was out of work from the date of her injury until 12 March 1979, when she returned and worked until 2 May 1980. When plaintiff was first injured, she consulted Dr. C. McCullough, an orthopedic specialist. On 20 April 1978, at the direction of Dr. McCullough, plaintiff began seeing Dr. Van Blaricom, a neurosurgeon, who treated her until 15 February 1979, when she was referred back to Dr. McCullough. When plaintiff stopped working on 2 May 1980, she went back to Dr. Van Blaricom. Plaintiff stopped seeing Dr. Van Blaricom on 8 June 1980. From 2 May 1980 until the filing of the supplemental Opinion and Award by the Full Industrial Commission on 1 April 1982, plaintiff has worked only two days, 11 and 12 September 1980.

The first hearing in this matter was held before Commissioner Brown on 2 October 1980 where the plaintiff and Drs. McCullough and Van Blaricom testified. Pursuant to that hearing,

Commissioner Brown on 16 January 1981 entered an Opinion and made the following Award:

> 1. Defendants shall pay to plaintiff compensation benefits at the weekly rate of $120.13 for temporary total disability for the period beginning 8 June 1977 and ending 6 March 1979, less any payments previously made by the defendants for that temporary total disability. This amount having accrued shall be paid in a lump sum without commutation.
>
> 2. Defendants shall pay to plaintiff compensation benefits at the weekly rate of $120.13 for 19 percent permanent partial disability of her back for 57 weeks. This amount having accrued shall be paid in a lump sum without commutation.
>
> 3. Defendants shall pay all medical expenses incurred by plaintiff as a result of the injury by accident giving rise hereto, when bills for same shall have been submitted, through the carrier, to the Industrial Commission and approved by the Commission.

From the Opinion and Award of Commissioner Brown, plaintiff appealed to the Full Commission. On 23 July 1981, the Full Commission, after making findings of fact and conclusions of law, entered an Opinion and Award which, among other things, included the following:

> 1. Defendants shall pay plaintiff compensation for temporary total disability at the rate of $120.13 per week for the period 8 June 1977 to 6 March 1979 and shall also pay her compensation for permanent partial disability at the same rate for 57 weeks commencing 6 March 1979. All of such compensation having accrued, it shall be paid to plaintiff in a lump sum, less any payments previously made by defendants for temporary total disability and less the attorney fee hereinafter allowed. Additional amounts of compensation, if any, due plaintiff for temporary total and/or permanent partial disability shall be determined subsequently.
>
> . . .
>
> 3. Defendants shall pay all medical expenses incurred by plaintiff as a result of the injury by accident giving rise

hereto, when bills for same have been submitted through the carrier to the Industrial Commission and approved by the Commission.

In the same Opinion and Award set out in part above, the Full Commission entered the following Comment and Order:

> The evidence of record before the Full Commission is insufficient to permit a determination of the length of time which plaintiff remained temporarily totally disabled after 2 May 1980. Likewise, there is no evidence before the Full Commission regarding any additional permanent partial disability, if any, plaintiff sustains as a result of the condition found to exist at the L4, L5 level of her back.
>
> The Full Commission therefore ORDERS defendants to make an appointment for plaintiff to see Dr. Van Blaricom at defendants' expense within 30 days of their receipt of this Opinion and Award. Dr. Van Blaricom is requested to examine plaintiff and to issue his report of his findings pertaining to plaintiff's physical condition to the Commission with copy to counsel for plaintiff and for defendants. Dr. Van Blaricom is further requested to give his opinion in his report on the questions whether plaintiff is able to work; if so, on what date she was able to return to work; whether plaintiff has reached maximum medical improvement and/or the end of the healing period with respect to the conditions he found in May and June of 1980; and whether plaintiff sustained any permanent partial disability to her back, as a result of such conditions, in addition to that he assigned as of 15 February 1979.
>
> Upon receipt of Dr. Van Blaricom's report, this matter shall be REFERRED to the Full Commission for further appropriate disposition.

On 1 April 1982, the Commission after considering the additional deposition testimony of Drs. Van Blaricom and Montgomery, pursuant to the Order of 23 July 1981 entered its supplemental Opinion and Award wherein it made the following order:

> 1. In addition to amounts previously awarded, defendants shall pay plaintiff compensation at the rate of $120.13

per week for the period 2 May 1980 to 8 June 1980 and shall also pay her additional compensation for permanent partial disability to her back at the same rate for 15 weeks commencing 1 October 1981. Defendants shall pay plaintiff compensation at such rate for permanent partial disability to her legs for 28 weeks commencing 30 October 1981. As much of such compensation as has accrued shall be paid in a lump sum, subject to an additional counsel fee hereinafter awarded.

From the supplemental Opinion and Award, plaintiff and defendants appealed.

Snyder, Leonard, Biggers and Dodd, P.A., by Gary A. Dodd for plaintiff.

Van Winkle, Buck, Wall, Starnes and Davis, by Roy W. Davis, Jr. and Allen R. Tarleton, for defendants.

WELLS, Judge.

Defendants' Appeal

We note at the outset that defendants' contentions on appeal relate only to the award of additional compensation to the plaintiff for permanent partial disability to her knees.

[1] Defendants' several assignments of error present the single question of whether it was error to allow into evidence the opinion testimony of a medical expert and, on the basis of that testimony, award plaintiff additional compensation.

Defendants argue that the Industrial Commission should not have considered any evidence respecting any disability to plaintiff's knees. Defendants contend that plaintiff, in her Notice of Appeal of the Opinion and Award of the Hearing Commissioner and Application for Review by the Full Commission, did not contend that she was entitled to benefits for any disability to her knees and that any subsequent consideration by the Commission of evidence of plaintiff's knee disability was therefore improper.

G.S. 97-85 provides that upon timely application for review of an award by the Commission, the Full Commission will review the award. In its review, the Commission may, upon good ground,

reconsider evidence, take additional evidence, rehear the parties and, if appropriate, amend the award. *Id.* The power to review and reconsider evidence and amend awards carries with it the power to modify or strike out findings of fact and conclusions made by the deputy commissioner or hearing commissioner, even though no exception has been made by the parties. *Smith v. William Muirhead Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975); *Garmon v. Tridair Industries, Inc.*, 14 N.C. App. 574, 188 S.E. 2d 523 (1972).

In support of their contention, defendants cite *West v. J. P. Stevens Co.*, 12 N.C. App. 456, 183 S.E. 2d 876 (1971), for the proposition that plaintiff's failure to assert a right to compensation for disability to her knees in her Notice of Appeal and Application for Review bars the Commission from taking and considering any evidence regarding that disability. *West* involves the sufficiency of a motion for modification of an award for a change in conditions under G.S. 97-47. Unlike *West*, the case before us concerns an appeal from an order modifying an award for a change in conditions. Defendants do not contest the sufficiency of plaintiff's initial motion pursuant to G.S. 97-47 and *West* therefore does not apply.

The basis for plaintiff's appeal from the Hearing Commissioner's Opinion and Award was that his findings of fact were not supported by competent evidence and the conclusions drawn from them were therefore improper. Further, plaintiff noted as error the failure of the Hearing Commissioner's Opinion and Award to determine the issue of whether there had been a change of conditions. The Hearing Commissioner's Opinion and Award made no finding of fact or conclusion as to any disability in plaintiff's knees. Defendants are attempting to argue that the absence of any mention in the Opinion and Award of plaintiff's knee disability amounts by implication to a finding of fact that there was no disability to the knees for which any additional compensation was appropriate and that plaintiff's appeal from that Opinion and Award should have excepted to this absence.

We disagree.

Plaintiff did except to the Hearing Commissioner's finding of fact that plaintiff had a nineteen percent disability of her back on the grounds that it was not supported by any competent evi-

dence. While plaintiff did not specifically mention the knee disability, plaintiff did except to the Hearing Commissioner's finding of fact regarding the extent of plaintiff's disability. *Compare Holder v. Neuse Plastic Co.*, 60 N.C. App. 588, 299 S.E. 2d 301 (1983). We hold that this, along with plaintiff's assignment of error that no determination of any change of conditions was made, is sufficient to allow for the consideration on appeal to the Full Commission of any and all evidence regarding plaintiff's disability.

Defendants also contend that plaintiff's failure to appeal the 23 July 1981 Opinion and Award of the Full Commission, in which was made no finding or conclusion regarding plaintiff's knees, bars any subsequent award of compensation for plaintiff's knee disability. The 23 July 1981 Opinion and Award expressly reserved final disposition of the matter pending the receipt of more complete evidence regarding any additional permanent partial disability plaintiff sustained as a result of the condition of her back. That Opinion and Award did not dispose finally of the matter. Rather, it contemplated further proceedings and was therefore interlocutory. Appeal from an order of the Industrial Commission lies only from a final order. *Lynch v. M. B. Kahn Construction Co.*, 41 N.C. App. 127, 254 S.E. 2d 236 (1979), *disc. rev. denied*, 298 N.C. 298, 259 S.E. 2d 914 (1979). Appeal from an interlocutory order is improper. Defendants' contention is without merit.

[2] Since the testimony of defendants' expert witness, Dr. Montgomery, with respect to the disability in plaintiff's knees was properly admitted and considered, the remaining question is whether there was sufficient evidence to support the Industrial Commission's finding of fact and conclusion that plaintiff had sustained a compensable disability to her knees.

It is well established that the findings of the Industrial Commission, if supported by competent evidence, are conclusive and binding on appeal, even though the evidence could support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). The appellate court, on appeal from the Commission, is limited to considering whether the findings support the legal conclusions and decision of the Commission. *Id.*

Upon a review of the record before us, we find that there was sufficient evidence to support the findings of the Industrial Commission as to plaintiff's permanent partial disability. The conclusions drawn therefrom are proper and support the Commission's decision.

That portion of the Commission's final order, dated 1 April 1982, awarding plaintiff additional compensation for permanent partial disability to her knees, will be affirmed.

Plaintiff's Appeal

[3] We note at the outset that all of plaintiff's contentions on appeal relate to the failure of the Industrial Commission to award her compensation for temporary total disability from 8 June 1980 to 1 October 1981.

Plaintiff's assignments of error present the question of whether the record evidence supports the findings of fact made by the Commission with regard to plaintiff's temporary total disability.

Plaintiff argues that the evidence adduced by the Commission established that plaintiff was temporarily totally disabled from 2 May 1980 until 1 October 1981 and the Commission's findings and conclusions limiting plaintiff's temporary total disability from 2 May to 8 June 1980 are not supported by competent evidence.

In support of her contention, plaintiff cites us to the case of *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109 (1951), for the proposition that when an award of compensation is made payable during disability, there is a presumption that the disability lasts until the employee returns to work. *Id.* at 189, 63 S.E. 2d at 112. However, the award in *Tucker* was directed to be paid beginning 13 April 1948 "and continuing for necessary weeks." *Id.* In the present case, the initial award of the Commission was not made payable during disability. Thus, no presumption of continuing disability attaches.

The initial award of the Commission, dated 16 January 1981, indicated that plaintiff's temporary total disability ended on 6 March 1979, when she was released by her doctor for return to work, and did not again commence when she stopped work on 2

May 1980. In her brief, plaintiff, referring us to pages 46 and 47 of the record on appeal, states that "[Dr. Van Blaricom] testified that in his opinion Mrs. Nash continued to be *totally* disabled from her job as a packer in June, 1980, and that he advised her not to return to work." (Emphasis added.) On pages 46 and 47 of the record, Dr. Van Blaricom, in his deposition of 12 February 1982, testified:

> . . . I have an opinion satisfactory to myself based upon a reasonable degree of medical certainty as to whether or not Mrs. Nash was disabled, totally disabled from that type of job on May 2, 1980 when I saw her. That opinion is that based on this lady's condition when I saw her in May of 1980, that she was disabled for that type of work.
>
> . . .
>
> At that time in June of 1980 I have an opinion satisfactory to myself based upon a reasonable degree of medical certainty as to whether or not Mrs. Nash continued to be totally disabled from her job as a packer at A-B Emblem Company. In my opinion she would not have been able to return to work in that capacity.
>
> I don't have it listed here in my records whether or not I advised her with respect to returning to that job at A-B Emblem Company, but to the best of my knowledge, I told her not to return because I didn't think she physically could.

On page 49 of the record, in the same deposition, Dr. Van Blaricom testified:

> If the Industrial Commission should find from the evidence and by its greater weight that from May of 1980 until October 1, 1981 Mrs. Nash suffered with the conditions that she gave me by way of history on October 1, 1981, I have an opinion satisfactory to myself as to whether or not she continued to be totally disabled from her employment as a packer at A-B Emblem during that period. It is my opinion that she remained disabled for that type of job or work from May of 1980 through to my evaluation on October 1, 1981.

Such evidence was sufficient to require findings as to whether plaintiff was entitled to payment for *total* disability from

May 1980 until, at least, 1 October 1981. Plaintiff's evidence showed that after she became disabled from performing her usual job, she later tried working at "lighter" work, but could not physically endure such work. Her physician not only found her to be totally disabled from that "lighter" work, but in June 1980, advised her not to return to *any* industrial work. Plaintiff, herself, testified that her condition in June, 1980, was such that she was physically able to do only light housework. None of this evidence was rebutted.

Plaintiff having clearly established that she was *totally* disabled from performing *any* industrial work, plaintiff's appeal requires that that portion of her case be remanded for findings as to whether plaintiff was totally disabled for any employment between 8 June 1980 and 1 October 1981. *See Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978).

That portion of the Industrial Commission's award with respect to plaintiff's permanent partial disability is

Affirmed.

That portion of Opinion and Award of the Industrial Commission with respect to plaintiff's claim for temporary total disability is

Reversed and remanded.

Judge PHILLIPS concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK concurring in part and dissenting in part.

I concur in that part of the majority decision which affirms the Award of additional compensation to plaintiff for permanent partial disability to her knees; however, I dissent from that part of the majority decision which reverses and remands the cause to the Industrial Commission for findings "as to whether plaintiff was totally disabled for any employment between 8 June 1980 and 1 October 1981."

A case of temporary total disability within the meaning of the Workers' Compensation Act is defined as " 'one in which the employee is temporarily unable to perform *any* work duties.' " *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 508, 263 S.E. 2d 280, 281 (1980) *quoting* N.C. Industrial Commission, 24th Biennial Report for 1974-75, 1975-76 (emphasis added). *See generally* Larson, Workmen's Compensation Law, Sec. 57.51 (1982). Nowhere in this record is there any evidence that plaintiff was unable to perform *any* work duties from 2 May 1980 until 1 October 1981. Obviously, plaintiff suffered during this period of time from a permanent partial disability to her back and knees. Dr. Van Blaricom's testimony, quoted in the majority opinion, rather than indicating temporary total disability, indicates his opinion that plaintiff had some permanent partial disability and is consistent with his testimony on page 49 of the record where it is stated that, in his opinion, based on his examinations, plaintiff had reached a level of maximum improvement and suffered from a "25% permanent partial disability of the back." It is also consistent with his deposition testimony in February of 1982, on page 48 of the record, that based on his examination of 1 October 1981, "[plaintiff's] current condition represented a permanent partial disability of 35% of her back or spine."

Plaintiff's temporary total disability ceased when plaintiff reached a plateau of maximum improvement and she was rated as having a certain degree of permanent partial disability. None of the medical evidence tends to show that plaintiff was temporarily totally disabled from 2 May 1980 to 1 October 1981. All of the medical evidence tends to show that plaintiff suffered from permanent partial disability during that period of time.

Plaintiff stopped work on 2 May 1980 not because of a new injury or the onset of temporary total disability but because the degree of her permanent partial disability had increased to the point where she was unable to continue her usual job duties. Plaintiff has been compensated for this increased permanent partial disability. The gratuitous finding by the Commission that plaintiff was temporarily totally disabled from 2 May 1980 until 8 June 1980 does not alter the fact that plaintiff during this period of time was suffering from her permanent partial disability.

While the evidence conflicts as to the degree of plaintiff's permanent partial disability to her back and knees, there is no

conflict in the evidence with respect to whether plaintiff was temporarily totally disabled from 8 June 1980 to 1 October 1981. Thus, there was no necessity for the Commission to make a negative finding that plaintiff was *not* temporarily totally disabled during that period.

My analysis of plaintiff's appeal would be incomplete were I not to point out that plaintiff chose to pursue her claim on the theory of a compensable injury sustained on 7 June 1977 which resulted in permanent partial disability to her back and later to her knees. The wisdom of her choice is manifest in the fact that she obtained an award for temporary total disability from 8 June 1977 to 6 March 1979 and for a permanent partial disability to her back of 19 percent. This award was later enlarged to compensate plaintiff for temporary total disability from 2 May 1980 until 8 June 1980, 9 percent permanent partial disability to her right leg, 5 percent permanent partial disability in her left leg, and an additional 5 percent permanent partial disability to her back.

In my opinion, that portion of the Award with respect to plaintiff's temporary total disability should be affirmed.

STATE OF NORTH CAROLINA v. CHRISTOPHER WADE CARROLL

No. 8228SC853

(Filed 21 June 1983)

1. Criminal Law § 66.16— in-court identification—properly admitted

The trial court properly allowed an in-court identification of defendant where there was evidence which showed that the prosecuting witness saw the assailant for about two minutes; that the assailant's face was very close to her face during the assault; that the porch light partially illuminated the room; and that the prosecuting witness had seen the person on earlier occasions. This evidence supported the trial court's finding that the prosecuting witness's identification of defendant was based on her observation of him at the time of the incident.

2. Criminal Law § 66.9— photographic identification—not unconstitutionally suggestive

A pretrial photographic identification procedure was not suggestive where the victim was shown six photographs of white males, and she selected the photograph of defendant, but asked to see a front view picture so that she could be absolutely sure of the identification, and the victim was shown front

view pictures of six white males, one picture being that of the defendant and the other five pictures being different from the five that accompanied defendant's picture in the first photographic lineup. The fact that the defendant's photograph was the only one common to both lineups did not make the procedure impermissibly suggestive.

3. **Criminal Law § 66.9— pretrial photographic identification—not impermissibly suggestive**

Two photographic identification procedures were not impermissibly suggestive where in the first lineup, the five individuals other than defendant were depicted by both side and front views, while defendant was represented only by a side view picture, and where in the second lineup, defendant's photograph was somewhat darker than the other photographs, it showed more of his body than did the others, and the hairstyles of the other men were different from his hairstyle.

4. **Criminal Law § 66.9— photographic identification—statement by officer that defendant lived in same complex—subsequent photographic identification**

Where, between the time a prosecuting witness positively identified the defendant as her assailant from a side view photograph and the time that she identified her assailant from a front view photograph, a police officer told her that the man she had selected lived in the same apartment complex that she did, defendant failed to show that this fact made it substantially likely that either identification was mistaken.

5. **Criminal Law § 114.2— instructions—no expression of opinion on evidence**

The trial judge did not express an opinion in his summary of the prosecuting witness's testimony as to whether or not she saw defendant's mustache. G.S. 15A-1232.

Judge EAGLES dissenting.

APPEAL by defendant from *Friday, Judge*. Judgment entered 15 March 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 February 1983.

As Lisa Felmet was leaving her apartment for work on the morning of 6 November 1981, she opened her front door and saw a man standing on the porch with one hand covering the lower part of his face. The man forced his way into the apartment and pushed Ms. Felmet to the floor. He touched her genital area with one hand and tried to unbutton her blouse with the other. A brief struggle ensued, during which time Ms. Felmet was screaming. After about 10 seconds, the man ran away.

The police investigated the incident and later that day, showed Ms. Felmet a photographic lineup. Ms. Felmet picked defendant's picture out of this lineup and told the police she thought

he was the perpetrator. However, because the police only had a side view photograph of defendant, Ms. Felmet asked to see a front view picture of him in order to be certain of the identification. The authorities took a front view photograph of defendant on 10 November 1981. They included this picture in a second photographic lineup shown to Ms. Felmet on 11 November 1981, and she again identified the defendant as the man who had assaulted her.

Defendant was arrested and charged with first degree burglary and attempted rape. He was convicted by a jury of both offenses. From the court's imposition of an active prison term, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Arthur E. Jacobson; and Joel B. Stevenson for defendant appellant.

WEBB, Judge.

[1] Defendant contends the trial court should not have allowed the in-court identification of defendant as the offender by the prosecuting witness, Lisa Felmet. He argues first that the circumstances at the time of the assault were such that she could not have recognized defendant as the assailant. Defendant maintains that the evidence shows it was dark outside the apartment except for the porch light, and that all the lights inside the apartment had been extinguished; that the assailant was in the room for only 10 seconds; that the victim could see only a facial outline of him; that the assailant had his hand over his face part of the time; and that the victim could not even tell whether or not he had a mustache. Other evidence was presented, however, showing that Ms. Felmet saw the assailant for about two minutes; that the assailant's face was very close to her face during the assault; that the porch light partially illuminated the room; and that Ms. Felmet had seen the person on earlier occasions. She testified in court that the man who had attacked her on 6 November 1981 was the defendant. The trial court, after a *voir dire* hearing in the jury's absence, found that the prosecuting witness's identification of defendant was based on her observation of him at the time of the incident. We believe this finding is supported by the evidence.

The evidence brought to our attention by the defendant goes merely to the weight and credibility of the identification, not to its admissibility, and was for the jury's consideration.

[2] Defendant next contends it was error to admit the in-court identification testimony because it was so tainted by impermissibly suggestive pretrial photographic procedures that it violated due process of law.

After a careful review of the evidence concerning the two occasions during which Ms. Felmet positively identified the defendant by way of photographs, we do not believe that the pretrial photographic lineups were conducted in an unconstitutionally suggestive manner. On both occasions, the victim was shown six photographs of white males. The police did not suggest that Ms. Felmet choose any of the photographs but merely asked her to see if she recognized anyone who looked like the assailant. On the first occasion, she selected the photograph of the defendant, but asked to see a front view picture so that she could be absolutely sure of the identification. On the second occasion, the victim was shown front view pictures of six white males, one picture being that of the defendant and the other five pictures being different from the five that accompanied defendant's picture in the first photographic lineup. Ms. Felmet again picked defendant's photograph.

Defendant's photograph was the only one common to both lineups. He argues that this made the procedure impermissibly suggestive. We are bound by earlier decisions of this Court and our Supreme Court to reject this argument. *See State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982) and *State v. Battle*, --- N.C. App. ---, 300 S.E. 2d 276 (1983).

[3] Defendant next argues it was impermissibly suggestive that his photograph was presented in each lineup in a different manner than were the other photographs. In the first lineup, the five individuals other than defendant were depicted by both side and front views, while defendant was represented only by a side view picture. In the second lineup, defendant argues that his photograph was somewhat darker than the other photographs, that it showed more of his body than did the others, and that the hairstyles of the other men were different from his hairstyle. We do not believe that differences like these create a suggestiveness

that is substantially conducive to misidentification. *See, e.g., U.S. v. Lincoln*, 494 F. 2d 833 (9th Cir. 1974) [lineup with color photograph of defendant and black-and-white photographs of others held constitutional]; *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978) [fact that defendant's photograph was newer than others in the lineup held not unnecessarily suggestive]; *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977) [different hairstyles]; *State v. Conyers*, 33 N.C. App. 654, 236 S.E. 2d 393, *appeal dismissed*, 293 N.C. 362, 238 S.E. 2d 150 (1977) [defendant's photograph had yellow-tinged border as result of the development process which made it distinctive from the other photographs]. We, therefore, find no merit in this contention.

[4] After Ms. Felmet identified defendant in the first lineup, a police officer apparently told her that the man she had selected lived in the same apartment complex that she did. Defendant contends that this fact drew the victim's attention to him in the second lineup, and made the procedures impermissibly suggestive. This argument is without merit. When informed that defendant lived in the apartments, Ms. Felmet had already viewed the first lineup and positively identified the defendant as her assailant. It is true that she asked to see a front view picture of him and was subsequently shown a second lineup, but this was done so that she could be completely sure of the identification. Furthermore, she was not told that defendant was a suspect, only that he lived in the same complex. It is at least as likely that this suggested to the victim that because she may have seen the defendant before at the apartments, her first identification was a mistaken one. Yet she selected his photograph again from the second lineup. Defendant has failed to show that this fact made it substantially likely that either identification was mistaken.

We hold that the photographic lineups were not impermissibly suggestive and that the witness's in-court identification of defendant was properly allowed into evidence.

[5] In his second assignment of error defendant contends the trial judge expressed, in his instructions to the jury, his opinion that defendant was the person who had assaulted Ms. Felmet. That portion of the charge to which defendant takes issue reads as follows:

> "Now you will recall, ladies and gentlemen, that for the State of North Carolina the first witness to take the stand was Lisa Felmet. She testified . . . that she saw the defendant's face in the apartment; that he did not have any glasses on and that *she could not see the mustache because his hand was over his mouth* and that she did not notice any mustache and did not see any mustache; that he was in the light on the porch and there was light on the inside of the room but that she did not see any mustache . . . his hand was under his mouth—over his mouth under his nose . . . ." (Emphasis added.)

We note first that defendant failed to object to the court's instruction before the jury retired and therefore waived any opportunity to assign error to portions of the instructions. However, considering the merits of his contentions, we find no error in the charge.

Defendant argues that whether or not the assailant had a mustache was his primary defense since he did, at the time in question, have a prominent mustache. He contends the judge's instruction removed from the jury's consideration the question of whether the assailant had a mustache and in this way intimated that the judge was of the opinion that the defendant was the assailant. We cannot agree. The trial judge has a duty to summarize the evidence presented to the extent necessary to explain the application of the law to the evidence. G.S. 15A-1232. Lisa Felmet testified that she "did not see a mustache when he was on the front porch because of his hand covering his mouth" and that she "did not notice a mustache because I was not looking for one." We believe the instructions to which defendant objects were a proper summary of this evidence. We do not believe these instructions in any way intimated the opinion of the judge as to any question of fact to be decided by the jury. This assignment of error is overruled.

No error.

Chief Judge VAUGHN concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. The majority deals with each asserted error separately, each independent of the others.

It is correct that two photographic showups of six persons each in which defendant was the only one appearing in both is not sufficient standing alone to conclude that the identification was impermissibly suggestive. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Battle*, 61 N.C. App. 87, 300 S.E. 2d 276 (1983).

It is also true that the defendant's photograph, presented in a different manner, i.e., one view of defendant versus two views of each other person in the photographic showup, is not sufficient standing alone to require a finding that the procedure was impermissibly suggestive. *State v. Conyers*, 33 N.C. App. 654, 236 S.E. 2d 393, *appeal dismissed* 293 N.C. 362, 238 S.E. 2d 150 (1977).

Furthermore, it has been held that where the hairstyles of all other persons in a photographic showup (except defendant's) are dissimilar to the description given by the victim, it is not sufficient standing alone to require a finding that the procedure was impermissibly suggestive. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977).

Finally, the fact that the photograph of the defendant is newer than the others and was obtained especially for this showup is not by itself unnecessarily suggestive. *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978).

I would hold that the pre-trial photographic identification was subject to impermissibly suggestive procedures and must be considered in light of the totality of the circumstances including the following:

(a) In the identification of her assailant, prosecutrix never mentioned a mustache and never noticed a mustache on her attacker (according to her trial testimony). At the time of the offense, this defendant had what was characterized as a prominent mustache.

(b) The assailant covered his face with his hand and was seen in the predawn dark by the prosecutrix, on the porch where there was a porch light, for just "two or three sec-

onds" and for another ten seconds in an area of the apartment so dimly lit that only a facial outline of the assailant was discernible.

(c) All other persons in the photographic showups were represented by two photographs each, while defendant was depicted in one photograph.

(d) At the first photographic showup, the prosecutrix selected defendant's photograph on a tentative basis but wanted a second photograph because she was uncertain.

(e) Between the time of the first and second photographic showup a police officer told the prosecutrix that the photograph about which she had been unsure was of a resident of her apartment complex.

(f) Following the officer's conversation with the prosecutrix about the defendant's residence in the same apartment complex, prosecutrix was shown a second group of photographs of six individuals in which defendant was the only one who had also been depicted in the first lineup (albeit by only one photograph). Upon viewing the second photographic showup, prosecutrix then acknowledged recognizing the defendant as a resident of her apartment complex and acknowledged having seen him around the apartment complex before and since the attack. She thereafter identified him as her assailant.

(g) Prosecutrix's description of her assailant described his hair length as coming down near the ears, just over the ears or exactly to the center of the ears. Of the photographs displayed, only the defendant's hairstyle roughly approximated that description—all others were not even remotely similar. This dissimilarity of hairstyles was noticeable in both photographic showups.

In the case *sub judice*, as distinguished from *Leggett* and other cases cited by the majority, the observation by the prosecutrix was not in broad daylight, but was at night, before dawn, momentarily on a porch and in a room illuminated only by an outside porch light. The total period of observation was only a very brief time—ten seconds—in the heat of a violent struggle which resulted in the assailant running away. Here, there was no in-

person lineup under the scrutiny of defendant's attorney in conjunction with the photographic identification; only two unsupervised photographic showups.

Prosecutrix testified that at the second showup she recalled having seen defendant in the apartment complex where they both lived and thereupon "put two and two together" and then named defendant as her assailant. The function of an identification witness is to relate what they saw or otherwise observed—not to piece together factors and not to jump to conclusions properly within the province of the jury.

As the cases indicate, no one of these suggestive factors *standing alone* would be sufficient to characterize the procedure as impermissibly suggestive. Here, however, these factors do not stand alone; they stand together cumulatively and each adds to the overall suggestiveness of the identification procedure. When an extrajudicial identification is surrounded by so many suggestive factors, it is suspect. Considering the totality of the circumstances, as we are required to do, I would hold that the combination of the suggestive factors and procedures is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Based on the impermissibly suggestive procedures, I would reverse.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND THE LUMBEE INDIANS OF ROBESON COUNTY OF ALLENTON COMMUNITY v. SEABOARD COAST LINE RAILROAD COMPANY

No. 8210UC521

(Filed 21 June 1983)

1. Railroads § 2; Utilities Commission § 7— repair of drainage ditches along railroad tracks—jurisdiction of Utilities Commission

The Utilities Commission had jurisdiction under G.S. 62-42 and G.S. 62-235 to consider a petition seeking to require a railroad to repair and improve drainage ditches along its tracks in an area of Robeson County insofar as the condition of the drainage ditches related to the safe and proper maintenance of the railroad's track facilities.

2. **Railroads § 2— Federal Railroad Safety Act—local safety hazards—jurisdiction of states**

The Federal Railroad Safety Act of 1975, 45 U.S.C. § 421 *et seq.*, permits the states to continue to exercise safety jurisdiction over local safety hazards. Therefore, the Act did not preempt action by the Utilities Commission requiring a railroad to repair drainage ditches along only a few miles of its tracks.

3. **Railroads § 2; Utilities Commission § 12— violation of federal track safety standards—local safety hazard—jurisdiction of Utilities Commission**

A finding by the Utilities Commission that a railroad violated the track safety standards promulgated by the Secretary of Transportation in failing properly to maintain its tracks in a local area did not invalidate its conclusion that such violation also constituted a local safety hazard over which the Commission had authority under G.S. Ch. 62, and the Commission did not invade the province of the Secretary of Transportation to promulgate and enforce railroad track safety standards by ordering the railroad to repair and improve drainage ditches along a few miles of its tracks.

4. **Railroads § 2; Utilities Commission § 12— requiring railroad to repair drainage ditches—no taking without due process**

The fact that an order of the Utilities Commission requiring a railroad to maintain its tracks by repairing drainage ditches along a portion thereof has the incidental benefit of allowing adequate drainage of nearby lands does not constitute a "taking" of the railroad's property without due process.

5. **Railroads § 2; Utilities Commission § 12— proceeding to require improvement of railroad track facilities—participation by Public Staff**

Although G.S. 62-15(e) limits the Public Staff's initiative in a proceeding to require a railroad to repair and improve its track facilities, the Utilities Commission acted within its authority under G.S. 62-15(g) in permitting the Public Staff to participate in such a proceeding.

APPEAL by respondent from the North Carolina Utilities Commission. Orders entered 4 August 1981 and 5 January 1982. Heard in the Court of Appeals 12 April 1983.

By its order of 23 May 1980, the Utilities Commission (hereinafter "Commission") served upon respondent railroad company (hereinafter "Seaboard") a complaint filed by petitioning citizens and landowners (hereinafter "petitioners"). In their complaint, petitioners sought to require Seaboard to open drainage ditches along its tracks in an area of Robeson County, petitioners alleging that the failure of Seaboard to keep its drainage ditches open caused flooding of their lands. The order of the Commission serving the complaint required Seaboard to either satisfy the demands of the complaint or file an answer. Seaboard answered, moved to dismiss for lack of jurisdiction and upon other grounds.

The Public Staff of the Commission (hereinafter "Public Staff") filed a reply to Seaboard's motion to dismiss. Seaboard then moved to remove the Public Staff from further participation in the proceedings. By its order of 8 May 1981, the Commission denied Seaboard's motion.

On 18 February 1981, the Commission opened a hearing on petitioners' complaint, culminated by its order of 4 August 1981. That order shows on its face that appearances at the hearing were entered by counsel for Seaboard and counsel for the Public Staff. The order reflects no appearances by counsel for petitioners *per se*. In its order, the Commission summarized the history of the proceedings, summarized the evidence adduced at the hearing, made findings of fact, entered conclusions, and concluded its order as follows:

> IT IS, THEREFORE, ORDERED:
>
> 1. That the original Complaint and amended complaint filed in this docket requesting the Commission to order Seaboard Coast Line Railroad to correct the drainage problem on its track and right-of-way between Lumberton and Wilmington is hereby allowed. It is further ordered that the Motion of Seaboard to Dismiss the Complaint be denied.
>
> 2. That the Respondent, Seaboard Coast Line Railroad Company, shall undertake immediately, on the right-of-way of its Lumberton to Wilmington track between mileposts 302 and 306, to clean out its existing ditches on both sides of the track or, where necessary, to excavate new ditches, and either to upgrade its existing culverts so that they will carry water freely from one side of the track to the other, or, where necessary, to construct new culverts, so that the water that runs into and collects in said ditches and culverts will flow unobstructedly in an easterly direction from milepost 302 towards the Big Swamp. The work directed to be done by this Ordering Paragraph shall be completed on or before September 30, 1982.
>
> 3. The Commission shall retain jurisdiction of this mater pending the filing, on or before September 30, 1982, of a final report by Seaboard with this Commission and with the Public Staff stating that the work ordered to be done in Ordering Paragraph 2 has been completed.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of August, 1981.

Pursuant to the provisions of G.S. 62-90, Seaboard duly filed notice of appeal and exceptions to the Commission's order of 4 August 1981. Following oral arguments, participated in by Seaboard and the Public Staff, the Commission, by its order of 5 January 1982, overruled Seaboard's exception and affirmed its order of 4 August 1981.

Seaboard has appealed from both orders.

Executive Director of the Public Staff Robert Fischbach, by Theodore C. Brown, Jr., Gisele L. Rankin, and Karen E. Long, for appellees.

Maupin, Taylor & Ellis, P.A. by Frank P. Ward, Jr., and M. Keith Kapp; Law Department of Seaboard Coast Line Railroad, by John T. Alderson, Jr. and Neill W. McArthur; and McLean, Stacy, Henry & McLean, by Everette L. Henry, for appellant.

WELLS, Judge.

[1] In its first assignment of error, Seaboard contends that the Commission lacks jurisdiction under the laws of North Carolina to consider petitioners' complaint. The heart of Seaboard's argument is that petitioners' complaint addresses a dispute between petitioners and Seaboard which is essentially private in nature, in the nature of a complaint in tort and not related to or within the powers of the Commission to regulate railroads as public utilities. Seaboard correctly argues that the Commission is a statutory body possessing only the authority conferred upon it by the General Assembly. *See Utilities Commission v. National Merchandising Corp.*, 288 N.C. 715, 220 S.E. 2d 304 (1975). We, therefore, turn to the statutory grant of authority pertinent to the issues in this case. In addition to other grants of general supervisory and regulatory authority over public utilities found in Chapter 62 of the General Statutes, G.S. 62-42 provides, in pertinent part, as follows:

> (a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

. . .

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity.

The Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. . . .

G.S. 62-235 provides:

Commission to inspect railroads as to equipment and facilities, and to require repair.

The Commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the safety and convenience of the public and the railroad employees; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair.

In order to put the Commission's jurisdictional standing in proper perspective, it is necessary to refer to the findings of fact made by the Commission.[1] The pertinent findings are as follows:

1. We note that Seaboard has excepted to many of these findings. Such exceptions will be dealt with in this opinion. The findings are used here only to establish a factual background against which the question of jurisdiction must be viewed.

FINDINGS OF FACT

1. The Complainants are residents and landowners in the Allenton Community of Robeson County, which community is on N.C. Highway 211 a few miles east of Lumberton. The land of the Complainants, which is used mostly for farming and homesites, abuts or is near Seaboard's railroad track and right-of-way under consideration in this proceeding.

. . .

4. Seaboard owns and maintains a railroad track which runs in an eastwardly direction from Hamlet to Wilmington, North Carolina. This track runs through the Town of Lumberton and near the community of Allenton in Robeson County. The railroad track and right-of-way under consideration in this proceeding begins at the Seaboard milepost 302 near Allenton, just west of the intersection of State Road 1002 and the track, and ends at milepost 306 in the Big Swamp, just west of the Robeson-Bladen county line. . . .

5. Between milepost 302 and milepost 306 Seaboard maintains a drainage system on both sides of the railroad track and entirely within the 200-foot right-of-way. There are roadbed ditches which collect the water that falls on the track and the roadbed and on the area around the right-of-way; these ditches are designed to carry the water to the crossings of natural waterways. Seaboard also maintains on its right-of-way various pipes or culverts underneath the track, which are designed to drain water from one side of the track to the other.

6. The elevation of the land alongside the railroad track from milepost 302 near Allenton to milepost 306 in the Big Swamp generally slopes downward toward the Big Swamp.

7. The natural flow of water in the area alongside the track and right-of-way is more or less in an easterly direction toward and into the Big Swamp.

8. The ditches and culverts maintained by Seaboard on its right-of-way between milepost 302 and milepost 306 are in various states of disrepair and, as a consequence, are unable to accommodate and to carry away the water which collects in these ditches and culverts.

9. Debris such as pulpwood and abandoned crossties are in some of the ditches maintained by Seaboard between mileposts 302 and 306; this debris inhibits or prevents the water collecting in these ditches from flowing toward a natural watercourse. Other ditches have become filled in with dirt and vegetation or are virtually nonexistent.

10. Many of the railroad's culverts underneath the track between mileposts 302 and 306 have become filled in with dirt and debris and are incapable of property draining water from one side of the track to the other; the outlets of some culverts are higher than the ditches they were designed to serve.

11. The water collecting and standing in these ditches and culverts backs up and spills out onto the land adjoining the railroad right-of-way. . . .

. . .

13. At or near Seaboard's hot box detector house, which is located at the intersection of State Road 2118 and the track, the railroad's ditches and tiles on either side of the track have become filled in, further inhibiting the natural flow of water towards the Big Swamp.

14. At or near milepost 303, the rails "swing" or "pump" in muddy, fouled ballast that is unable to drain properly; this condition is unsafe and if it is not corrected, the track could deteriorate further and adversely affect the service of Seaboard over these rails.

15. Seaboard maintains a long trestle on this track just west of milepost 306. In 1919 the trestle was approximately 650 feet long; today it is 262 feet long. Seaboard shortened the trestle by filling it in with dirt and riprap to prevent erosion. The effect of this shortening is to create a weirlike effect, which retards the flow of water along the railroad's ditches towards the Big Swamp.

16. In March 1979, the Commission's track inspector investigated the condition of the track, roadbed, and drainage facilities between mileposts 302 and 306; in his report he noted the standing water in the ditches unable to drain and

the "pumping" or "swinging" rails. He testified in the February 1981 hearing that the same conditions exist today.

17. The Commission has adopted and enforces the Track Safety Standards of the Federal Railroad Administration. These standards are applicable to Seaboard's drainage facilities under consideration herein. Section 213.33, which relates to drainage, reads as follows:

"Each drainage or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned."

These track standards also incorporate a number of drainage violations, which are identified by a defect code. These violations are:

"33.01 Drainage or water carrying facility not maintained.

33.02 Drainage or water carrying facility obstructed by debris.

33.03 Drainage facility collapsed.

33.04 Drainage or water carrying facility obstructed by vegetation.

33.05 Drainage or water carrying facility obstructed by silting.

33.06 Drainage facility deteriorated to allow subgrade saturation.

33.07 Uncontrolled water undercutting track structure or embankment."

18. The ditches and culverts maintained by Seaboard on its right-of-way between mileposts 302 and 306 do not comply with Section 213.33 of the Track Safety Standards. These ditches and culverts also violate defect codes 33.01—Drainage or water carrying facility not maintained; 33.02, 33.04, and 33.05—Drainage or water carrying facility obstructed by debris, vegetation, and silting; and 33.06—Drainage facility deteriorated to allow subgrade saturation.

19. The failure of Seaboard to maintain its drainage facilities in compliance with the above-described Track Safety Standards results in the drainage problems alongside the railroad's track and right-of-way between mileposts 302 and 306.

20. It is to the advantage of Seaboard to keep its ditches and culverts between mileposts 302 and 306 clean and open and properly maintained. Improperly maintained drainage facilities offer the potential of undermining the rail roadbed and could ultimately cause a derailment.

. . .

23. Repairs and improvements to Seaboard's drainage ditches and culverts between mileposts 302 and 306 ought reasonably to be made so that the water which runs into and collects therein can flow unobstructedly toward the Big Swamp.

The foregoing findings show the existence of hazardous conditions affecting a portion of Seaboard's track facilities. Without regard to whether such conditions affect the lands of petitioners in any respect, such conditions, as they relate to the safe and proper maintenance of Seaboard's track facilities are sufficient to invoke the Commission's jurisdiction under the provisions of Chapter 62 of the General Statutes. Indeed, once called to the Commission's attention, such conditions are sufficient to require remedial action by the Commission. This assignment is overruled.

[2] In its second argument, Seaboard contends that the Congress of the United States has enacted legislation which has the effect of preempting the field of railway safety and that the Commission's action was therefore invalid. The act of Congress upon which Seaboard relies is the Federal Railroad Safety Act of 1975, codified as 45 U.S.C. sections 421-444.

Sec. 434 of the act is as follows:

National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt

> or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

We are persuaded that the congressional intent expressed in the foregoing section clearly allows the respective States to continue to exercise safety jurisdiction over local safety hazards. Courts in other jurisdictions agree with us. *See National Association of Regulatory Utility Commissioners v. Coleman*, 542 F. 2d 11 (3 Cir. 1976); *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 536 F. Supp. 653 (E.D. Pa.), *affirmed*, 696 F. 2d 981 (3 Cir. 1982); *Bessemer and L.E.R. Co. v. Penn. Public Utility Comm., Pa. Cmwelth.*, 368 A. 2d 1305 (1977); *compare Donelon v. New Orleans Terminal Company*, 474 F. 2d 1108 (5 Cir.), *cert. denied*, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed. 2d 105 (1973). The hazard under review by the Commission in this case could not be described in any other way than "essentially local" in nature as it involved only a few miles of respondent's tracks, all in one general contiguous local area. The Commission's order did not attempt or purport to lay down any generally applicable rule with respect to Seaboard's track system, but only responded to those local hazards it found to exist.

Seaboard's second assignment is overruled.

[3] In its next assignment, Seaboard argues that the Commission has invaded the exclusive province of the Secretary of Transportation to promulgate and enforce railroad track safety standards, as provided in the Railroad Safety Act. While we agree that under the act, the Secretary has such exclusive authority to both promulgate and enforce track safety *standards*, the Commission's finding that Seaboard has violated the track safety standards promulgated by the Secretary of Transportation in failing to properly maintain its tracks in the local area complained of does not

invalidate its conclusions that such violation also constitutes a local safety hazard over which the Commission has authority under Chapter 62 of the General Statutes. The Commission did not attempt or purport to penalize Seaboard or assess damages against Seaboard for violations of Federal track safety standards. In the judgment portion of its order, such standards are not even mentioned, much less required to be conformed to. This assignment is overruled.

[4] In its next assignment of error, Seaboard argues that the order of the Commission deprives Seaboard of its property for a public or private use without compensation, and without due process of law, in violation of the United States and North Carolina Constitutions. We do not agree. The Commission's order does no more than require Seaboard to maintain a small (short) segment of its track in a safe condition. If the order has the incidental benefit of allowing adequate drainage of nearby lands of petitioners, such an incidental benefit flowing from the expenditure Seaboard may have to make pursuant to the Commission's order does not constitute a "taking" of Seaboard's property. This assignment is overruled.

[5] In its next assignment of error, Seaboard contends that the Commission erred in denying Seaboard's petition to remove the Public Staff from this case, because the Public Staff was acting beyond its statutory authority in appearing in the case. G.S. 62-15 contains the basic statutory provisions under which the Public Staff was created and functions. G.S. 62-15(d) enumerates various broad and specific duties, responsibilities, and authorities of the Public Staff, dealing with investigations, complaints, rate cases and other proceedings before the Commission.

G.S. 62-15(e) provides:

> (e) The public staff shall have no duty, responsibility, or authority with respect to the laws, rules or regulations pertaining to the physical facilities or equipment of common, contract and exempt carriers, the registration of vehicles or of insurance coverage of vehicles of common, contract and exempt carriers; the licensing, training, or qualifications of drivers or other persons employed by common, contract and exempt carriers, or the operation of motor vehicle equipment by common, contract and exempt carriers in the State.

G.S. 62-15(g) provides:

> (g) Upon request, the executive director shall employ the resources of the public staff to furnish to the Commission, its members, or the Attorney General, such information and reports or conduct such investigations and provide such other assistance as may reasonably be required in order to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation.

Although the provisions of G.S. 62-15(e) would appear to limit the Public Staff's initiative in cases such as the one before us, G.S. 62-15(g) clearly provides the basis for the Commission to seek the Public Staff's assistance in such cases and that the Public Staff shall provide such assistance as may "reasonably be required." Construing these statutory provisions together and in context, we are persuaded that the Commission acted within its authority in allowing Public Staff participation in this case. This assignment is overruled.

Finally, Seaboard argues that the "remedial action" prescribed by the Commission is not based on competent, material, and substantial evidence and that the Commission's findings that Seaboard's tracks were in an unsafe condition were not so supported. Without burdening this opinion with a recitation of the lengthy and substantial evidence supporting the Commission's essential findings, we note that we have carefully examined the evidence and hold that the evidence supports the Commission's findings and that its findings support its conclusion and judgment. These assignments are overruled.

For the reasons given, the order of the Commission is

Affirmed.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. GLENN DOUGLAS ATWELL

No. 8221SC1059

(Filed 21 June 1983)

1. **Criminal Law § 146.5— denial of motion to suppress—failure to give notice of appeal prior to guilty plea**

Where a trial judge denied defendant's motion to suppress, and where the court found that plea negotiations were finalized before either the court or the prosecutor was made aware of defendant's intent to appeal, but where there was some evidence that the district attorney's office and the court had notice of a possible appeal of the denial of the suppression motion before the guilty plea, the Court in its discretion decided to treat the purported appeal as a petition for certiorari. G.S. 15A-979(b).

2. **Searches and Seizures § 24— validity of search warrant—information from informers**

A search warrant met the requirements of G.S. 15A-244 and G.S. 15A-245(b) where (1) the warrant was issued by a proper person and described the place to be searched and items to be seized with sufficient particularity, (2) the affidavit, which was based on information from informants, stated sufficient underlying circumstances to understand how the informant reached his conclusion, and the affidavit provided sufficient reasons to believe that the informants were credible and that the information was reliable in that the application specifically said that two sources had proved to be truthful and reliable in the past and that the detailed nature of the report and the fact that the officers swore that the third informer was reliable was sufficient to warrant a finding of probable cause.

APPEAL by defendant from *Albright, Judge.* Judgment entered 26 May 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 April 1983.

The defendant appeals from a guilty plea to a charge of manufacturing cocaine in violation of G.S. 90-95(a)(1). He received a three-year sentence when he entered his guilty plea on 26 May 1982.

The defendant originally pled not guilty after being indicted for the two charges of manufacturing cocaine and possession of cocaine with intent to sell and deliver. Following the denial of his motion to suppress on 20 May 1982, he entered a plea of guilty. The defendant did not give notice of appeal from the denial of his motion to suppress until *after* he was sentenced.

The State moved on 30 August 1982 to dismiss the defendant's appeal. This motion was denied by Judge Albright on 21

September 1982 after hearing arguments of counsel, consideration of their briefs and affidavits, and an examination of the record in the case. Although this order concluded that the defendant waived his right to contest the denial of the suppression motion, the judge concluded that he only had authority to settle the record on appeal.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Bruce C. Fraser for the defendant-appellant.

ARNOLD, Judge.

I. Notice of Appeal

[1] G.S. 15A-979(b) provides that an order denying a motion to suppress evidence can be reviewed upon an appeal from a guilty plea. But *State v. Reynolds,* 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied,* 446 U.S. 941 (1980), held that "when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." 298 N.C. at 397, 259 S.E. 2d at 853.

The evidence in the record does not clearly show that the notice required by *Reynolds* was given. An affidavit by the defendant's attorney states that he discussed a secured bond pending appeal with members of the District Attorney's office. The affidavit also alleges that Judge Albright was aware of the appeal before the guilty plea was entered.

The motion to dismiss the appeal by Assistant District Attorney Richard R. Lyle denied that his office or the court received the requisite notice. An affidavit by Assistant District Attorney C. C. Walker said that he did not remember if the defendant's attorney mentioned an appeal bond. Walker added, however, that he was not surprised by the appeal.

Counsel for a codefendant, Gary W. Willard, submitted an affidavit which said that he heard counsel for the defendant raise the appeal bond question in conversations with Walker prior to

the denial of the motion to suppress. Willard could not state if Lyle heard any discussion about the appeal bond.

In his 21 September 1982 order denying the motion to dismiss the appeal, Judge Albright found the following facts:

> 4. That Defendant did not give notice to the Prosecutor of his intention to appeal the suppression motion denial pursuant to N.C.G.S. 15A-979(b), and in no manner or form did the Defendant give notice of such intent to the Court at any time; and
>
> 5. That plea negotiations were finalized before either the Court or the Prosecutor was made aware of the intent to appeal.

Although we conclude that the defendant's appeal is not properly before us, we have decided in our discretion to treat the purported appeal as a petition for certiorari, to allow it, and to consider the case on its merits. *See* Rule 21(a)(1), N.C. Rules App. Proc.; *State v. Walden*, 52 N.C. App. 125, 127, 278 S.E. 2d 265, 266 (1981). There is at least some evidence that the district attorney's office and the Court had notice of a possible appeal of the denial of the suppression motion before the guilty plea. This distinguishes this case from *Reynolds*, where there was no such evidence. *See* 298 N.C. at 396-97, 259 S.E. 2d at 853.

II. Suppression Motion

[2] The defendant argues that his motion to suppress should have been granted. He contends that the affidavit underlying the search warrant was insufficient on its face to establish probable cause that the search would discover the items specified in the application as required by G.S. 15A-245(b). A search of the defendant's residence resulted in his arrest.

G.S. 15A-244 requires that all applications for a search warrant must contain:

> (1) The name and title of the applicant; and
>
> (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; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

The application here meets the requirements of this statute.

A search warrant can only be issued upon a determination of probable cause. U.S. Const. amend. IV. The person who makes that determination must be "a neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime." *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

The warrant should describe with particularity the place to be searched since general warrants are repugnant to the Fourth Amendment, which has been applied to the states through incorporation in the Fourteenth Amendment. *Stanford v. Texas*, 379 U.S. 476 (1965). The warrant in the case *sub judice* was issued by a proper person and described the place to be searched and the items to be seized with sufficient particularity.

When the application is based on an informant's tip, however, it must also meet the two-prong test developed by the Supreme Court in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964).

First, the affidavit must set forth sufficient underlying circumstances to permit a neutral and detached magistrate to understand how the informant reached his conclusion.

Second, the affidavit must establish the reliability of the informant. This can be done by showing prior use and reliability of the informant, a declaration against his penal interest, clear and precise details in the tip indicating personal observation and knowledge of the location of the evidence, or membership of the informant in a reliable group like the clergy. *Spinelli*, 393 U.S. at 412-15; *Aguilar*, 378 U.S. at 114. *See also*, C. Whitebreak, *Constitutional Criminal Procedure* 49-50 (1978).

The application here states:

I, E. B. Hiatt, Jr., Sgt. Narcotics Division, Forsyth County Sheriff's Department being duly sworn, hereby request that the court issue a warrant to search the (~~person~~) (curtlidge) (place) (~~vehicle~~) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: Cocaine, envelope covers, utility bills, receipts, and similar recent writings of possession (constitutes evidence of) (~~constitutes evidence of the identity of a person participating in~~) a crime, to wit: Possession of Cocaine, a Schedule II controlled substance as described in Chapter 90 of the North Carolina Controlled Substances Act. and the property is located (in the place) (~~in the vehicle~~) (curtlidge) (~~on the person~~) described as follows: 339 Lawndale Drive, Winston-Salem, N.C. The residence in question will be the fifth house on the left on the east curb of Lawndale Drive past Hathaway Park and faces west. It is a one story wood frame structure green in color trimmed in white on a brick foundation. The numbers 339 appear to the right of the front door on right front side of house.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: The applicant has been employed by the Forsyth County Sheriff's Department for over ten (10) years during which time has been assigned to the narcotics division and currently holds the rank of sergeant. During this time the applicant has been involved in numerous drug investigations, including joint investigations with the Winston Salem Police Department and the North Carolina State Bureau of Investigation. The applicant has also received extensive training in drug investigations by attending schools sponsored by Drug Enforcement Administration, the State of North Carolina Justice Academy, and local schools by our own department.

The applicant has received the following information from a reliable confidential source whose identity must remain confidential for reasons of their personal safety. The following is a list of facts given the applicant by this reliable confidential source (Source #1):

1. Within the past six (6) days this reliable confidential source has personally observed cocaine on the premises of 339 Lawndale Drive, Winston-Salem, N.C.

2. That Glenn Douglas Atwell and Beverly Sparks Atwell along with an infant daughter about three weeks old live at 339 Lawndale Drive. The applicant checked the public records which revealed that a baby girl was born on March 3, 1982 named Abby Rose with the parents being Mr. & Mrs. Glenn Douglas Atwell of 339 Lawndale Drive, Winston-Salem, N.C.

3. That the cocaine observed on the premises off 339 Lawndale Drive was in the controll of Gbenn Atwell.

4. The description of the cocaine was that it was white and fluffy. Source #1 is familiar with the sight and appearance of cocaine and has seen xxcocaine on numerous occassions in the past with other people including at least one other occassion on the person of Glenn Douglas Atwell.

5. Accurate directions to 339 Lawndale Drive. The applicant personally verified this by Driving by the residence. Additionally Source #1 gave an accurate general physical description which the applicant personally verified.

6. That the phone number of 765-0258 in the name of Beverly Atwell at 339 Lawndale Drive. THis was personally looked up and found to be truthful by the applicant.

7. That Glenn Atwell is a licensed pilot. The applicant verified this fact by chekcing with Officer Larry Rose of the Winston-Salem Police Department Narcotics Division who has received this same information from his own reliable confidential sources.

8. That Beverly S. Atwell is a real estate agent for McNames-Sparks Reality Company of which Rose Sparks, Beverly Atwell's mother, is part owner. The applicant checked this and found it to be true from a Multiple Listing Service Publication (Beverly's employment).

9. The applicant also checked the power service record and found it to be listed to Rose Sparks.

A check of Department of Motor Vehicle Records, showed that the opearator's license of Glenn Douglas Atwell had the address of 339 Lawndale Drive, Winston-Salem as well as the registration of a 1981 Volvo with the same information (VYF-810, NC Tag). DMV records also showed a 1979m Chevrolet listed to both Beverly and Rose XXSparkd of the same address of 339 Lawndale Drive, Winston-Salem, N.C.

The applicant talked with Larry Rose of the Narcotics Division of the Winston-Salem RkPolice Department. Detective Rose stated that on his independant investigations he has received information that Glenn Atwell is involved in cocaine drug traffic. Detective Rose's information comes from two reliable confidential sources (Source 2 and Source 3). Source 2 has provided Detective Rose with reliable and Accuarate information in the past which has lead to the arrest of at least two people for drug (cocaine) violations. Source 3 has provided Detective Rose with truthful information in the past concerning drug, especially cocaine, information. The applicant has verified m uch of Source 3's information for Detective Rose from his own reliable sources.

Detective Rose's investigation and information related in this applicant has been gathered complete independantly from the applicant. XXX Also, Source 1, Source 2, and Source 3 have no knowledge of each's existance in providing information. Much of Detective Rose's information has been received within the past 30 days where as the applicant has been receiving his information longer than 30 days.

s/ E. B. HIATT, JR.
SIGNATURE OF APPLICANT

(Sworn this 26 day of March, 1982 at '713 (P.M.)

THIS EXECUTED SEARCH WARRANT WAS RETURNED TO ME ON 26 March, 1982 at 1043 (A.M.) (P.M.)

s/ (Illegible)
SIGNATURE OF DEPUTY CLERK OF
SUPERIOR COURT/JUDGE

We note that the first prong of the *Aguilar-Spinelli* test is met here. That is, sufficient underlying circumstances are stated

in the application to understand how the informant reached his conclusion. For example, the informant personally observed the cocaine at the defendant's house in the defendant's control within six days of the application. The informant was familiar with the sight and appearance of cocaine, having seen it on a number of occasions.

The specific objection raised by the defendant in his motion to suppress is that the application "fails to allege sufficient reasons to believe that the informant was credible or that his information was reliable." This contention goes to the second prong of the test.

The normal method for establishing the reliability of a confidential informant is to allege in the application for a warrant that the informant has given information in the past that led to an arrest or conviction. *See, e.g., State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). It is not alleged that the informant here (Source #1) had given such information before this case.

But the Supreme Court has not held that past reliability is determinative in these cases. *See United States v. Harris*, 403 U.S. 573, 581-82 (1971). This Court, in *State v. Chapman*, 24 N.C. App. 462, 211 S.E. 2d 489 (1975), upheld a warrant issued upon an application containing information from a confidential informant who had not given any information before. *Chapman* persuades us here:

> We believe that when the detailed nature of the report and the fact that the officer swore that his informer was reliable are considered in a common sense and practical fashion, it would induce a prudent and disinterested magistrate to credit the report and conclude that the informant's information was reliable and not a causal [sic] rumor or a conclusory fabrication. In our opinion, the affidavit in the present case was sufficient to warrant a finding of probable cause to search the defendant's house.

24 N.C. App. at 467, 211 S.E. 2d at 493. *See also, State v. Ellington*, 18 N.C. App. 273, 196 S.E. 2d 629, *aff'd*, 284 N.C. 198, 200 S.E. 2d 177 (1973) (found detailed corroborating facts persuasive in establishing the informer's reliability).

The defendant also attacks the parts of the application that state what two other reliable confidential sources (sources 2 and 3) told Detective Larry Rose. The application said that Rose's information comes from two reliable confidential sources that have provided truthful drug information in the past, some of which led to arrests.

Although the information that Rose provides does not determine finally the validity of the application, we note that this Court has approved applications like this in the past. In *State v. Elam*, 19 N.C. App. 451, 199 S.E. 2d 45, *cert. denied*, 284 N.C. 256, 200 S.E. 2d 656 (1973), the Court approved an affidavit containing the following:

> Affiant further states the [sic] S/A B. M. Lea of the SBI advised him that the above named subject is dealer of marijuana. S/A Lea advised affiant that he had obtained this information from a confidential source of information who had given information in the past which led to the arrest and conviction of Rodney McCain. S/A Lea further stated to affiant that he believes his information to be true and accurate.

19 N.C. App. at 453, 199 S.E. 2d at 47. The affidavit in *Elam* is similar enough to the one before us to be persuasive here.

Because we find that the application met the *Aguilar-Spinelli* tests and other constitutional qualifications, we affirm the trial judge's denial of the motion to suppress. As the Supreme Court stated in *United States v. Ventresca*, 380 U.S. 102, 108 (1965):

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. BEVERLY SPARKS ATWELL

No. 8221SC1122

(Filed 21 June 1983)

APPEAL by defendant from *Albright, Judge.* Judgment entered 7 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 April 1983.

The defendant pled guilty on 7 June 1982 to felonious possession of cocaine, which is punishable under G.S. 90-95(a)(3). She was given a two-year sentence which was suspended for three years. She was placed on supervised probation and ordered to pay a $5,000 fine and court costs.

Her motion to suppress evidence seized as a result of the execution of a search warrant was denied on 20 May 1982. She filed that motion with codefendant Glenn Douglas Atwell, her husband.

The defendant gave a timely notice of appeal from the denial of her motion to suppress to this Court.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Daniel S. Johnson for the defendant-appellant.

ARNOLD, Judge.

We first note that this appeal raised the same question that we decided in an accompanying case, *State v. Atwell,* 62 N.C. App. 643, --- S.E. 2d --- (No. 8221SC1059; filed 21 June 1983). The defendant there was the husband of the defendant in this case and the facts in both cases are substantially similar.

The same application for a search warrant that we upheld in Glenn Atwell's case is attacked by the defendant here. For the reasons announced in that opinion, we again hold that the application and search warrant were valid.

Whether appeal was proper from denial of the motion to suppress, which was an issue in Glenn Atwell's case, is not an issue here because the defendant's guilty plea in this case was not the result of plea negotiations. Glenn Atwell's guilty plea occurred only after plea negotiations with the District Attorney's office. The question of if he gave notice of his intention to appeal from denial of the suppression motion before plea negotiations were finalized was crucial in his case. That question is not before us here.

Finally, we note that the briefs of the defendants in this case, and in Glenn Atwell's case, are nearly identical even though they are signed by different attorneys. The statement of the facts and arguments are reproduced almost verbatim.

Although this practice is not prohibited by our rules or the law, we believe that defense attorneys should prepare briefs and records with care to state the strongest arguments of each *individual* defendant. Effective arguments were made here in the defendant's brief, but irrelevant facts involving Glenn Atwell are mentioned throughout the record and the defendant's brief. We discourage this practice in the future.

Because it was correct to deny the defendant's motion to suppress for the reasons stated in our opinion in Glenn Atwell's case, we affirm the trial judge's 20 May 1982 order.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

R-ANELL HOMES, INC. v. ALEXANDER & ALEXANDER, INC.

No. 8227SC804

(Filed 21 June 1983)

1. Insurance § 2.2— negligent advice by insurance agent—liability for damages

Plaintiff's evidence was sufficient for the jury in an action to recover damages for negligent advice given by defendant insurance agency where it tended to show that defendant's employee, knowing that plaintiff had installed its own telephone equipment, breached his duty to plaintiff by erroneously ad-

vising plaintiff that the new equipment was covered under plaintiff's existing blanket building policy and that plaintiff did not need to extend the coverage on its building contents policy; the telephone equipment was destroyed in a fire; the equipment was not covered under the building policy; and the amount of coverage on plaintiff's building contents policy was insufficient to cover the damage to the telephone equipment.

2. **Evidence § 48— failure to qualify witness as expert**

The trial court did not err in failing to qualify defendant's witness as an expert in the field of real and personal property appraisals where the witness's proposed testimony did not concern an appraisal of property but was a reiteration of what other people had told him the property was worth.

3. **Judgments § 55; Interest § 1— prejudgment interest—liability insurance—amount involved less than deductible**

The trial court did not err in denying plaintiff prejudgment interest pursuant to G.S. 24-5, although defendant had liability insurance, where defendant defended the suit on its own because the amount involved was less than the deductible amount of the liability policy.

APPEAL by defendant from *Mills, Judge.* Judgment entered 3 March 1982 in Superior Court, LINCOLN County. Heard in the Court of Appeals 6 June 1983.

Plaintiff brought this action against defendant, an insurance agency, to recover damages in the amount of $20,746.00 due to the destruction of its telephone system in a fire which occurred on September 9, 1980. Plaintiff's complaint consisted of two causes of action: that defendant was negligent in failing to procure the proper insurance coverage, and that defendant breached its contract with plaintiff by failing to procure the insurance coverage. Defendant denied the material allegations in plaintiff's complaint, and alleged that plaintiff was contributorily negligent. At trial, plaintiff presented the following evidence. Jeffrey Stewart, Secretary, Treasurer, and Director of Financing Administration for plaintiff in 1981, testified that plaintiff, a manufacturer of mobile homes, had a manufacturing plant, a warehouse, and corporate offices in Denver, North Carolina. From 1 October 1979 to 1 October 1980, plaintiff had an insurance policy through defendant. The buildings were covered by a blanket policy and the contents of the buildings were covered for actual cash value. Stewart said he dealt with Charles Harris, an employee of defendant, in obtaining the insurance. In May, 1980, plaintiff purchased a telephone system for $20,918.16. Stewart called Harris a day or two after the telephone system was installed and told him

that he needed to see about getting insurance coverage. According to Stewart, he told Harris, "We took all their [Southern Bell] telephones out and put in our own equipment." He said that the wires ran through the floors and the walls. Harris told Stewart that the telephone system had to be part of the building and was covered under the blanket policy on the building. After the fire, the insurer, Ranger Insurance Company, sent an adjuster to investigate the fire. Ranger Insurance Company told plaintiff that the telephone system would not be covered under the building policy but would be covered under the contents portion of the policy, which was limited to $60,000.00. The policy specified that losses would be paid at cash value, which is replacement cost less depreciation. According to Stewart, the cash value of all the contents, including the telephone system, destroyed by the fire was $79,000.00. The insurer paid the policy limit of $60,000.00 on the loss. The cash value of the telephone system was $20,746.51.

At the close of plaintiff's evidence, defendant moved for a directed verdict. The motion was allowed as to the contract cause of action and denied as to the negligence cause of action.

Defendant introduced the following evidence. Charles Harris, Assistant Vice-President and Office Manager for defendant, testified that his primary duty with Alexander & Alexander was to produce service insurance contracts. He said that in September 1979, the insurance coverage of the office contents of plaintiff's business was increased to $60,000.00, and the office building insurance was increased to $35,000.00. The office building insurance was later increased to $45,000.00 because of the addition made in February 1980. When asked whether he had a conversation with Stewart regarding the telephone system he said: "Not to my recollection. The only conversation that I have had concerning the telephone system was in a passing remark be it over the telephone or in his office that 'we were getting away from Ma Bell.' Beyond that, nothing else."

James Ervin Thompson, Jr., the appraiser who investigated plaintiff's fire loss, testified as to the value of the equipment damaged by the fire. He said that the cash value of the telephone system was $20,746.51.

At the close of all the evidence, defendant renewed its motion for a directed verdict. The motion was denied.

The following issues were submitted to the jury:

1. Did the plaintiff, R-Anell Homes, Inc., suffer loss as a result of the defendant, Alexander & Alexander's, Inc., negligent advice, as alleged in the complaint, that the telephone system purchased by the plaintiff was covered as a part of the buildings of the plaintiff under the blanket insurance company?

2. If so, did the plaintiff, R-Anell Homes, Inc., by its own negligence contribute to its loss?

3. What amount, if any, is the plaintiff, R-Anell Homes, Inc., entitled to recover of the defendant, Alexander & Alexander, Inc.?

The jury answered the first issue "yes", the second issue "no", and the third issue in the amount of $20,746.51. Defendant moved for judgment notwithstanding the verdict and, in the alternative, a new trial. The motion was denied.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for plaintiff appellee.

Shuford and Caddell, by Dwight L. Crowell III, for defendant appellant.

VAUGHN, Chief Judge.

Defendant's first, fifth, and sixth assignments of error are that the trial court erred in denying defendant's motions for directed verdict and judgment notwithstanding the verdict on plaintiff's negligence claim. Defendant argues that its motion for directed verdict should have been granted because plaintiff did not present any evidence of negligence on the part of defendant. The question raised by defendant's motion for directed verdict was whether the evidence, viewed in the light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference, was insufficient to justify a verdict for plaintiff. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The test for judgment notwithstanding the verdict is the same as for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

[1] Defendant first contends, although somewhat indirectly, that plaintiff has not alleged a valid cause of action. Negligent failure to procure insurance is a recognized cause of action in North Carolina. *See Sloan v. Wells*, 296 N.C. 570, 251 S.E. 2d 449 (1979); *Mayo v. American Fire and Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972); *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E. 2d 246 (1967); *Johnson v. Smith*, 58 N.C. App. 390, 293 S.E. 2d 644 (1982). In this case, however, defendant had procured an insurance policy for plaintiff. Plaintiff's claim arises from defendant's alleged negligent assurance that plaintiff's telephone system was covered under the blanket building policy, and defendant's advice that plaintiff need not extend the coverage on the building contents policy. Although this is not the same as failing to procure insurance, it is similar in that plaintiff, relying on defendant, mistakenly believed that certain items were covered by insurance, and did not seek additional coverage.

An action against an insurance agent for negligent advice is recognized in North Carolina. In *Bradley Freight Lines, Inc. v. Pope, Flynn & Co.*, 42 N.C. App. 285, 256 S.E. 2d 522, *review denied*, 298 N.C. 295, 259 S.E. 2d 299 (1979), the plaintiff, a Tennessee trucking company doing business in North Carolina, was a defendant in an Iowa lawsuit brought as a result of a motor vehicle accident. Plaintiff's insurer refused to defend the suit claiming plaintiff's policy did not extend coverage to substituted vehicles that had not received a special endorsement from the insurance agency, defendant Pope, Flynn & Co. (Pope). Plaintiff then sued Pope, alleging that Pope negligently advised him that substitution of vehicles not listed on the insurance policy for vehicles covered by the policy but which were inoperative was authorized and no special endorsement was required. The truck which was involved in the accident was an unendorsed substituted vehicle. At trial, the court denied Pope's motions for directed verdict, and the jury returned a verdict for plaintiff. On appeal, Pope assigned error to the trial court's denial of its motions for directed verdict and argued that plaintiff did not have a valid cause of action because a cause of action based on negligent advice against an insurance agent had never been recognized in North Carolina. This Court held that plaintiff had alleged a valid cause of action in negligence. Plaintiff's evidence had shown a relationship between the parties, and a duty on the part of Pope

which was breached by Pope's negligent false assurances to plaintiff concerning the extent of insurance coverage on the unendorsed substituted vehicles.

In *Fli-Back Co. v. Philadelphia Manufacturers Mutual Insurance Co.*, 502 F. 2d 214 (4th Cir. 1974), the Fourth Circuit held that plaintiff had a cause of action against defendant for defendant's breach of its duty to inform plaintiff that one of its buildings was not covered under their insurance policy. In *Fli-Back*, Philadelphia Manufacturers Mutual (PMM) first provided plaintiff with fire insurance in 1955. The insurance covered all of plaintiff's manufacturing complex except the West Building which fell short of the required construction standards. PMM secured coverage from an affiliate, Affiliated FM, for the West Building. In 1960, plaintiff purchased business interruption insurance from PMM. PMM did not mention that the West Building was excluded, and did not suggest securing the insurance from Affiliated FM. The policies were renewed in 1963 and 1966. Representatives from PMM, acting for PMM and Affiliated FM, were in frequent contact with plaintiff and made recommendations about insurance coverage, safety, and fire prevention. On 7 May 1969, the West Building was destroyed by fire. Although Affiliated FM paid the claim for property damage, PMM refused plaintiff's claim for business interruption loss. Plaintiff filed suit on the policy, and later amended its complaint to state a claim for breach of agreement to provide business interruption coverage. The District Court granted defendant's motion for summary judgment. The Fourth Circuit reversed and remanded, noting that the relationship between an insurance agent and his client is both contractual and fiduciary, and, citing *Elam v. Smithdeal Realty*, 182 N.C. 600, 109 S.E. 632 (1921), proof that the agent misrepresented the scope of the insurance coverage may support an action for damages. The Court held that an agreement to provide insurance may create a continuing agency relationship under North Carolina law, and found that the evidence PMM introduced to support its motion for summary judgment raised an inference that PMM accepted a continuing obligation to advise plaintiff of its insurance needs, and if an agreement to provide full coverage can be proved, PMM breached its duty to inform plaintiff that the policies did not include the West Building.

Bradley and *Fli-Back* demonstrate that as well as a contractual relationship between the insurance agent and the insured, there is a fiduciary duty on the part of the insurance agent to keep the insured correctly informed as to his insurance coverage. Thus, in the instant case, plaintiff has alleged a valid cause of action for negligently conveying false advice. At trial, plaintiff introduced evidence which tended to show that Stewart told Harris, the insurance agent, that plaintiff had removed the Southern Bell telephone equipment and installed their own telephone equipment, and Harris told Stewart that no additional insurance was needed because it was covered under the blanket policy. This evidence could obviously enable a jury to find that defendant, knowing that plaintiff had installed their own telephone equipment, breached his duty to plaintiff by erroneously advising plaintiff that the equipment was covered under plaintiff's existing policy and no change in insurance coverage would be necessary. A jury could also find that plaintiff's reliance on defendant's presumably superior knowledge of the insurance business was reasonable, and plaintiff was not contributorily negligent. Clearly this is sufficient to withstand defendant's motions for directed verdict. After the jury made the above finding, the motion for judgment notwithstanding the verdict or, in the alternative, a new trial, was properly denied.

[2] Defendant's third and fourth assignments of error are that the trial court erred in failing to qualify their witness, James Thompson, as an expert witness in the field of real property and personal property appraisals. Defendant contends that had Thompson been permitted to give his opinion as an expert witness he would have testified that the actual cash value of all plaintiff's equipment was $123,960.77. This testimony, according to defendant, would have been important for two reasons: it would undermine the credibility of Stewart, who testified that the cash value of the contents destroyed by the fire was $79,000.00, and it would tend to show contributory negligence by plaintiff because plaintiff was underinsured. The competency of a witness to testify as an expert is a question addressed to the discretion of the trial judge, and his finding as to whether the witness is qualified or not is conclusive absent abuse of discretion or error of law. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956); 1 Brandis on North Carolina Evidence Section 133 (1982). Thompson was

tendered as an expert on personal and real property appraisals. According to Webster's Seventh New Collegiate Dictionary, to appraise is "to evaluate the worth, significance or status of; . . . to give an expert judgment of the value or merit of. . . ." Thompson's proposed testimony, however, did not concern an appraisal of the property, but was merely reiterating what other people had told him the property was worth. He said he obtained his figures "from the individuals involved where the original equipment had been purchased, asking them what the equipment would cost today." Since his proposed testimony was not about an appraisal of the property, the court correctly exercised its discretion in refusing to qualify him as an expert in the field of appraisals.

Additionally, his proposed testimony could have been excluded on the ground that it was not relevant to the issue in this case. Plaintiffs brought this action to obtain payment for the damaged telephone equipment because defendants allegedly gave them negligent advice about the insurance coverage. Whether plaintiff's other property was underinsured is not at issue and, of course, is not evidence of contributory negligence as to the insurance coverage of the telephone system. Neither is it a proper matter for impeachment purposes because it is a collateral issue and Stewart may be impeached as to collateral matters only on cross-examination, not by extrinsic evidence such as Thompson's testimony. *Hawkins v. Pleasants*, 71 N.C. 325 (1874); 1 Brandis on North Carolina Evidence Section 48 (1982).

Plaintiff brings forth two cross-assignments of error. Plaintiff's first cross-assignment of error is that the trial court erred in granting defendant's motion for directed verdict as to the claim for breach of contract. As we are affirming the jury's verdict in plaintiff's favor this question need not be addressed.

[3] Plaintiff's second cross-assignment of error is that the trial court erred in denying plaintiff prejudgment interest pursuant to G.S. 24-5. G.S. 24-5 provides, in pertinent part:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The

preceding sentence shall apply only to claims covered by liability insurance.

Plaintiff contends that since defendant had liability insurance, defendant should be required to pay prejudgment interest. Defendant, however, was defending the suit on its own because the amount involved was less than the deductible amount of the liability insurance policy. Therefore, plaintiff's claim was not covered by the liability insurance. The statute is obviously referring to claims which are defended by the liability insurer, because there is no logical reason to distinguish between claims against an uninsured defendant and an insured defendant defending a claim which falls short of the deductible amount of the insurance policy.

For the reasons stated above, the judgment is

Affirmed.

Judges HILL and BECTON concur.

LETA PEARCE v. AMERICAN DEFENDER LIFE INSURANCE COMPANY

No. 8210SC851

(Filed 21 June 1983)

Insurance § 14— life insurance—accidental death provision—death in military aircraft—motion to dismiss improperly granted

Plaintiff's complaint stated a claim upon which relief could be granted and the trial court erred in granting defendant's motion to dismiss where plaintiff's now-deceased husband bought a life insurance policy which provided for double coverage in the event of accidential death but which created certain exceptions for military planes; where deceased had questioned defendant's insurance company concerning his coverage shortly after he entered the United States Air Force; where the insurance company replied that the deceased was fully covered; and where the insured was killed in an accident involving a military aircraft on which he was acting as a crew member.

Judge WEBB concurring.

APPEAL by plaintiff from *Brewer, Judge.* Order entered 9 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1983.

This is a civil action wherein plaintiff seeks payment of certain proceeds under an insurance policy issued by defendant to plaintiff's now-deceased husband.

The policy in question was issued in 1968 in the face amount of $20,000 but includes an "Accidental Death and Dismemberment Agreement" which provides for the payment of $40,000 in the event of the insured's accidental death. This "Accidental Death and Dismemberment Agreement" was made subject to the following exceptions:

> EXCEPTIONS: This agreement does not cover death or injuries resulting directly or indirectly from: (a) travel or flight in or descent from any species of aircraft if (*i*) you are a pilot, officer, or other member of the crew of such aircraft, are giving or receiving any kind of training or instruction, or have any duties whatsoever aboard such aircraft while in flight, or (ii) the aircraft is maintained or operated for military or naval purposes, or (b) military, naval, or air service or any allied branch thereof of any country at war, ...

In 1971, the insured entered the United States Air Force and began training at The Navigation School. The insured's training involved approximately 250 hours of flying time. After completion of his training at the Navigation School, the insured anticipated further flying while in the Air Force. After beginning his training, the insured became concerned about the extent of his coverage under the policy issued by defendant. The insured asked an insurance agent to inquire of defendant concerning the extent of the policy's coverage in the insured's situation. On 4 May 1971, the agent sent the following letter of inquiry to defendant:

> RE: Douglass Allen Pearce, Pol. No. 82-0058
>
> Gentlemen:
>
> Lt. Pearce signed an application in 1968 for $20,000 and he is concerned as to whether or not he is fully covered now that he is in the USAF. He is a 2nd Lt. enrolled in The Navigation School at Mather, Ca. He is flying the T-29 which is a trainer for the Nav School. He has flown 6 hours so far and expects to fly approximately 250 hours during the next 12 months. After graduation he does not have any idea as to which plane he will be assigned.

Will you please check over his coverage and advise us. I feel sure that he is fully covered, however, to make him feel at ease and appreciate his policy and its protection—he would like to have it spelled out over the signature of one of your executives.

Thanks for your usual very prompt service.

On 12 May 1971, the insured received the following letter from defendant:

Policy Number: 82-0085

Dear Mr. Pearce:

We have received Mr. C. L. Dickerson's letter of May 4, 1971, concerning the coverage of your above numbered policy.

Your policy was a $20,000.00 College Defender Program with a $40,000.00 Accidental Death and Dismemberment Rider, $10,000.00 Guaranteed Insurability Option. Your program does not contain a war clause. In other words, the basic program is in full force and effect regardless of your occupation. The Accidental Death Rider portion of the policy would not be payable should your death occur as the result of a direct act of war. However, in addition to the basic policy, this Accidental Death Rider would also be payable should his death occur while in the Armed Forces but not as the result of an act of war.

Should this letter not fully answer your questions or if you would like additional information, please write directly to us or call us collect.

Sincerely yours,

(Miss) Linda Wynne
Policyowners' Service

The insured made no further inquiry and continued paying the premiums on the policy. On 24 July 1979, the insured was killed in an accident involving a military aircraft on which he was acting as a crew member. Defendant has paid plaintiff $20,000 as a result of the insured's death, but has refused to pay the additional $20,000 due under the policy in case of accidental death.

On 25 February 1982, plaintiff filed a complaint alleging the above facts. On the basis of these allegations, plaintiff made nine claims for relief ranging from simple contract to unfair trade practices. Plaintiff prayed the court to award her the $20,000 balance of the $40,000 said to be owing under the policy, treble damages and attorneys' fees under the unfair trade practices theory, actual and punitive damages under the theory of fraud, and to tax the costs of the action to defendant.

On 3 April 1982, counsel for defendant moved the court, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss plaintiff's Complaint for failure to state a claim upon which relief could be granted. The hearing on this motion was held on 9 July 1982. From an order granting defendant's motion to dismiss under Rule 12(b)(6), entered after the hearing, plaintiff appealed.

Akins, Mann, Pike and Mercer, by Jerome J. Hartzell, for plaintiff-appellant.

Reynolds and Howard, by Ted R. Reynolds, for defendant-appellee.

HILL, Judge.

In their briefs, the parties state the following versions of the question presented on appeal:

> Plaintiff: [W]hether, assuming the accuracy of plaintiff's allegations, defendant has acted wrongfully.
>
> Defendant: [W]hether such action [referring to the May, 1971 exchange of letters] can be construed as placing within the coverage of a life insurance policy risks not originally insured against.

There in no dispute about the facts of this case. The sole issue in the case is whether the insured's death is covered under certain terms of a life insurance policy, issued by defendant, which provide for the payment of $40,000 to the beneficiary in the event of the insured's accidental death. The resolution of this issue depends upon the construction and effect given to the letters, set out above, exchanged by the insured, through an agent, and defendant.

The case presents a factual situation of first impression in this jurisdiction. We cannot say which of the constructions urged upon us by the parties is correct. Our review is limited to a consideration of whether it was error for the trial court to dismiss plaintiff's Complaint for failure to state a claim upon which relief could be granted. We hold that it was.

In ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the test to be applied by the court is whether the complaint alleges a set of facts which would entitle the plaintiff to some relief. *Carolina Builders Corp. v. AAA Drywall, Inc.*, 43 N.C. App. 444, 259 S.E. 2d 364 (1979); *Yates v. City of Raleigh*, 46 N.C. App. 221, 264 S.E. 2d 798 (1980). For purposes of testing the sufficiency of a complaint to withstand a motion to dismiss under 12(b)(6), the allegations contained therein are liberally construed and treated as true. *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979). A complaint is sufficient to withstand a motion to dismiss when no insurmountable bar to plaintiff's claim appears on the face of the complaint. *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co., supra; United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). A complaint should not be dismissed unless it appears to a certainty that no state of facts that could be proved in support of plaintiff's claim would entitle him to relief. *Yates v. City of Raleigh, supra* at 225, 264 S.E. 2d at 800. *See generally* 2A Moore's Federal Practice § 12.08 (1983).

Both parties expend considerable effort in their respective arguments proceeding from the premise that the exchange of letters in May of 1971 somehow broadens the coverage of the policy, creating attendant problems of agency and contract law. Without passing on the merits of these contentions, our reading of plaintiff's Complaint and the letters therein establishes to our satisfaction that plaintiff has, at the very least, pleaded no insurmountable bar to her claim.

The 4 May 1971 letter, written on behalf of the insured to defendant, states specifically that the insured is in the armed forces, flying as a crew member on an aircraft, and anticipating later assignment to other aircraft. The letter requests defendant,

on the basis of these facts, to advise the insured as to the extent of his coverage under the policy. The letter recited the insured's name and policy number. The letter also asks that the requested advice be spelled out over the signature of one of the executives of defendant insurance company.

Defendant responded directly to the insured in a letter dated 12 May 1971. The response letter said unequivocally that "the basic program is in full force and effect regardless of your occupation." The response letter further stated that the Accidental Death Rider in the policy would be payable if the insured's death occurred while in the armed forces. The letter said that the Accidental Death Rider would not be payable if the insured's death was the result of an act of war.

There is no mistaking the nature of the 4 May 1971 letter to defendant and no misunderstanding the question asked. Defendant was notified of the insured's entry into the Air Force and the fact that he would be serving as a crew member on a military aircraft. Nevertheless, the response letter of 12 May 1971 did not say that the policy precluded payment of the Accidental Death Rider should the insured's death occur while he was engaged in his occupation, which involved considerable flying as a crew member on a military aircraft.

Without citing them as controlling, our research has disclosed two cases where accidental death benefits were held to be payable in situations similar to the one now before us. In *Schifter v. Commercial Travellers' Mutual Accident Association*, 183 Misc. 74, 50 N.Y.S. 2d 376, *aff'd*, 269 App. Div. 706, 54 N.Y.S. 2d 408 (1944), the insurance contract contained aviation and military exceptions similar to those in the present case. The Accident Association in *Schifter* attached an endorsement to the certificate of membership issued to the insured which said that membership in the Association covered military training "regardless of those provisions which except from payment any claims arising where [the insured] has changed to a hazardous occupation or entered the armed forces of the Nation in time of war." 50 N.Y.S. 2d at 377. The judgment in *Schifter* turned upon the construction to be given to the membership certificate as modified by the endorsement attached. The court found that the insurer knew or should have known that military training involved the possibility of air

training. The court also found that the insurer had no obligation to issue the endorsement but, having done so, was bound by it.

In *Trahan v. Southland Life Insurance Co.*, 155 Tex. 548, 289 S.W. 2d 753 (1956), the insured rejected a life insurance policy offered by defendant because it contained two aviation riders, one covering military flight and the other covering civilian flight. The insured was in the Air Force and wanted full coverage, even while flying. The insurance company removed one of the riders and the insured purchased the policy. The *Trahan* court said that the failure to remove one of the two riders, when the company knew of the reason for the insured's initial refusal, created an ambiguity in the contract which was properly construed against the company. *See* Couch on Insurance §§ 41:555, 41:566 (1982).

North Carolina courts have consistently held that the plain and unambiguous terms of an insurance policy must be given effect and the policy enforced accordingly. *See, e.g., Duke v. Mutual Life Insurance Co.*, 286 N.C. 244, 210 S.E. 2d 187, *reh. denied*, 286 N.C. 547, --- S.E. 2d --- (1974). Where ambiguities exist, it is just as well-established that they are to be resolved in favor of the insured. *See, e.g., White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967). "[A] contract of insurance should be given that construction which a reasonable person *in the position of the insured* would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, ..." *Grant v. Emmco Insurance Co.*, 295 N.C. 39 at 43, 243 S.E. 2d 894 at 897 (1978). [Emphasis added.]

Although the North Carolina cases cited above concern the construction of language in the policy itself, the rules of construction employed in them can be applied to the situation before us. The 4 May 1971 letter to defendant asks whether defendant's interpretation of the Accidental Death Rider in the policy covers him in his then-current occupation. The answer received is capable of being construed by one in the insured's position as bringing him within the coverage of the policy or at least making ambiguous the pertinent terms of the policy.

Whether the policy, as construed, brings the accident resulting in the insured's death within its coverage is a question which the limited scope of our review will not permit us to

answer. We hold only that plaintiff's Complaint does state a claim for relief which, if proven, would sustain a judgment in her favor. The order of the trial court granting defendant's motion to dismiss is therefore vacated and the cause remanded for further proceedings.

Vacated and remanded.

Judges WEBB and BECTON concur.

Judge WEBB concurring.

I concur. I believe the majority is correct in reversing the judgment of the superior court. I believe the plaintiff has made allegations which if proven would estop the defendant from denying coverage under the insurance policy. If the plaintiff can prove that after an inquiry by the deceased the defendant sent the letter of 12 May 1971 to the deceased, a jury could conclude the deceased relied on this letter and did not buy insurance which would have covered him for an accidental death while flying in a military aircraft. This would support a judgment of estoppel.

RAINTREE HOMEOWNERS ASSOCIATION, INC., AND LARRY L. FALCONE, INDIVIDUALLY, AND ON BEHALF OF OTHER PERSONS SIMILARLY SITUATED v. RAINTREE CORP., A CORPORATION

No. 8226SC821

(Filed 21 June 1983)

1. Rules of Civil Procedure § 56.1— motion to dismiss converted into summary judgment motion—timeliness of affidavits

Where defendant filed a Rule 56 motion for summary judgment and a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief, and the Rule 12(b)(6) motion to dismiss was converted into one for summary judgment by the court's consideration of matters outside the pleadings, the trial court did not err in considering affidavits filed by defendant after the summary judgment motion since Rule 12(b) provides that, whenever a Rule 12(b)(6) motion is treated as a motion for summary judgment, the parties shall be given a "reasonable opportunity" to present pertinent materials, and objections to timeliness are thus not germane in such a situation, and since plaintiff's proper remedy would have been a motion for continuance or additional time to produce evidence.

2. Notice § 1— membership agreement—notice of dues increase—notice of fee increase—moot question

A country club membership agreement did not require the club to give members 30 days' notice of its intention to raise the amount of the yearly membership dues because notice of 30 days was required for individual members to withdraw their membership for a membership year without incurring monetary liability. Furthermore, any claim plaintiffs may have had with respect to the club's failure to give members 30 days' notice of any increase in fees for use of club facilities as required by the membership agreement was rendered moot when defendant voluntarily extended the effective date of the fee increases so as to comply with the membership agreement.

APPEAL by plaintiffs from *Grist, Judge.* Judgment entered 4 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 May 1983.

This is a civil action wherein plaintiffs seek to enjoin defendant from raising the amount of certain dues, fees and spending minimums required to be paid by plaintiffs under an Agreement with defendant. Plaintiffs also seek declaratory judgment with respect to certain provisions of the Agreement.

Raintree Country Club is owned and managed by Raintree Corp., defendant. The club and its facilities are situated in the Village of Raintree, a Planned Unit Development, in Mecklenburg County, North Carolina. The development also is managed by defendant.

Plaintiff Raintree Homeowners Association (hereinafter RHOA) is an association of 457 owners of property in the Raintree Development, 245 of whom are members of the club. Plaintiff Falcone is the president of RHOA and a member of the club.

The Residential Membership Agreement is an agreement whereby property owners in the Village of Raintree can become members of the Raintree Country Club. The Agreement is for one year's membership which is automatically extended at the beginning of each membership year (April 1 to March 31). Members in the club are required to pay annual dues on a monthly basis and required to spend a certain minimum amount per month for food and beverages in the club facilities or be billed for such amount. The Agreement provides for annual adjustment of these payments according to a formula specified in the Agreement. The Agreement also provides for certain fees for such things as guests, locker rental and equipment storage. These fees may be

modified by the management of the club in its discretion, provided notice is posted in a conspicuous place at least thirty days prior to the effective date of the increases.

On or about 15 March 1982, all Resident Members received a letter from the club management reminding them to renew their memberships by 31 March 1982. Attached to this reminder was a disclosure statement regarding payment of annual dues for the ensuing membership year. The amount of dues for the 1982-83 membership year reflected an increase over the previous year of 10 percent. Also enclosed was a copy of the Club Account Agreement for the 1982-83 Membership year which similarly reflected a 10 percent increase over the previous year in the required monthly spending minimum.

On or about 15 March 1982, defendant mailed to plaintiffs a Schedule of Fees which reflected increases in various fees for use of club facilities. These increases were to become effective on 1 April 1982.

On 31 March 1982, plaintiff RHOA filed suit in Superior Court of Mecklenburg County seeking: (1) a permanent injunction enjoining defendant from increasing membership dues and the monthly food and beverage spending minimums for the 1982-83 membership year, (2) a temporary restraining order and preliminary and permanent injunctions enjoining defendant from making any increase in the Schedule of Fees until it had complied with the notice provisions of the Membership Agreement, and (3) declaratory judgment that the provision of the Membership Agreement regarding the adjustment of annual dues and the monthly food and beverage spending minimums was void. Submitted along with this Complaint were Exhibits A through E and three affidavits which supported the allegations in the Complaint.

The Temporary Restraining Order was not granted, and a hearing on the Preliminary Injunction was set and later continued for a 3 May 1982 hearing.

On 22 April 1982, defendant moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and for dismissal for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6).

Also on 22 April 1982 plaintiffs filed an amended complaint seeking to convert the action to a Class Action by adding plaintiff Falcone as a complainant in his individual capacity and as representative of all other persons similarly situated. The amended complaint alleged no additional facts pertinent to the cause of action but added a Fourth and Fifth Claim for Relief, seeking specific performance and damages respectively. Plaintiffs submitted twenty-seven affidavits in support of their amended allegations.

On 28 April 1982, defendant filed a motion to dismiss the amended complaint, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief could be granted. This motion was accompanied by two affidavits, filed 30 April 1982, tending to show, among other things, that the effective date of the proposed increase in the Schedule of Fees had been postponed to 15 April 1982 and was therefore in compliance with the notice requirement of the Membership Agreement.

On 3 May 1982, at the hearing on the motions plaintiffs filed written objections to defendant's motions on the grounds that the affidavits supporting them were not timely. Plaintiff also objected on the same grounds to a supplemental affidavit filed by defendant at the hearing. Defendant moved under Rule 7(b)(1) to dismiss the amended complaint.

The trial court held that defendant's affidavits were timely and properly before the court with respect to defendant's motions of 22 April 1982 and, in its discretion, allowed them to be filed as supporting affidavits after the motions had been filed. Plaintiffs failed to request a continuance or additional time to produce evidence and, the court held, by appearing for and participating in the hearing on the summary judgment motion, had in any event waived their objections to that hearing.

The court denied plaintiffs' motion for a preliminary injunction and granted defendant's motions to dismiss and for summary judgment as to the complaint and defendant's motion to dismiss the amended complaint. Plaintiffs' motion on 12 May 1982 under Rule 59(e) to alter the judgment was also denied.

From the court's order denying plaintiffs' motion for a preliminary injunction and granting defendant's motions to dismiss

the complaint and amended complaint and for summary judgment, plaintiffs appealed.

Weaver & Bennett, by F. Lee Weaver for plaintiffs, appellants.

Kennedy, Covington, Lobdell & Hickman, by Edgar Love III for defendant, appellee.

HEDRICK, Judge.

[1] Plaintiffs first ask us to consider whether it was error for the trial court to permit the filing of affidavits supporting defendant's motion for summary judgment.

Plaintiffs point out that the trial court's order, "That defendant's motion to dismiss and for summary judgment as to the complaint be granted and that the complaint and each claim thereunder be dismissed" is unclear as to whether it is based on the pleadings alone or whether matters outside the pleadings were considered. Because the trial court allowed the filing of the affidavits without limiting their use, plaintiffs contend that defendant's 12(b)(6) motion was thereby converted to one for summary judgment, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), and asks us to consider the propriety of the trial court's action in that context.

Plaintiffs argue that it was error for the trial court to consider, in connection with the summary judgment motion, the affidavits filed with the court on 30 April 1982, and the supplemental affidavit filed on 3 May 1982 on the grounds that they were not timely. In support of their argument, plaintiffs refer us to the North Carolina Rules of Civil Procedure, specifically Rule 6 as it applies to Rule 56 regarding the submission of affidavits in support of a motion for summary judgment. Plaintiffs argue that Rule 6(d) requires that supporting affidavits be served with the motion unless the filing period has been enlarged by the court. Since the court in this case had not enlarged the filing period, plaintiffs argue, defendant was required to submit its supporting affidavits with its motion for summary judgment.

Plaintiffs cite us to the case of *Insurance Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E. 2d 421, 423 (1974), wherein this Court

held that "Rule 6(d) applies to affidavits in support of a Rule 56 motion for summary judgment."

We do not question the holding in *Chantos*, but find that case to be clearly distinguishable from the one before us. There, the court was concerned with the timeliness of affidavits filed in support of a motion for summary judgment. Here, we are concerned with two motions, one for dismissal under Rule 12(b)(6) and one for summary judgment under Rule 56.

Plaintiffs properly objected to the defendant's filing of affidavits after the summary judgment motion was filed and, if summary judgment were the only motion under consideration by the court, the affidavits should have been excluded by the court. However, the court also had before it defendant's 12(b)(6) motion to dismiss. Plaintiffs correctly contend that the court's implicit consideration of defendant's affidavits in connection with the 12(b)(6) motion converts that motion to one for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 12(b). Rule 12(b) also says that, in such a case, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* It is significant that the rule provides a "reasonable opportunity" rather than requiring that the presentation of materials be in accordance with Rule 56.

In a previous case with this defendant as plaintiff, this Court held that the notice required by Rule 12(b) in situations where, as here, a 12(b)(6) motion is being treated as a motion for summary judgment is procedural rather than constitutional. *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). As such, the proper action for counsel to take is to request a continuance or additional time to produce evidence. *Id.* Objections to timeliness are therefore not germane in such situations and the trial court had discretion, provided the opposing party has a "reasonable opportunity" to present pertinent material, to take and consider affidavits in support of a converted 12(b)(6) motion. By participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to this procedural notice. *Id., see also Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975).

In the present case, plaintiffs' objections to the affidavits filed 28 April 1982 and 3 May 1982 concern the timeliness of

their filing. Under the circumstances of this case, such objections are not appropriate. Plaintiffs did not request a continuance or additional time to produce evidence. Plaintiffs having participated in the hearing on the motion for summary judgment, without such objection or request for continuance, thereby waived any right to procedural notice with respect to the hearing. It was not an abuse of discretion for the trial court to consider defendant's affidavits and grant defendant's motion for summary judgment. The affidavits were properly before the court and plaintiff's contention is without merit.

We move now to a consideration of whether the trial court's grant of summary judgment for defendant was proper.

[2] (A) In their first claim, plaintiffs ask the court to find that the Membership Agreement, submitted with plaintiffs' complaint as Exhibit A, requires defendant to provide thirty days notice of its intention to raise the amount of yearly membership dues and the minimum monthly expenditure and that by failing to provide this notice, defendant is equitably estopped from increasing these amounts for the membership year 1982-83. Plaintiffs ask this Court to enjoin defendant from raising the dues and monthly minimum expenditure for the 1982-83 membership year.

In support of their claim for an injunction, plaintiffs argue that the Membership Agreement requires defendant to notify plaintiffs of its intention to raise the dues and minimum expenditure amount at least thirty days in advance of the date on which membership in the club is automatically extended for the following membership year.

Plaintiffs argue that defendant is equitably bound to give such notice under the following theory: Thirty days notice is required in order for individual members to withdraw their membership for a membership year without incurring monetary liability. Therefore, plaintiffs contend, defendant was required to notify plaintiffs of any increase enough in advance of the membership renewal deadline to allow plaintiffs to withdraw from membership without incurring financial liability.

The Agreement, however, has no requirement for such notice. Further, no construction of the Agreement will support plaintiffs' theory that defendant is equitably estopped from no-

tifying plaintiffs of any increase in dues or monthly minimum expenditure less than thirty days before the date on which memberships are automatically renewed.

Therefore, the plaintiffs have pleaded an insurmountable bar to their claim and there is no genuine issue of material fact. The trial court's order, whether denominated summary judgment for defendant or dismissal of plaintiffs' complaint under 12(b)(6), must be affirmed.

(B) In their second claim, plaintiffs ask the Court to find that the Membership Agreement requires defendant to give thirty days notice prior to the effective date of any increase in certain fees for use of club facilities. Plaintiffs pray the court to enjoin defendant from increasing such fees until the thirty day notice requirement is complied with.

The Membership Agreement does provide that defendant conspicuously post notification of fee increases at least thirty days prior to the effective date of such increases. However, the affidavits and exhibits offered in support of defendant's motion for summary judgment with respect to this claim disclose that defendant voluntarily extended the effective date of the fee increases so as to be in compliance with the Membership Agreement.

We are prepared to hold that any claim the plaintiffs may have had with respect to this issue was therefore made moot by defendant's subsequent compliance with the notice requirement.

The record before us affirmatively discloses that plaintiffs have suffered no damage and have suffered no irreparable injury and are therefore not entitled to any relief prayed for in any of their claims. The record affirmatively discloses that there is no genuine issue of material fact. The trial court's judgment granting defendant's motions for summary judgment for defendant and dismissing plaintiffs' complaint with prejudice is therefore affirmed.

Affirmed.

Judges WELLS and PHILLIPS concur.

CHARLES OLIN SETHNESS III v. ANN WORCESTER SETHNESS

No. 8215DC813

(Filed 21 June 1983)

Husband and Wife § 10.1— separation agreement—cohabitation with another man—no breach of agreement

The trial court properly dismissed plaintiff's cause of action to have certain provisions of a separation agreement between plaintiff and defendant declared void on the ground that defendant had cohabited with a man which was contrary to the public policy of North Carolina therefore making the agreement illegal, void, and unenforceable. Under the agreement, cohabitation by defendant with another man did not constitute a breach of the agreement or grounds for termination of plaintiff's support obligation. Nor can the Court say that such acts, even if substantiated, would be cause for voiding the agreement with respect to the executory provisions regarding alimony.

APPEAL by plaintiff from *Hunt, Judge.* Judgment entered 20 May 1982 in District Court, ORANGE County. Heard in the Court of Appeals 8 June 1983.

This is a civil action wherein plaintiff seeks to have certain provisions of a separation agreement between plaintiff and defendant declared void. Plaintiff also seeks custody of the minor child of the marriage between plaintiff and defendant.

On 1 August 1976, plaintiff and defendant, husband and wife, entered into a separation agreement in the State of New York. The portions of that agreement pertinent here are set forth below:

ARTICLE 6. SUPPORT OF WIFE

. . . .

6.2 In addition to the promissory note set forth in paragraph 6.1 above, the Husband shall pay to the Wife for her support and maintenance the sum of $41,004. per annum, in equal monthly installments of $3,417. each in advance, beginning on the effective date of this agreement inclusively to and through the installment payable on December 1, 1980, for the year ending December 31, 1980. Thereafter, for the calendar year, 1981, the payments which the Husband shall make to the Wife pursuant to this paragraph shall be $42,000. per annum, in equal monthly installments of $3,500. each in ad-

> vance, beginning on January 1, 1981, to and through the installment payable for the year ending December 31, 1981. Thereafter, for the calendar year, 1982, the payments which the Husband shall make to the Wife pursuant to this paragraph shall be $42,996. per annum, in equal monthly installments of $3,583. each in advance, beginning on January 1, 1982, to and through the installments payable for the year ending December 31, 1982. Thereafter, beginning with the calendar year, 1982, the payments which the Husband shall make to the Wife pursuant to this paragraph shall be $44,000. per annum, in equal monthly installments of $3,650. each in advance, beginning January 1, 1983, and thereafter.
>
> . . . .
>
> ARTICLE 13. <u>ARBITRATION</u>
>
> 13.1 Any claim, dispute or misunderstanding arising out of or in connection with this agreement or the interpretation or meaning of any part thereof shall be arbitrated by the parties in the City of New York and under the auspices and pursuant to the then existing rules of the American Arbitration Association. The award of the arbitrators shall be final and binding upon both parties, and judgment may be entered thereon in any court having jurisdiction. The cost of the arbitration including the reasonable legal fees incurred by the Wife therein, shall be paid by the Husband as the same shall be fixed and determined by the arbitrator. It is the intention of the parties, if occasion arises for an arbitration, that the arbitration proceed with reasonable promptness and that a determination be made without undue delay.

The separation agreement also provided that custody of the minor child would be with defendant. In addition to the above provisions, plaintiff was required by the separation agreement to make certain other financial arrangements that inured to the benefit of defendant and the minor child. These other arrangements included such things as maintaining a life insurance policy and providing for the medical expenses and support of the minor child.

Subsequent to entering into the separation agreement, defendant relocated to North Carolina and plaintiff to Massachusetts.

On 18 April 1982, plaintiff filed a complaint in Orange County, North Carolina. The "First Cause of Action" of the Complaint alleged, *inter alia*, that defendant had "lewdly and lasciviously associated, bedded and cohabited with a man." Plaintiff further alleged that such conduct was contrary to the public policy of North Carolina and that the agreement to pay alimony was therefore illegal, void, and unenforceable. On the basis of defendant's alleged cohabitation, plaintiff's "Second Cause of Action" alleged that defendant was not a fit and proper person to have custody of the minor child. In his prayer for relief, plaintiff sought to have the 1 August 1976 separation agreement declared illegal and void as against public policy and therefore unenforceable with regard to the executory provisions concerning alimony. Plaintiff also sought custody of the minor child.

In April of 1982, prior to the filing of the Complaint by plaintiff, defendant filed a demand for arbitration under the separation agreement in New York. This demand was filed in response to plaintiff's alleged breach of the terms of the agreement concerning increases in the amount of yearly support payments. On 21 April 1982, plaintiff filed a Motion to Stay Arbitration alleging as grounds therefore his pending challenge to the legality and enforceability of the agreement.

On 3 May 1983, defendant filed an Application to Compel Arbitration alleging that the issues raised by plaintiff's Complaint were, by the terms of the separation agreement, properly subjects of arbitration. Defendant also alleged that plaintiff had refused to submit the issues to arbitration. Defendant moved to dismiss plaintiff's Complaint under Rule 12(b)(1), N.C. Rules Civ. Pro., for lack of jurisdiction and, in the alternative, to dismiss plaintiff's First Cause of Action under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Defendant also moved the court to stay its proceedings on those issues subject to arbitration. On 20 May 1983, after a hearing on plaintiff's and defendant's several motions, the trial court entered an order which:

(1) Denied plaintiff's motion to stay arbitration as to the First Cause of Action.

(2) Allowed plaintiff's motion to stay arbitration as to the Second Cause of Action.

(3) Denied defendant's motion to dismiss the Complaint for lack of jurisdiction.

(4) Granted defendant's motion to dismiss plaintiff's First Cause of Action for failure to state a claim upon which relief could be granted.

(5) Compelled the parties to proceed with the arbitration commenced in New York as to plaintiff's First Cause of Action.

From that portion of the Order granting defendant's Motion to Dismiss plaintiff's First Cause of Action and compelling arbitration with respect thereto, plaintiff appealed.

Douglas, Ravenel, Hardy, Crihfield and Bullock, by G. S. Crihfield and James W. Lung for plaintiff-appellant.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill, and Hargrave, by Roger B. Bernholz for defendant-appellee.

HILL, Judge.

Plaintiff's first contention on appeal is that the trial court erred in dismissing plaintiff's Complaint for failure to state a claim upon which relief could be granted.

Plaintiff argues that the allegations in his Complaint establish his right to the relief prayed for: that the separation agreement be declared void.

In ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the test to be applied by the court is whether the complaint alleges a set of facts which would entitle the plaintiff to some relief. *Carolina Builders Corp. v. AAA Drywall, Inc.*, 43 N.C. App. 444, 259 S.E. 2d 364 (1979); *Yates v. City of Raleigh*, 46 N.C. App. 221, 264 S.E. 2d 798 (1980). For purposes of testing the sufficiency of a complaint to withstand a motion to dismiss under 12(b)(6), the allegations contained therein are liberally construed and treated as true. *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979). However, " 'conclusions of law or unwarranted deductions of fact are not admitted.' " *Sutton v. Duke*, 277 N.C. 94 at 98, 176 S.E. 2d 161 at 165 (1970), *quoting* 2A Moore's Federal Practice

§ 12.08 (2d ed. 1968). A complaint is sufficient to withstand a motion to dismiss when no insurmountable bar to plaintiff's claim appears on the face of the complaint. *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co., supra; United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). A complaint should not be dismissed unless it appears to a certainty that no state of facts that could be proved in support of plaintiff's claim would entitle him to relief. *Yates v. City of Raleigh, supra* at 225, 264 S.E. 2d at 800. *See generally Sutton v. Duke, supra*, 2A Moore's Federal Practice § 12.08 (1983).

In support of his contention, plaintiff cites us to G.S. § 52-10.1 for the proposition that separation agreements are "valid only so long as 'not inconsistent with public policy.'" Plaintiff also cites several cases where separation agreements were found to be void as against public policy and thus unenforceable. *Pierce v. Cobb*, 161 N.C. 300, 77 S.E. 350 (1913); *Howland v. Stitzer*, 236 N.C. 230, 72 S.E. 2d 583 (1952); *Foy v. Foy*, 57 N.C. App. 128, 290 S.E. 2d 748 (1982). Our reading of these cases shows the agreements involved to be void by their own terms at the time of their execution. The clear implication of these cases and the statute cited, as defendant points out, is that such agreements may not by their own terms promote objectives (i.e.: divorce, termination of parental rights) which are offensive to public policy. While these authorities are pertinent here, they are not controlling.

Murphy v. Murphy, 295 N.C. 390, 245 S.E. 2d 693 (1978), is cited by plaintiff in support of his contention that "illicit intercourse" is grounds for invalidating a separation agreement. *Murphy*, however, involved the resumption or continuation of sexual relations between a husband and wife after they had executed a separation agreement. The court in *Murphy* found that sexual relations between the parties to a separation agreement, even if infrequent, were irreconcilably inconsistent with the intent of the agreement and the policy of the law sanctioning such agreements. *Id.* The fact that the individuals involved in the sexual relations were both parties to the separation agreement is essential to the holding in *Murphy*. Here, the sexual relations which plaintiff contends invalidate the separation agreement involve defendant-wife and another man who has never been defendant's husband and is

not a party to the separation agreement. The rationale of *Murphy* does not apply and that case does not control the result here.

More on point is the case of *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E. 2d 809 (1977), where this Court found that cohabitation by one party to a separation agreement does not necessarily invalidate the agreement or relieve a party of his support obligations thereunder. *Riddle* holds, in accordance with general principles of contract law, that a separation agreement must be enforced according to its own terms. The applicable provision of this separation agreement, quoted at the outset, provides that plaintiff is to pay defendant certain sums of money. This obligation is to continue until the happening of certain events stated in the agreement (*i.e.*: emancipation of the child, remarriage of defendant). The agreement also confirms the right of the parties to "live separate and apart" and provides that "neither party shall interfere with the rights, privileges, doings or actions of the other." Under the agreement, cohabitation by defendant with another man does not constitute a breach of the agreement or grounds for termination of plaintiff's support obligation.

We do not condone illicit cohabitation or illicit intercourse and we note that such acts violate the laws of this state. We cannot say, however, that such acts, even if substantiated, would be cause for voiding the agreement with respect to the executory provisions regarding alimony. Therefore, plaintiff has pleaded an insurmountable bar to his claim and the trial court correctly dismissed the Complaint. Because a separation agreement does not specifically prohibit "illicit intercourse" and cohabitation and may, by implication, even condone such acts, it does not therefore follow that the agreement promotes them. Whether the silence of a separation agreement on such issues renders it void as against public policy is a matter for legislative, not judicial, determination. *See Stallings v. Stallings*, 36 N.C. App. 643, 244 S.E. 2d 494, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 249 (1978).

Plaintiff next excepts to and assigns as error the trial court's granting of defendant's Motion to Compel Arbitration. Plaintiff contends that there is a material issue of fact as to whether there exists an agreement to be the subject to arbitration. In his brief, plaintiff argues that the agreement, even if valid under New York law, cannot be given effect in North Carolina if contrary to the

public policy of this state. Plaintiff also argues that the law of the state where the agreement was executed controls its construction and validity. Where the agreement is attacked as being contrary to public policy, the law of the forum controls. Plaintiff has attacked the separation agreement here as being contrary to public policy. We have relied on the laws of North Carolina in reaching our determination that the agreement is not invalid for that reason. Plaintiff's contention in this regard is without merit.

Those portions of the trial court's 20 May 1982 Order granting defendant's Motions to Dismiss plaintiff's First Cause of Action and to Compel Arbitration as to plaintiff's First Cause of Action are affirmed.

Affirmed.

Chief Judge VAUGHN and Judge BECTON concur.

IN THE MATTER OF THE ARBITRATION BETWEEN JACK O. BOYTE, ARCHITECT, HEREINAFTER REFERRED TO AS "CLAIMANT," AND MR. AND MRS. CLYDE C. DICKSON, JR. AND C. C. DICKSON COMPANY, HEREINAFTER REFERRED TO AS "RESPONDENTS," AMERICAN ARBITRATION ASSOCIATION CASE NUMBER: 31 10 0052-81

No. 8226SC771

(Filed 21 June 1983)

1. **Arbitration and Award § 4— arbitration proceedings—persons not parties to arbitration agreements**

The trial court did not err in failing to vacate an arbitrator's award because the individual respondents were not parties to the arbitration agreement between claimant and the corporate respondent, and the female respondent was not a party to claimant's agreement with the male respondent, where respondents consented to the consolidation of the proceedings for arbitration, none of the respondents applied for a stay of the proceeding or objected thereto, and all respondents participated in the arbitration proceedings without objection to their status as parties. G.S. 1-567.3; G.S. 1-567.13.

2. **Arbitration and Award § 6— arbitration award—remand for clarification**

Pursuant to the applications of claimant and respondents, the trial court had authority under G.S. 1-567.10 to remand an arbitration award for clarification.

3. Arbitration and Award § 6— revision of arbitration award

Upon remand for clarification of an arbitration award requiring respondents to pay claimant a certain amount for architect services on a house project and on a warehouse project, the arbitrator did not err in revising the award so that the total amount of the award was due only from the individual defendants for services on the house project.

APPEAL by respondents Mr. and Mrs. Clyde C. Dickson, Jr., from *Grist, Judge.* Judgment entered 25 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 May 1983.

This is an appeal from a judgment of the trial court confirming a "clarified" arbitration award.

Jack O. Boyte, claimant, commenced arbitration proceedings against respondents Dickson and against C. C. Dickson Company to collect money allegedly due under two separate construction contracts, each of which contained an arbitration clause whereby disputes were to be resolved according to the Construction Industry Arbitration Rules of the American Arbitration Association (AAA). The first contract was for the construction of a beach house in South Carolina. The contract designated respondents Mr. and Mrs. Dickson as "owners" and claimant Boyte as the architect. The contract was executed by claimant and Mr. Dickson. The second contract was for the construction of an office and warehouse project in Charlotte, North Carolina. Claimant Boyte was again designated as the architect and C. C. Dickson Company was designated as "owner." This contract was also executed by claimant and Mr. Dickson.

Claimant served upon respondents two separate notices of intention to arbitrate, one as to the claim against respondents Dickson for money due on the beach house and another as to the claim against C. C. Dickson Company for money due on the office and warehouse project. Accompanying this service was a copy of a letter from claimant's counsel to AAA requesting that the two claims be consolidated for arbitration. Respondents consented to consolidation and the AAA notified all parties that it would proceed with the claims "as one arbitration." All parties were served with a written notice of hearing from the AAA, showing that the claims were to be consolidated. On 13 October 1982, both claims were heard before one arbitrator, the beach house claim being

heard in the morning and the office and warehouse claim being heard in the afternoon.

The award of the arbitrator read, in pertinent part, as follows:

In the Matter of the Arbitration between

JACK O. BOYTE, ARCHITECT, hereinafter referred to as "CLAIMANT"

AND

MR. AND MRS. CLYDE C. DICKSON, JR. AND C. C. DICKSON COMPANY, hereinafter referred to as "RESPONDENTS"

CASE NUMBER: 31100052-81

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February 1, 1979 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

RESPONDENTS shall pay to CLAIMANT the sum of SEVEN THOUSAND NINE HUNDRED THIRTY DOLLARS AND THIRTY-THREE CENTS ($7,930.33). This amount is for services rendered on the house and warehouse/office project.

If this AWARD is not paid within thirty (30) days from the date hereof, then this AWARD may be considered a specific lien against the RESPONDENTS' lots, subject to the applicable statutory regulations.

The administrative fees and expenses of the American Arbitration Association shall be borne equally by the parties and shall be paid as directed by the Association.

This AWARD is in full settlement of all claims and counterclaims submitted to this arbitration.

Thereafter, claimant asked the arbitrator to clarify the award and the arbitrator refused. Claimant then filed with the court alternative motions for confirmation, clarification and modification of the award and respondents filed alternative mo-

tions to vacate, correct or modify the award. The trial judge heard the motions of claimant and respondents and, finding that the award as rendered was "imperfect in a matter of form" and that it was in need of "clarification and modification pursuant to G.S. 1-567.10 and 1-567.14 so as to separate and delineate those portions of the award applicable to the different respondents," remanded the award to the arbitrator for clarification and modification.

The clarified award read, in pertinent part, as follows:

> I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February 1, 1979 and having been duly sworn and having duly heard the proofs and allegations of the Parties, and having rendered an AWARD dated December 5, 1981, and in compliance with Judge Grist's Order for Clarification and Modification of Arbitration Award, dated March 11, 1982, hereby clarify said AWARD as follows:
>
> 1. That portion of the total award of $7,930.99 [sic] which is chargeable against and due from the Respondent, C. C. DICKSON COMPANY.
>
> No Award $-0-
>
> 2. That portion of the total award of $7,930.33 which is chargeable against and due from the Respondents, MR. AND MRS. CLYDE C. DICKSON, JR.
>
> Award $7,930.33
>
> In all other respects the AWARD dated December 5, 1981 shall remain in full force and effect.

From judgment confirming the award as modified, respondents Dickson appealed.

Parker Whedon for claimant-appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Christian R. Troy, for respondent-appellants.

WELLS, Judge.

[1] In their first argument, respondents contend that the trial court erred in failing to vacate the arbitrator's initial award because neither Mr. or Mrs. Dickson was a party to the agreement between claimant Boyte and C. C. Dickson Company and because Mrs. Dickson was not a party to either of the agreements. The record clearly shows that Mr. and Mrs. Dickson were properly served with notice of Boyte's intention to arbitrate the beach house agreement and that C. C. Dickson Company was properly served with notice of intent to arbitrate the office and warehouse agreement. None of the respondents moved to stay either arbitration, but instead agreed to consolidate the proceedings and appeared and participated in the proceedings. G.S. 1-567.3 provides the means by which a party on notice of intent to arbitrate may object to or seek to stay a demand for arbitration on the grounds that there is no agreement to arbitrate.

Sec. 1-567.3. *Proceedings to compel or stay arbitration.*

(a) On application of a party showing an agreement described in G.S. 1-567.2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

. . .

G.S. 1-567.13, in pertinent part, provides:

Sec. 1-567.13. *Vacating an award.*

(a) Upon application of a party, the court shall vacate an award where:

. . .

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

. . .

The record in this case shows that none of the respondents, after being served with notice, applied for a stay of the proceedings, or objected to the proceedings, but rather that they consented to the consolidation of the proposed proceedings and participated, without objection as to their status as parties, in the proceedings. Under such circumstances, the trial court acted correctly in not granting respondents' motion to vacate the award on the grounds that there was no agreement between the respective respondents and claimant Boyte to arbitrate the claims asserted by Boyte.

[2] Respondents also argue that since the trial judge found the arbitrator's award to be imperfect in a matter of form, he was without authority to remand for clarification or modification. G.S. 1-567.10 provides:

Sec. 1-567.10. *Change of award by arbitrators.*

On application of a party or, if an application to the court is pending under G.S. 1-567.12 [Confirmation of an award], 1-567.13 or 1-567.14 [Modification or correction of award], on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 1-567.14, or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within 10 days from the notice. The award so modified or corrected is subject to the provisions of G.S. 1-567.12, 1-567.13 and 1-567.14.

Pursuant to the applications filed by both claimant and respondents, the foregoing portion of the Act clearly grants authority to the trial court to remand an award for "the purpose of clarifying the award."

All of respondents' assignments of error brought forward in their first argument are overruled.

[3] In their second argument, respondents contend that the modified award was invalid because it did not "clarify" the first award, but changed the award to assess all the award against Mr. and Mrs. Dickson. Essentially, respondents' second argument challenges the legality of the second award, respondents contending that the arbitrator exceeded his powers. We cannot agree. The rule in such cases was stated by this Court in *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 255 S.E. 2d 414 (1979):

> The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. *See* 6 C.J.S., Arbitration, Sec. 149, *et seq.*, p. 397. The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. 5 Am. Jur. 2d, Arbitration and Award, Sec. 167, *et seq.*, p. 643.

See also In re Cohoon, 60 N.C. App. 226, 298 S.E. 2d 729, *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 388 (1983). The action of the arbitrator in this case to revise his award to assess all remaining claims in the two proceedings was clearly within his authority. Mistakes of fact or law in such awards may not be reviewed by the courts. *Id.*

In their third argument, respondents assert that they have been deprived of their property without due process of law for lack of notice and hearing. These arguments may not prevail, for the reasons we have stated in disposition of respondents' first argument.

The judgment of the trial court must be and is

Affirmed.

Judges HEDRICK and PHILLIPS concur.

LEWIS HARDY v. FRED DOUG CRAWFORD; JOHN WESLEY CRAWFORD; MICK CRAWFORD; JESSIE BLYE AND WIFE, LOUISE BLYE; HOUSTON BLYE; RUBY BLYE SMITH AND HUSBAND, GEORGE SMITH; LILLIAN BLYE; ATHEL BOWMAN; AND THE HEIRS AT LAW OF SAM BOWMAN

No. 8225SC757

(Filed 21 June 1983)

Boundaries § 15; Trespass to Try Title § 4— boundary dispute—invalidity of prior consent judgment

A 1916 consent judgment entered in an action between the predecessors in title of plaintiffs and defendants was void and incapable of supporting a defense of *res judicata* as to the ownership of disputed land where (1) the language of the judgment indicated that a map was an integral part of the judgment and essential to its completion, and the map was not found with the judgment or otherwise produced, and (2) the metes and bounds description in the judgment was indefinite in that it used the word "about" six times when referring to the call distances and it varied from existing property lines and lacked considerable distance in closing.

APPEAL by defendant from *Hairston, Judge.* Judgment entered 22 March 1982 in Superior Court, BURKE County. Heard in the Court of Appeals 16 May 1983.

This civil action involves an ownership dispute concerning certain real property in Burke County, North Carolina. Plaintiffs claim ownership as the heirs-at-law of John Hardy who took fee simple title to the land by warranty deed, which deed was recorded in 1908. Defendants claim ownership under a 1916 Consent Judgment involving as parties defendants' predecessors in title and John Hardy. The Judgment purported to award ownership of certain land to defendants' predecessors in title, a portion of which [hereinafter referred to as disputed land] is that claimed by plaintiffs under their deed.

Plaintiffs initiated legal proceedings in this matter by obtaining a Temporary Restraining Order on 4 September 1980. The Order restrained defendants from trespassing on the disputed

land and from cutting timber thereon. Plaintiffs filed a Complaint with their Application for Temporary Restraining Order seeking to permanently enjoin defendants from trespassing or cutting timber on the disputed land. In addition, the Complaint sought monetary recovery for damages resulting from the alleged trespass.

Prior to the initiation of these legal proceedings, on 6 May 1980, F. D. Crawford, one of the defendant-appellants, executed a Quitclaim Deed to his son, J. W. Crawford, also a defendant-appellant, conveying his interest in the disputed land. On 28 August 1980 J. W. Crawford executed a Timber Deed to Danny Hudgins, conveying to him certain rights in the timber on the disputed land. It was Hudgins' entry onto the land and timber-cutting activity that plaintiffs sought to enjoin in their Complaint. Accordingly, plaintiffs amended their Complaint to reflect these additional facts. In the Complaint as amended, plaintiffs named Hudgins and Richard Beyer, trustee for J. W. Crawford, as additional defendants. Plaintiffs also asked that the 6 May 1980 Quitclaim Deed and the 28 August 1980 Timber Deed be declared null and void.

Defendant Hudgins answered on 27 May 1981 admitting his entry onto and timber cutting on the disputed land but denying trespass or liability for any damages on the grounds that his action was pursuant to the Timber Deed. Defendant Hudgins prayed the court to declare the Timber Deed null and void and to direct defendant Beyer to return to him the money paid for the timber rights.

The defendants, except defendant Hudgins, answered on 16 March 1982 denying plaintiffs' ownership of the disputed land. Defendants asked that the Temporary Restraining Order be lifted and that the question of ownership be determined by a jury.

This matter was tried on 27 March 1982. At the request of counsel for plaintiffs and defendants the matter was tried before the court without a jury. After making findings of fact and conclusions of law, the court entered a judgment, the pertinent portions of which are summarized as follows: (1) Plaintiffs are owners of marketable record title in the disputed land; (2) defendants are permanently enjoined from trespassing or cutting timber on the disputed land; and (3) the Quitclaim Deed of 6 May 1980 and the

Timber Deed of 28 August 1980 conveyed no interest in the property described therein. From this judgment, defendants appealed.

Byrd, Byrd, Ervin, Blanton, Whisnant and McMahon, by John W. Ervin, Jr., for plaintiff-appellees.

Simpson, Aycock, Beyer and Simpson, by Richard W. Beyer, for defendant-appellants.

HILL, Judge.

Plaintiff's claim to the disputed land is based on a warranty deed executed on 21 December 1907 and recorded in the office of the Burke County Register of Deeds on 25 July 1908. The deed conveys fee simple title in a parcel of land "containing thirty acres more or less" to John Hardy and his heirs and assigns. A survey conducted in 1980 showed the actual area to be 50.83 acres. Plaintiffs here are the heirs-at-law of John Hardy.

Defendants' claim to the disputed land arises from a Consent Judgment entered in December of 1916 in Burke County Superior Court. Parties to the Judgment included defendants' predecessors in title as plaintiffs and John Hardy as one of the defendants. The 1916 Judgment recites a metes and bounds description of property that includes a significant portion, approximately 28 acres, of the lands claimed by plaintiffs under the 1907 deed. In addition to the metes and bounds description, the Judgment also makes reference to a map showing the land to which the plaintiffs, defendants' predecessors in title, were entitled under the Judgment. However, there was no map accompanying the written Judgment or otherwise found which purported to be a map of the written description in the Judgment.

Plaintiffs' evidence consisted of the 1907 deed to John Hardy and the deeds to tracts surrounding the disputed land which tended to establish the boundaries thereof. Plaintiffs had the land described in their deed surveyed. From the survey and the deeds to the surrounding land, a composite map of the area was prepared which showed the boundaries established by the metes and bounds descriptions in the deeds. This map and the testimony of the surveyor who prepared it were part of plaintiffs' evidence. Plaintiffs' other evidence tended to show that plaintiffs and John Hardy had paid taxes on the disputed land, that they had put the

land to the uses to which it was susceptible, and that the general reputation of the land placed ownership in plaintiffs. Plaintiffs' evidence also included testimony and documents showing that John Hardy had initiated legal proceedings to enjoin defendants from cutting timber on the land in 1950.

Defendants' evidence consisted of the 1916 Consent Judgment and a mapped plot of the metes and bounds recited therein. Testimony from one witness indicated that a survey had been done and a map prepared pursuant to the 1916 Judgment. Other evidence for defendants included testimony regarding the extent of plaintiffs' use of the disputed land and a map showing the plot of the Consent Judgment overlaying the composite map of the disputed land and surrounding tracts prepared by plaintiffs.

On the basis of the evidence, the trial court made findings of fact which are summarized as follows:

—That plaintiffs claim title to the disputed land as the heirs-at-law of John Hardy, to whom fee simple title was conveyed by warranty deed recorded 25 July 1908 in the office of the Burke County Register of Deeds.

—That John Hardy and plaintiffs have had possession of and exercised dominion and control over the disputed land for more than sixty years.

—That the grantors of the 6 May 1980 Quitclaim Deed and the 28 August 1980 Timber Deed possessed no ownership interest in the disputed land and that the grantees of the deeds acquired no interest thereby.

—That the 1916 Consent Judgment involving the predecessors in title of plaintiffs and defendants was incomplete in that no map was ever filed in accordance with the Judgment and that the metes and bounds description was so indefinite that no boundary lines could be ascertained.

Based on these findings, the trial court made the following pertinent conclusions of law (summarized):

—The purported Consent Judgment entered in the 1916 Term of Superior Court, Burke County is void for the reason that it is both incomplete and indefinite and therefore cannot sustain a defense of *res judicata*.

—No interest in the disputed land or the timber thereon was conveyed by either the Quitclaim Deed of 6 May 1980 or the Timber Deed of 28 August 1980 and neither of the grantors in those Deeds possessed any interest in the disputed land or the timber thereon.

Defendants excepted to the trial court's findings of fact and conclusions of law. On appeal, defendants makes several assignments of error which, though variously worded, challenge the sufficiency of the evidence to support the findings of fact and the sufficiency of the findings to support the conclusions drawn therefrom.

Defendants' first argument is twofold. Defendants contend that the 1916 Consent Judgment is complete and definite and resolves the question of the ownership of the disputed land as to all parties in the present action. Based on this contention, defendants argue that the 1916 Judgment is valid and should operate as *res judicata* in the present dispute. Whether defendants' argument has any merit obviously depends on the validity of the 1916 Judgment.

The law in North Carolina is that a judgment is a conclusion of law based upon facts that have been admitted or established. *Eborn v. Ellis,* 225 N.C. 386, 35 S.E. 2d 238 (1945). Without established facts, the court cannot make a decision on the merits of the case. *Id.* A final judgment is one which decides the case upon its merits without need of further direction of the court. *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377, *reh. denied,* 232 N.C. 744, 59 S.E. 2d 429 (1950). A final judgment, rendered on the merits by a court of competent jurisdiction is conclusive or *res judicata* of the rights, questions, or facts in issue, as to the parties and those in privity with them, in all other actions involving the same matter. *Masters v. Dunstan,* 256 N.C. 520, 124 S.E. 2d 574 (1962); *Gunter v. Winders,* 253 N.C. 782, 117 S.E. 2d 787 (1960).

In the case before us, the 1916 Consent Judgment relied on by defendants makes two references to the missing map. In both references, the map is said to be "filed with and as a part of this judgment." This language clearly indicates that the map was meant to be more than, as defendants put it, "a superfluous aid in locating the property." Rather, this language indicates that the map is an integral part of the Judgment and essential to its com-

pletion. The fact that the map was not found with or attached to the Judgment, or otherwise produced, removes from the Judgment the necessary element of established facts to support the conclusions of law reached. Without this element, the Judgment cannot be said to be a decision on the merits of the case. Therefore, the 1916 Judgment is not a final judgment and cannot, *in this dispute*, support defendants' defense of *res judicata* as to the question of the ownership of the disputed land.

That the Judgment is also indefinite is borne out by evidence in the record, including the Judgment itself. The metes and bounds description in the Judgment uses the word "about" six times when referring to the call distances. As Judge Hairston pointed out in his concluding statement, "The description that was given is not in language normally used by surveyors." Testimony from the surveyor witness as well as defendants' own exhibits show that, although several of the calls in the Judgment are consistent with existing property lines, the metes and bounds description varies considerably from existing property lines and lacks considerable distance in closing. Such indefiniteness is fatally defective in situations involving the *res judicata* effect of judgments in later boundary disputes. With regard to such situations, our Supreme Court has said "[T]he verdict and judgment should establish the line with such definiteness that it can be run in accordance therewith. 'Otherwise, the judgment would not sustain a plea of *res judicata* in a subsequent suit between the same parties involving the same subject matter, ...'" *Goodwin v. Greene*, 237 N.C. 244 at 249, 74 S.E. 2d 630 at 633 (1953), *quoting Cody v. England*, 216 N.C. 604 at 609, 5 S.E. 2d 833 at 836 (1939).

The trial court's findings of fact that the 1916 Consent Judgment is incomplete and indefinite are amply supported by the record evidence. Indeed, it is difficult to see how the evidence could support contrary findings. The conclusion of law that the judgment was therefore void and incapable of supporting a defense of *res judicata* is legally mandated by the findings and properly drawn therefrom. Defendants' assignments of error in this regard are therefore without merit.

Our conclusion that the 1916 Consent Judgment is void renders defendants' remaining assignments of error and arguments moot and we will not consider them.

The judgment appealed from is

Affirmed.

Chief Judge VAUGHN and Judge BECTON concur.

LIBBY HILL SEAFOOD RESTAURANTS, INC. v. EDWARD P. OWENS AND WIFE, NANCY P. OWENS, J. R. YARBROUGH, SUSANNA R. GWYN, AND IDLE WILDE LAND AND CATTLE CO.

No. 8221SC753

(Filed 21 June 1983)

Vendor and Purchaser § 6— restaurant built on landfill—former use of lot known to plaintiff—contributory negligence per se

The trial court properly granted defendants' motion for directed verdict and dismissed plaintiff's actions based on fraud, negligent misrepresentation, breach of express warranty and unfair and deceptive trade practices where the evidence tended to show that plaintiff purchased commercial real estate from defendants, the land had been used by the City of Winston-Salem for 35 years as a trash dump, fill dirt had been added to the land, plaintiff's directors knew the lot was on or near land that had been used as a trash dump, and no independent investigations or test borings of the property were made before purchasing it and commencing construction. The evidence indicating that plaintiff knew of the former use for the land and that plaintiff had full opportunity to make pertinent inquiries but failed to do so through no artifice or inducement of defendants was sufficient evidence to indicate plaintiff was contributorily negligent as a matter of law.

APPEAL by the plaintiff from *Wood, Judge.* Judgment filed 8 April 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 May 1983.

Plaintiff sought damages arising from its purchase of commercial real estate from defendants, basing its claims on fraud, negligent misrepresentation, breach of express warranty and unfair and deceptive trade practices in violation of G.S. 75-1.1. At the close of plaintiff's evidence, the trial court granted defendants' motion for directed verdict, dismissed plaintiff's action with prejudice and entered judgment from which plaintiff appeals.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah, Charles T. Hagan, III, and Beth H. Daniel, for plaintiff-appellant.

Weston P. Hatfield and Carol L. Allen for defendants-appellees.

HILL, Judge.

The sole question for decision is whether plaintiff's evidence, when considered in the light most favorable to plaintiff, is sufficient as a matter of law for submission to the jury. We hold that it is not. However, even if sufficient evidence of wrongdoing has been offered, plaintiff is contributorily negligent as a matter of law. We therefore affirm the judgment below.

Plaintiff's evidence tends to show defendants Owens acquired a tract of land including the subject lot from the City of Winston-Salem which for some 35 years had used the area as a trash dump. The Owenses thereafter entered into agreements with defendants Yarbrough, Gwyn and Idle Wilde Land and Cattle Co. (a corporation wholly owned by Yarbrough and Gwyn) that, in practical effect, created a partnership for the development and sale of the property consisting of the Owenses, Yarbrough and Gwyn. Yarbrough and Gwyn took active roles in developing the total acreage and negotiating with prospective purchasers.

In 1974 and 1975, defendants added 100,000 cubic yards of fill dirt to the land immediately abutting Silas Creek Parkway to raise the property to grade and, in cooperation with City engineers, installed a gas barrier system to eliminate any remaining methane gas produced by the trash fill. Once the fill dirt was added, the location of the trash dump was no longer apparent.

In 1975, David Conrad, a vice-president of plaintiff Libby Hill Seafood Restaurants, Inc. (Libby Hill) approached defendants about purchasing the subject lot for a restaurant site. Conrad and the other corporate directors knew the lot was on or near land that had been used as a trash dump. Nevertheless, plaintiff made no independent investigations or test borings of the property before purchasing it and commencing construction.

In 1976, Libby Hill built the restaurant and opened for business. Subsequently, cracks appeared in the building. Retained

by plaintiff, Geotechnical Engineering Corporation (Geotechnical) examined the building and underlying soil, finding, among other things, that the rear of the restaurant lay over a wedge of trash. Although Libby Hill followed Geotechnical's recommendations, it was unable to halt the deterioration of the building, which was eventually closed and razed.

In its restated complaint filed 5 December 1980, plaintiff asserts claims based on fraud, negligent misrepresentation, breach of express warranty and violation of G.S. 75-1.1. By their answer, defendants deny the material allegations of the complaint and assert plaintiff's negligence. The trial court granted defendants' motion for directed verdict at the close of plaintiff's evidence and accordingly entered judgment from which plaintiff appeals.

This case hinges on plaintiff's allegations that defendants culpably misrepresented or failed to disclose (1) the property's fitness of composition and compaction to support a building of the type plaintiff contemplated and (2) the distance of the trash dump from the building site. Plaintiff contends that defendants' misrepresentations induced it to forego independent examination, including test borings of the property, which would have revealed the trash dump extended well into the building lot.

We find, however, that the statements attributed to defendants are mere opinions regarding the location of the trash dump upon which plaintiff unreasonably relied, and that, in any event, the plaintiff was under a duty to conduct independent investigations before commencing its costly venture. Plaintiff's duty is particularly clear since the structural defects complained of stem from the manner in which the building was constructed and the compaction of the underlying soil, circumstances that plaintiff should have independently investigated and about which defendants made no comment of record.

Upon motion for directed verdict made by defendants, the question before the Court is whether the evidence offered by plaintiff, when considered in the light most favorable to plaintiff and allowed the benefit of every reasonable inference which may be drawn therefrom, is insufficient as a matter of law for submission to the jury. G.S. 1A-1, Rule 50(a), *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972), *Clark v. Bodycombe*, 289 N.C.

246, 221 S.E. 2d 506 (1976). The defendants' motion may be granted where plaintiff's evidence is insufficient to support a verdict in plaintiff's favor. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979). Having therefore inquired into the sufficiency of the evidence, *see Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E. 2d 222 (1971), we conclude plaintiff's evidence is insufficient as a matter of law to support a verdict in its favor and, quite to the contrary, indicates plaintiff was negligent.

> To make out an actionable case of fraud, plaintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Odom v. Little Rock & I-85 Corp., 299 N.C. 86, 91-92, 261 S.E. 2d 99, 103 (1980). While the presence of any of the elements is questionable, the most glaring omissions are sufficient evidence of (1) a representation, false or otherwise, and (2) reasonable reliance.

An action in fraud for misrepresentations regarding realty will lie *only* where the purchaser has been fraudulently induced to forego inquiries which he otherwise would have made. *Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940). Thus, the representation generally must be definite and specific. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). The specificity required depends on the tendency of the statement to deceive under the circumstances, *id.*; a vague statement is nevertheless deemed a representation of fact if the speaker has peculiar knowledge of the fact. Thus, where material facts are available to the vendor alone, he or she *must* disclose them. *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960). Where, however, the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie. *Harding v. Insurance Co.*, *supra.*

Plaintiff complains that statements of defendant Yarbrough indicating the trash fill ended "approximately" or "exactly" 20 feet inside the rear propertly line, the supposed location of the gas barrier system, amounted to a representation of fact. Not only is plaintiff's testimony on the point equivocal, but the context indicates the purported representation is merely a vague speculation: (1) The alleged representation was made by pointing to a place in the property; (2) No measurements were taken as a result of the pointing; (3) No stakes or markers were laid. Nor did Yarbrough have peculiar knowledge of the facts. He was, as plaintiff well knew, a real estate professional, not a contractor, builder, soil engineer, or gas barrier installer.

Plaintiff understood Yarbrough relied on other sources for his information, in particular, a soil test report by Coleman Engineering Laboratories, Inc., yet failed to avail itself of the Coleman report or the opportunity to confer with defendants' technical consultants. Plaintiff had ample opportunity to investigate the premises and engage independent technical assistance; a duty to disclose is simply not at issue here. *Cf. Brooks v. Construction Co., supra* (because a defect in the residential property was not apparent to the purchaser and could not be discovered through diligent investigation, the builder-vendor had an affirmative duty to disclose). Indeed, the vague statements cited put plaintiff on notice to ascertain the conditon of the soil before commencing construction.

Plaintiff's claims based on breach of express warranty and negligent misrepresentation succumb to the foregoing analysis as well. Having found the alleged misrepresentations are no more than the expression of Yarbrough's opinion, we conclude they certainly "do not rise to the level of 'affirmation of fact or promise' required for the creation of an express warranty." *Stanford v. Owens*, 46 N.C. App. 388, 393, 265 S.E. 2d 617, 621, *disc. rev. denied*, 301 N.C. 95, --- S.E. 2d --- (1980). Nor, regarding the negligence claim, has plaintiff established defendants breached their duty of care as sellers of real estate by speculating about matters within the peculiar knowledge of contractors, builders and soil engineers.

Even if Yarbrough's statements were representations, plaintiff has failed to show reasonable reliance. A purchaser who is on

equal footing with the vendor and has equal means of knowing the truth is contributorily negligent if he relies on a vendor's statements regarding the physical condition of property. *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); *Harding v. Insurance Co., supra; cf. Johnson v. Wall*, 38 N.C. App. 406, 248 S.E. 2d 571 (1978) (reiterating the general rule, this Court nevertheless found a directed verdict on grounds of contributory negligence insupportable where, among other things, the opposing party obtained an independent examination of the premises by a neutral third party). "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest." *Calloway v. Wyatt, supra* at 134-135, 97 S.E. 2d at 886. We find that, being on equal footing with defendants, plaintiff had no right to rely on defendants' statements and was negligent in doing so.

Finally, plaintiff's claim for unfair and deceptive trade practices pursuant to G.S. 75-1.1 is similarly appropriate for directed verdict. In essence, a party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position. *See generally, Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Even if defendants misrepresented the location of the trash fill, this sophisticated plaintiff could and should have verified defendants' assertions. Surely any corporation contemplating a $100,000.00 venture would be expected to have exercised at least this minimal degree of prudence.

We have examined plaintiff's remaining arguments and find them to be without merit.

Affirmed.

Chief Judge VAUGHN and Judge BECTON concur.

MARIE L. SHUTT, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JEAN SHUTT BUTNER v. JERRY L. BUTNER

No. 8221DC599

(Filed 21 June 1983)

1. **Parent and Child § 7.1— separation agreement and consent judgment—child support—continuance after death of parent with custody**

Where a separation agreement and consent judgment required defendant husband to pay child support to the wife, the wife died, and custody of the child was granted to its grandmother, the trial court could properly require defendant to continue the child support payments to the grandmother without making new findings as to the needs of the child and the ability of defendant to pay.

2. **Husband and Wife § 11.1— separation agreement—sale of entirety property—effect of wife's death**

Where a separation agreement and consent judgment gave the wife child custody and provided that the wife should have possession of the home held by the parties as tenants by the entirety during the minority of their child or until the child was otherwise emancipated, at which time the home would be sold and the proceeds divided equally between the parties, the wife thereafter died while the child was unemancipated, and the child went to live with his grandmother, it was *held* that the husband's obligations with respect to the sale of the home were not terminated by the wife's death, the reason for delaying the sale ended when the child began living with his grandmother, and the wife's executrix could properly move that the property be sold.

APPEALS by plaintiff and defendant from *Alexander, Judge.* Orders entered 8 February 1982 and 20 April 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 20 April 1983.

On June 24, 1981, after twenty-one years of marriage, the late Jean Shutt Butner, alleging various misdeeds and offenses, sued the defendant for alimony and support for their one minor child, then 16 years old. Three and a half weeks later the parties settled the case by entering into a separation agreement, the terms of which were incorporated into a consent judgment. Among other things, the contract and judgment absolved each from the claims of the other, awarded custody of the child to the wife, required the husband to support the child until emancipated, divided their personal property, gave the wife possession of their entirety held house and lot until the child's death or emancipation, with the requirement that it be sold at that time and the

proceeds divided equally between them, and gave each the right to acquire and dispose of property as though unmarried. Four months later, a year and a half before the son's 18th birthday, the wife died.

Within a short while after Mrs. Butner's death, several new pleadings seeking relief of different kinds were filed in the case. The decedent's mother, individually, and as Executrix of the estate, after being substituted as party plaintiff with the Court's leave, moved that she be given official custody of the minor son, who had elected to live with her after his mother's death, and that the support payments required of the defendant be made to her. The defendant moved that the judgment be revised to permit him to occupy the house, which was then vacant. The plaintiff then countermoved, asking that the house be sold and the proceeds divided as provided in the agreement and consent judgment, and alleged that she was entitled to the decedent's share as devisee under the decedent's will. In response defendant requested that plaintiff's countermotion be dismissed for the reason that it was in effect an action for the partition of real estate and therefore subject to the original jurisdiction of the Clerk of Court. Finally, the defendant responded to plaintiff's motion for custody and support and without alleging any facts at all—the plaintiff's allegations being either admitted or denied—asked that custody of the boy be given to him.

By order entered 8 February 1982, after finding that defendant and his deceased wife had owned their house as tenants by the entirety and that they were still married at the time of her death, the judge denied plaintiff's countermotion for sale of the property, ruling that defendant was the sole owner of the house and lot by operation of law and that plaintiff had no right to have the property sold.

By order entered 20 April 1982, custody of the minor son was awarded to the plaintiff and defendant's obligation to make support payments of $35 per week was continued. Both parties appealed.

Pettyjohn & Molitoris, by Theodore M. Molitoris, for plaintiff appellant and appellee.

Robert K. Leonard and David L. Spence, for defendant appellee and appellant.

PHILLIPS, Judge.

[1] Though the custody and support order appealed from by the defendant can have no future effect, since the minor child's eighteenth birthday has now passed, the rights and duties of the parties until then still require adjudication. Before the substitute plaintiff entered the picture, defendant was required to pay $35 a week for the child's support to the child's mother. Since the child lived with the plaintiff after his mother died, the order continuing the support payments and permitting the plaintiff to receive them was clearly justified. Defendant's contention that the judge's findings of need and ability to pay were insufficient is without merit. The needs of the child and the defendant's ability to pay had been established by the Court and agreed to by the defendant just a few months earlier and the judgment with respect thereto was still in effect. Under the circumstances new findings of need and ability to pay were not required. If the child no longer needed the payments or if the defendant was no longer able to make them, it was up to the defendant to establish that this change of condition had occurred; but this apparently was not even attempted. Nevertheless, ample findings as to both the child's need and defendant's ability to pay were made, and the order appealed from is hereby affirmed.

[2] The trial court erred, however, in denying the plaintiff's motion for the sale of the marital homeplace. Though the defendant did become the *record* fee simple owner of the entirety held realty by operation of law upon the death of his wife, as the court concluded, he became so subject to his promise and agreement as follows:

> (8) It is agreed that the wife shall have complete possession of the homeplace of the parties until the minor child TIMOTHY EUGENE BUTNER attains the age of 18 years or until the child respectively dies, marries, or is otherwise emancipated, at which time the homeplace of the parties will be sold and the proceeds will be divided equally among the parties. It is further agreed that the wife shall make monthly payments on the homeplace . . . and that the husband shall reimburse to the wife the amount by which her monthly mortgage payments have reduced the principal on the mortgage.

This agreement to sell their property and divide the proceeds between them, solemnly and deliberately made twice, was therefore doubly binding—first as an ordinary separation and settlement agreement, *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973), and second as a consent judgment in compromise and settlement of matters that were then being disputed in this litigation. *Price v. Horn*, 30 N.C. App. 10, 226 S.E. 2d 165 (1976).

Unlike the agreements involved in those cases, however, the agreement here requires little or no construction, only enforcement. The parties' obligation to sell the property and divide the proceeds was explicit and without ambiguity; nor was it contingent upon either party being alive when the time to sell came or anything else. The agreement to sell and divide was absolute and unequivocal; only the time was uncertain and that was clearly ascertainable from the terms used—no later than the boy's eighteenth birthday, then less than two years away, and sooner than that if the boy married, was otherwise emancipated, died, or stopped living there. Though the latter eventuality was not expressly provided for in the agreement as the others were, it is impliable from the obvious fact that the parties delayed the sale as they did only so that the boy could dwell there rent-free until his legally dependent status ended. Therefore, upon him ceasing to live there after his mother died, the reason for delaying the sale vanished, and the parties were obligated to go ahead with the sale if either so requested. That this is so, however, need not be demonstrated or even relied upon, since the son's eighteenth birthday has passed, and the property must be sold now in any event.

Nor were the defendant's obligations under the contract terminated by the death of the other contracting party. Few contracts are terminated by death in the absence of explicit provisions therein to the contrary. This is because all know that unexpected and untimely death is a constant possibility and are deemed to make their contracts in light thereof, and also because most contracts can be satisfactorily performed by personal representatives. 17A C.J.S., *Contracts* § 465. The general rule is that "contracts bind the executor or administrator, though not named therein, and that death does not absolve a man from his engagements." *Burch v. Bush*, 181 N.C. 125, 127, 106 S.E. 489, 490 (1921). But in this instance it is unnecessary to resort to the

general rule, because the parties themselves, leaving nothing to chance or the law's operation, had their agreement to provide that:

> . . . this Judgment shall be enforceable against the parties, their personal representatives, heirs and assigns.

Having so contracted, the defendant is bound thereby.

It is true, of course, for obvious reasons, that contracts of a personal nature or that require special talent—to marry, to draw a picture, write a book, perform on the stage, be one's companion, etc.—do come to an end upon the death of a party, unless the parties agree otherwise. *Burch v. Bush, supra.* But selling a house and lot and dividing the proceeds does not depend upon talent or personality and the defendant's obligation with respect thereto still abides.

In enforcing the agreement upon remand, a partition proceeding before the Clerk will neither be necessary, nor appropriate. All that is needed is for the property to be sold and the proceeds divided equally, under the court's direction, with the plaintiff executrix being reimbursed by the defendant for any reduction that her decedent made in the mortgage debt. How the sale is conducted or by whom is for the court to determine, subject to the best interests of the parties and the laws governing such matters. We point out, however, that, since neither the terms nor validity of the will that plaintiff claims under are involved in this appeal, the right of the plaintiff or anybody else to receive the sale proceeds that the decedent was entitled to has not been determined by us, and that before the proceeds are divided an adjudication with respect thereto will have to be made.

In the plaintiff's appeal, the order is

Reversed and remanded.

In the defendant's appeal, the order is

Affirmed.

Judges HILL and JOHNSON concur.

DONALD E. MISENHEIMER, EXECUTOR UNDER WILL OF ISAM R. MISENHEIMER v. JOHN E. MISENHEIMER, CAROLYN M. PRINCE, DONALD E. MISENHEIMER, THOMAS M. MISENHEIMER, SYLVIA M. GRUENDLER, SHARON M. MISENHEIMER, KENNETH R. MISENHEIMER, JOHN E. MISENHEIMER, JR., AND SAMUEL MISENHEIMER, MINOR

No. 8226SC718

(Filed 21 June 1983)

Descent and Distribution § 6— slayer statute—interest of slayer going to two sons

The trial judge did not err in applying the anti-lapse statute in conjunction with the slayer statute and in finding that the children of the slayer, who are also the grandchildren of the decedent, take the father's share under the will by substitution. G.S. 31-42, G.S. 31A-4, G.S. 31A-3(3) and G.S. 31A-15.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 8 June 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1983.

This action is brought under the provisions of the North Carolina Declaratory Judgment Act, G.S. 1-253, *et seq.*, and involves a determination of beneficiaries under a will by operation of the North Carolina "slayer statute," G.S. 31A-1, *et seq.*

After a hearing, the court ordered that the slayer, John E. Misenheimer, was not entitled to take under the will of Isam R. Misenheimer, but that the slayer's children, defendants John E. Misenheimer, Jr. and Samuel Misenheimer (hereafter defendants), were entitled to divide equally the one-eighth share devised to their father under the will of Isam R. Misenheimer. Plaintiff appeals from entry of this judgment.

Henderson & Shuford by William A. Shuford for plaintiff appellant.

Jo Hill Dobbins for defendant appellees, John E. Misenheimer, Jr. and Samuel Misenheimer.

BRASWELL, Judge.

At issue is whether John E. Misenheimer's share under the will of his deceased father, Isam R. Misenheimer, should be distributed to his sons or to the seven other children of Isam R. Misenheimer.

The facts are not in dispute. John E. Misenheimer was convicted before the Mecklenburg County Superior Court of first-degree murder of his father, Isam R. Misenheimer. His conviction was upheld by the Supreme Court in *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Isam R. Misenheimer died testate, leaving his residuary estate to his eight children, each of whom was individually named, share and share alike. John E. Misenheimer is one of the eight children; his children, John E., Jr. and Samuel, defendants herein, are Isam's grandchildren.

Plaintiff, executor of Isam R. Misenheimer's estate, initiated this declaratory judgment action on 4 December 1981, seeking to have the court declare that John E. Misenheimer and his children have no interest in the estate pursuant to the North Carolina "slayer statute," G.S. 31A-1, *et seq.* After hearing and rehearing, the court on 8 June 1982 entered judgment in which it found that John E. Misenheimer was a "slayer" within the meaning of G.S. 31A-3(3) and therefore not entitled to take under the will of Isam R. Misenheimer and that his one-eighth share in the estate should be divided equally between his sons, John E., Jr. and Sam. Plaintiff appealed to this Court from entry of the judgment.

The scope of appellate review of a judgment rendered under the Declaratory Judgment Act was set forth in *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E. 2d 473, 475, *disc. rev. denied*, 303 N.C. 315, 281 S.E. 2d 652 (1981):

> "[T]he [trial] court's findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary, and even though incompetent evidence may have been admitted. [Citations omitted.] The function of our review is, then, to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions."

Our examination of the record discloses that the findings of fact are based upon uncontroverted evidence and support the conclusions of law.

Plaintiff presents two alternative arguments: first, that the slayer statute exclusively controls the distribution of the estate,

pursuant to G.S. 31A-15,[1] and the interest of the slayer lapses, to be taken by the remaining named residual legatees or devisees; or in the alternative, if the anti-lapse statute, G.S. 31-42, operates in conjunction with the slayer statute, then subsection (c) applies in that the residuary devise or legacy failed and therefore becomes a part of the residue, passing to the remaining residuary devisees or legatees. We agree, however, with the trial judge that the slayer statute applies in conjunction with the anti-lapse statute and that subsection (a) of the anti-lapse statute is the applicable provision.

The relevant section of the slayer statute, G.S. 31A-4, provides that "[t]he slayer shall be deemed to have died immediately prior to the death of the decedent . . ." and further that "[w]here the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will." Therefore, pursuant to the terms of the statute, when a decedent's will otherwise disposes of property devised to a slayer, that property is to be distributed according to the terms of the will. Since nothing to the contrary appears in the will of Isam R. Misenheimer, the anti-lapse statute is deemed a part of the will. The pertinent portions of the anti-lapse statute, G.S. 31-42, are as follows:

> "*Failure of devises and legacies by lapse or otherwise; renunciation.*—(a) Devolution of Devise or Legacy to Person Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as sur-

1. "§ 31A-15. *Chapter to be broadly construed.*—This Chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this Chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this Chapter, all rules, remedies, and procedures, if any, which now exists or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable."

vive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

. . . .

(c) Devolution of void, revoked, or lapsed devises or legacies.—If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

. . . .

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto."

Section (a) of the statute is designed and intended to prevent the lapse of a devise or bequest in a situation where the devisee or legatee who would have taken under the will had he survived the testator predeceases the testator, survived by issue who also survive the testator and who would have been heirs of the testator had there been no will. If this situation does not exist, then the devise or bequest lapses and passes under the provisions of section (c). *Bear v. Bear,* 3 N.C. App. 498, 504, 165 S.E. 2d 518, 522 (1969). We find that the situation presented in the case before us fits into section (a) of the anti-lapse statute and that therefore the defendants, sons of the slayer and grandsons of the testator, would take their father's share under the will by substitution.

This result is consistent with the public policy behind the slayer statute. As this court expressed in *Gardner v. Insurance Co.,* 22 N.C. App. 404, 409, 206 S.E. 2d 818, 821, *cert. denied,* 285 N.C. 658, 207 S.E. 2d 753 (1974), "The public policy sought to be fostered by the enactment of G.S. 31A is predicated upon the theory that the murderer *himself* will not profit by his own wrongdoing, however, this principle does not extend to those

related to the slayer . . . ." We think it is helpful to look at the history of the enactment of G.S. Ch. 31A in 1961. The statute was based on legislation submitted to the General Assembly by a special committee of the General Statutes Commission and substantially followed a model slayer statute initially proposed in 1936 by Professor John Wade of the Harvard Law School. *Quick v. Insurance Co.*, 287 N.C. 47, 51-52, 213 S.E. 2d 563, 565-66 (1975). Section 4 of Wade's model statute expressly provided that the anti-lapse statute did not apply, with the result that property did not pass to those persons claiming from the slayer. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715, 727 (1936). We feel it is significant that the General Assembly did not choose to include Professor Wade's proposed section in our Chapter 31A. By not specifically excluding the anti-lapse statute from operating in situations involving the slayer statute, the legislature mandated that the slayer be treated as if he predeceased the decedent and allowed children of slayers to take the slayer's share by substitution. In arriving at this interpretation of the legislative intent behind G.S. Ch. 31A, we are aware of, but unpersuaded by, the fact that at least one other jurisdiction has interpreted a similar slayer statute to exclude operation of the anti-lapse statute. *McGhee v. Banks*, 115 Ga. App. 155, 154 S.E. 2d 37 (1967).

The findings of fact in the court's judgment are uncontradicted. We find that the facts found support the conclusion that the children of the slayer, who are also the grandchildren of the decedent, take their father's share under the will by substitution. We hold that the trial judge did not err in applying the anti-lapse statute in conjunction with the slayer statute. The judgment of the trial court is therefore

Affirmed.

Judges WEBB and WHICHARD concur.

LARRY THOMAS JUSTUS v. ROBERT J. DEUTSCH, ATTORNEY-IN-FACT FOR NANCY REVIS JUSTUS MASON, NANCY REVIS JUSTUS MASON, AND RANDOLPH C. ROMEO, TRUSTEE

No. 8229SC560

(Filed 21 June 1983)

Mortgages and Deeds of Trust § 9— action for breach of agreement to execute release deeds—summary judgment

In plaintiff's action for breach of contract to execute release deeds pursuant to a settlement agreement under which plaintiff executed a $90,000.00 note payable to defendant and secured by a deed of trust on land, plaintiff was given the right to sell portions of the encumbered land, defendant agreed to release the land "at the time of the sale," and plaintiff agreed to apply the net proceeds of sale first to a superior bank lien and then to the $90,000.00 note to defendant, the trial court properly granted summary judgment for defendant on plaintiff's claim and properly denied plaintiff's motion for summary judgment on defendant's counterclaim based on breach of the settlement agreement where the evidence tended to show that defendant refused to execute release deeds and instituted foreclosure proceedings because plaintiff was in default for failure to pay real property taxes; all release deeds requested by plaintiff prior to the due date of the note were executed by defendant; delivery of offer to purchase forms did not meet the requirements for a release "*at the time of sale*"; and five of the six offers to purchase required seller financing by plaintiff, which would be a breach of the settlement agreement since the net proceeds would not be available for application to the bank lien and then to defendant's note.

APPEAL by plaintiff from *Kirby, Judge.* Order entered 19 February 1982 in Superior Court, HENDERSON County. Heard in the Court of Appeals 18 April 1983.

This is an action seeking injunctive relief and monetary damages for breach of contract for failure to execute release deeds.

The plaintiff and the defendant Mason entered into a contract entitled "Settlement Agreement" on 2 March 1979. The stated purpose of the contract was to settle all issues involved with a partition proceeding instituted by the defendant to obtain her interest in real property owned jointly by the parties in Henderson County. The parties were divorced in 1977.

Under the terms of the agreement, Mason deeded to the plaintiff her interest in certain real property. The plaintiff executed a note for $90,000 payable to the defendant, which was due

on 2 March 1980. The note was secured by a deed of trust on land in Henderson County, part of which was already subject to a $50,000 deed of trust payable to the Bank of North Carolina. The defendant Romeo was the trustee in the deed of trust to secure the plaintiff's $90,000 note.

The agreement provided further that the plaintiff could sell portions of the encumbered property "in his complete discretion" and that Mason would release the property "at the time of the sale. . . ." The plaintiff agreed to apply the net proceeds from the sale of the encumbered property first to the superior lien of the Bank of North Carolina. After that indebtedness was completely satisfied, the net sale proceeds from the encumbered property were to be used to satisfy the $90,000 note.

On 4 February 1980, the plaintiff's lawyer, James H. Toms, mailed a release deed to defendant Deutsch, Mason's attorney-in-fact under a power of attorney executed by her. Toms asked Deutsch to have the deed executed.

Deutsch refused to execute the release deed in a 12 February 1980 letter to Toms because he contended that the plaintiff was in default for failure to pay real property taxes. Deutsch then instructed trustee Romeo to begin foreclosure proceedings in a 13 February 1980 letter.

A number of affidavits were filed in support of the plaintiff's complaint. They indicated that he had opportunities to sell portions of the encumbered property in early 1980, but was unable to do so because of his inability to procure release deeds from the defendants.

Defendants Deutsch and Mason counterclaimed against the plaintiff, alleging a failure to comply with the settlement agreement. Mason sought a return of the land that she deeded to the plaintiff under the agreement and additional real property security for the $90,000 note in her favor.

The trial judge granted the defendants' motion for summary judgment. He denied a like motion by the plaintiff as to the defendants' counterclaim. The plaintiff made a timely appeal of the grant of the defendants' motion for summary judgment. This Court granted a writ of certiorari in order to review the denial of his summary judgment motion.

James C. Coleman for the plaintiff-appellant.

Prince, Youngblood, Massagee & Creekman, by Boyd B. Massagee, Jr., for the defendant-appellees.

ARNOLD, Judge.

Because we find that there are no genuine issues of fact to be resolved in this case, we affirm entry of summary judgment for the defendants and denial of a like motion by the plaintiff. To understand our holding, a review of when this remedy should be used is helpful.

Summary judgment under G.S. 1A-1, Rule 56(c) is proper when there is "no genuine issue as to any material fact. . . ." It is a "drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). This remedy "does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980) (emphasis in original). Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Spector Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

In *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516, --- S.E. 2d --- (1972), the court defined two terms that are determinative on a summary judgment question.

> An issue is *material* if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "*genuine*" if it may be maintained by substantial evidence.

280 N.C. at 518, 186 S.E. 2d at 901 (emphasis added). In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." 2 McIntosh, N.C. Practice and Procedure § 1660.5

(2d ed., Phillips Supp. 1970). *See also,* W. Shuford, N.C. Civil Practice and Procedure § 56-7 (2d ed. 1981).

The defendants argue that the plaintiff was in default because he did not pay the real property taxes that were due on the encumbered property. They also contend that all requests for release deeds from the plaintiff were met before the due date of the note.

The plaintiff contends that the defendants incorrectly declared the note payable before its due date. He argues, by implication, that if he had been given release deeds for the encumbered property, he could have met his obligation under the settlement agreement.

The record before us supports our decision. First, all release deeds that the plaintiff requested were executed by the defendants prior to the due date of the note. In his answer to the defendants' interrogatories on 29 December 1980, the plaintiff attached "copies of *all* release deeds" (emphasis added). Although in another answer the plaintiff stated that "based on information and belief" there were other release deeds offered to the defendants, that mere allegation is not sufficient to overcome the entry of summary judgment.

Second, the plaintiff was in default under the deed of trust for not paying the 1979 real property taxes. G.S. 105-360 provides that real property taxes are due in September of the fiscal year in which they were levied. Although the deed of trust was not printed in the record on appeal, we accept the admission on oral argument by both counsel that failure to pay real property taxes is default that allows the defendant Mason to institute foreclosure proceedings.

Third, the terms of the agreement require the defendant Mason to release the encumbered property "at the time of sale." Delivery of offer to purchase forms is not sufficient to meet this requirement.

In addition, five of the six offers to purchase in the record required seller financing by the plaintiff. This would be a breach of the settlement agreement, which provides that any net proceeds from the sale of encumbered property must first be used to pay the debt to the Bank of North Carolina and then applied to the

$90,000 debt to Mason. The net proceeds would not be available in a sale in which the plaintiff was financing part of the purchase price.

Finally, the plaintiff argues that because the agreement was executed under seal that the defendants' counterclaim cannot be allowed on a failure of consideration theory. It is true that a contract under seal in North Carolina imports consideration to support that contract. *See, e.g., Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979). But the defendants were properly given summary judgment because the plaintiff's default was a breach of the agreement which entitled the defendants to a grant of their motion.

For these reasons, we affirm the trial judge's grant of the defendants' summary judgment motion and denial of the plaintiff's summary judgment motion.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

ELMORE'S FEED AND SEED, INC., PLAINTIFF AND THIRD-PARTY PLAINTIFF v. EDDIE PATRICK, DEFENDANT v. RALSTON PURINA COMPANY, THIRD-PARTY DEFENDANT

No. 8227SC604

(Filed 21 June 1983)

1. Rules of Civil Procedure § 56— granting of summary judgment—pending motion to compel discovery

It was not error for the trial judge to rule on summary judgment motions even though a motion to compel discovery was pending since (1) the defendant was dilatory in discovery, (2) the defendant had not shown that further discovery would lead to the production of relevant evidence, and (3) the defendant's counsel admitted at the summary judgment hearing that everything necessary for the court to find on the motion was present. G.S. 1A-1, Rule 56(f).

2. Animals § 1; Negligence § 29.1— change in cattle feed—negligence in not informing

The trial court improperly granted plaintiff's and third party defendant's motions for summary judgment since there was a genuine issue of material

fact on whether the plaintiff was negligent in not informing the defendant of change in cattle feed since there was evidence which linked defendant's damage in lower milk production and death of some of his cows to a change in the feed mixture.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 8 February 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 20 April 1983.

The plaintiff brought this action to recover for unpaid cow feed that it sold to the defendant from December, 1976 to June, 1977. The defendant answered and counterclaimed for damages.

He alleged that the plaintiff was negligent in failing to warn him of a change in the dairy feed formulation being purchased by the defendant from the plaintiff. According to the counterclaim, the milk production of the defendant's herd dropped and some of his cows died. The defendant also sought punitive damages and treble damages for unfair and deceptive trade practices.

The plaintiff denied liability in its reply to the defendant's counterclaim. Ralston Purina was joined as a third-party defendant because of its possible liability for all or part of the defendant's counterclaim against the plaintiff.

When the defendant bought a herd of cows in late 1976, he told Bob Elmore, the plaintiff's owner, that he wanted the cows to stay on the same Purina feed that they had been eating. It was Milk Special 20 "B", a soybean-based feed sold by the third-party defendant. Although the defendant did not know it, all of the Milk Special 20 "B" feed produced at the third-party defendant's Charlotte plant from 26 April through June 1977 contained cottonseed as a protein ingredient.

The defendant was not notified that the protein base of the feed had changed from soybean to cottonseed, even though the plaintiff knew that a sudden change in feed could cause problems to dairy cows. The plaintiff never gave the defendant an ingredient ticket even though he asked for one on a number of occasions.

The defendant's cows first became sick around the last of April or the first of May, 1977. Some of them died in May and June. Several days after 3 June 1977, veterinarian John Daven-

port told the defendant to find out if there had been any change in the feed ingredients. Bob Elmore denied any changes in the feed.

Dr. Davenport indicated that a change in the protein base in the feed could have caused the problems. He stated that signs of illness from such a change would have occurred no later than one week after the cows first ate the feed. Davenport termed a link between the change in feed and the problems in the defendant's cows "a calculated guess on my part." A neighboring dairy, who bought the same feed from the plaintiff as the defendant, had problems at the same time as the defendant.

When the defendant began purchasing soybean-based feed from FCX on 11 June 1977, the milk production of the herd began improving.

After the plaintiff answered the defendant's interrogatories and depositions were taken, a hearing was held on 8 February 1982 to decide pending summary judgment motions. The trial judge granted the summary judgment motions of the plaintiff and the third-party defendant prior to hearing the defendant's motion to compel discovery. From these rulings, the defendant appealed.

Lamb and Bridges, by William E. Lamb, Jr., for the defendant-appellant.

Horn, West & Horn, by C. A. Horn, for the plaintiff and third-party plaintiff-appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William L. Rikard, Jr. and Sheldon Love Sturges, for the third-party defendant-appellee.

ARNOLD, Judge.

[1] Before we decide if the summary judgment motions were properly granted here, we first answer the defendant's contention that summary judgment cannot be granted while his motion to compel discovery was pending. G.S. 1A-1, Rule 56 does not address this question.

The general rule for this situation was stated in *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979).

> Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so.

297 N.C. at 512, 256 S.E. 2d at 220. Although the defendant's motion to compel discovery was pending when summary judgment was decided against him, it was not error for the trial judge to rule on the Rule 56 motions.

First, the defendant was dilatory in discovery. Although the plaintiff answered his interrogatories on 7 October 1981, the plaintiff did not move to compel discovery until 12 December 1981. His motion asked for answers to only 12 of the 100 interrogatory questions.

Second, the defendant has not shown that further discovery would lead to the production of relevant evidence. He knew of the plaintiff's prima facie case since the 13 August 1981 deposition of Bob Elmore, but failed to allege that he was unable to obtain essential facts so as to justify more discovery as provided in G.S. 1A-1, Rule 56(f).

In addition, the defendant's counsel admitted at the summary judgment hearing that "everything is present, Your Honor, which would require this Court to find that there is in fact a genuine dispute of varied material facts so that the summary judgment motion should not apply." This is an admission that no further discovery was needed.

[2] Although we find that it was proper for the trial judge to reach the summary judgment question, it was error for him to grant the motions of the plaintiff and third-party defendant. There was a "genuine issue of material fact" on whether the plaintiff was negligent in not informing the defendant of the change in the feed.

Summary judgment under G.S. 1A-1, Rule 56(c) is proper when there is "no genuine issue as to any material fact. . . ." It is a "drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180

S.E. 2d 823, 830 (1971). This remedy "does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980) (emphasis in original). Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Spector Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

In *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516, --- S.E. 2d --- (1972), the court defined two terms that are determinative on a summary judgment question.

> An issue is *material* if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "*genuine*" if it may be maintained by substantial evidence.

280 N.C. at 518, 186 S.E. 2d at 901 (emphasis added). In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." 2 McIntosh, N.C. Practice and Procedure, § 1660.5 (2d ed., Phillips Supp. 1970). *See also*, W. Shuford, N.C. Civil Practice and Procedure § 56-7 (2d ed. 1981).

It is an accepted tenet of our jurisprudence that summary judgment is rarely proper in negligence cases like the defendant's counterclaim in this case. "Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E. 2d 436, 441 (1982).

Our examination of the facts here leads us to conclude that summary judgment was improper. There is evidence in this case to link the defendant's damage to a change in the feed mixture.

The defendant's herd began to develop sickness in late April or early May, 1977. This was about the same time that cottonseed was added to the feed mixture. The defendant stated that his

cows improved after they went off of the plaintiff's feed. Other dairy farmers who used the same feed had similar problems. Dr. Davenport made a "calculated guess" that the change in feed ingredients caused the illness.

The plaintiff uses Davenport's statement that illness from a feed change would have occurred "no later than one week after the cows first ate that feed" to argue that any feed change was not the problem. We disagree.

H. B. Turner, the production manager for Ralston Purina's Charlotte plant, stated in an affidavit that cottonseed was included in all Milk Special 20 "B" feed produced at that plant from 26 April through June, 1977. The plaintiff got feed from Purina's Charlotte plant and delivered it to the defendant during the April-June, 1977 period. The defendant stated that the problems with his herd began in late April or early May, 1977. This is a sufficient showing of causation to survive a summary judgment motion.

Because we find that there is a genuine issue of material fact in this case, we reverse the entry of summary judgment for the plaintiff and the third-party defendant and remand for a trial.

Reversed.

Chief Judge VAUGHN and Judge HEDRICK concur.

WILLIAM TAYLOR WHITE, EMPLOYEE-PLAINTIFF, APPELLEE v. BATTLEGROUND VETERINARY HOSPITAL, EMPLOYER; AND GREAT AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS, APPELLANTS

No. 8210IC676

(Filed 21 June 1983)

Master and Servant § 60.2— workers' compensation—injury while crossing street on personal errand

Injuries sustained by plaintiff, an animal hospital worker, when he was struck by a hit and run driver while crossing the street in front of defendant employer's place of business after having purchased a newspaper during his working hours did not arise out of and in the course of plaintiff's employment where the evidence showed that plaintiff's errand was strictly personal and that the newspaper was to be used by defendant's employees on their break time.

APPEAL by defendants from the Industrial Commission. Opinion and award entered 24 February 1982. Heard in the Court of Appeals 10 May 1983.

Plaintiff sought workers' compensation benefits for injuries he sustained when he was struck by a hit and run driver while crossing the street in front of defendant employer's place of business.

The evidence before the Industrial Commission showed the following pertinent facts. Plaintiff was employed by defendant in defendant's animal hospital. His duties included caring for the animals, cleaning and performing maintenance work. It was plaintiff's duty to open the hospital at five o'clock a.m. and to perform his duties alone until his co-workers began to arrive at seven-thirty a.m. While plaintiff was working alone between five and seven-thirty, he would receive animals delivered early by their owners for treatment.

Plaintiff testified that on the morning of his injury, he "caught up [his] work" at approximately seven a.m. Since no one was coming in with an animal and he "had nothing special to do right then," he went across the street to get a newspaper from a vending machine where he and his co-workers customarily purchased a paper. According to plaintiff, the employees would read the paper during coffee breaks. Plaintiff purchased a newspaper with his own money and began to return to the animal hospital, crossing Battleground Avenue, the street in front of defendant's work premises. As plaintiff was about to set his foot upon his employer's driveway and while his foot was in the "airspace" above defendant's premises, he was struck by a motorcycle and knocked into the street, sustaining injuries.

Plaintiff crawled out of the street and waited on an ambulance that a passerby had called. Plaintiff asked a bystander to go and lock the door to the hospital because he had left the door unlocked and the building unattended. After the ambulance arrived and plaintiff was placed inside it, Kay Bernard, the hospital receptionist, arrived and spoke with plaintiff. Plaintiff gave the newspaper to Bernard telling her that he had no more use for it and that the animal hospital employees could read it. Bernard testified that almost every day one of the employees would purchase a newspaper and that she was in the habit of checking the lost

and found section of the classified ads for animals in order to help hospital clients. She further testified that if the purchaser of the newspaper did not take it home, it would be used in the animal cages. Dr. Harling, plaintiff's employer, testified that in the past there had been a morning paper delivered to his work place but that practice had ceased. He knew that plaintiff purchased a newspaper from time to time and approved of the practice, as the employees used the paper primarily on their breaks. Dr. Harling did not ask plaintiff to buy newspapers and he did not reimburse him for them, but he did not require him to punch out when he went to buy one.

The parties stipulated that plaintiff's injury was caused by an accident. On the evidence, a majority of the Commission found, *inter alia,* that plaintiff was partially on and partially off his employer's premises at the time of the accident; that he went to get the newspaper for the "dual purpose of reading it and using it in their employment;" that the newspaper was to be used for keeping up with lost and found advertisements and in the animal cages; and that plaintiff's employer "approved [of] the employees' custom of getting a newspaper each day for the dual purpose of informing themselves and advancing the interest of his business." Based upon its findings and the stipulations, a majority of the Commission concluded that the accident arose out of and in the course of plaintiff's employment with defendant and awarded plaintiff compensation. One commissioner dissented. Defendants appealed from the opinion and award.

Joseph P. Shore; and Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr., for plaintiff.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Richard T. Rice, for defendants.

WELLS, Judge.

Defendants' appeal raises the question of whether the Commission properly found and concluded that plaintiff's injury was caused by an accident arising out of and in the course of his employment with defendant employers.

On appeal from the Industrial Commission, the findings of the Commission are conclusive if supported by competent evi-

dence and when the findings are so supported, appellate review is limited to review of the Commission's legal conclusions. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Findings of fact may be set aside by the appellate court only when there is no competent evidence to support them. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

In its recent decision in *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807 (1982), our Supreme Court recited the law that dictates our approach in the present case as follows:

> "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). An appellate court is, therefore, justified in upholding a compensation award if the accident is "fairly traceable to the employment as a contributing cause" or if "any reasonable relationship to employment exists." *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E. 2d 702, 704 (1963). In other words, compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer "to any appreciable extent" when the accident occurred. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955).

Some risk inherent to the employment must be a contributing proximate cause of the accident and the risk must be enhanced by the employment and one to which the worker would not have been equally exposed to apart from the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

When the employee is injured during a "special errand" undertaken in the furtherance of the employer's business interests, he is entitled to compensation notwithstanding the fact that he is not upon the premises of his employer. *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E. 2d 473 (1982); *see also Felton v. Hospital Guild of Thomasville*, 57 N.C. App. 33, 291 S.E. 2d 158, *affirmed without precedential value*, 307 N.C. 121, 296 S.E. 2d 297 (1982). The employee so injured is entitled to workers' compensation so long as he is performing duties of his

employer at the time. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980).

The evidence before the Commission in the present case was not sufficient to support the finding that plaintiff went to purchase the paper for use in his employment. Rather, all the evidence showed was that plaintiff's errand was strictly personal and that the paper was to be used by the employees on their break time for personal reasons. The incidental benefits accruing to the employer—having available "lost and found" advertisements and having available old newsprint to use in animal cages—were not appreciable enough to make plaintiff's errand *sufficiently work-related to justify compensation.* The Commission erred in concluding that plaintiff's accident arose out of and in the course of his employment.

For the reason stated, the award of the Commission must be and is

Reversed.

Judges BECTON and EAGLES concur.

MARY BUYS BRUCE v. NORTH CAROLINA NATIONAL BANK

MARY BUYS BRUCE v. NORTH CAROLINA NATIONAL BANK

No. 8225SC646

(Filed 21 June 1983)

Limitation of Actions § 4.6; Trusts § 7— express trust—breach of fiduciary and contractual duties in administering and managing—statute of limitations applicable

Where plaintiff instituted an action in January 1980 alleging that defendant breached its fiduciary duty by failing to liquidate or diversify poor quality stock which plaintiff held in both an *inter vivos* trust and a marital trust, the trial court properly found that plaintiff's action was barred by the three-year statute of limitations of G.S. 1-52(1) since plaintiff's cause of action accrued when defendant sold virtually all the poor stock in December of 1974 and not when the trusts were terminated in 1978. G.S. 1-47(2).

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 16 March 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 10 May 1983.

Plaintiff, beneficiary of two express trusts, brought this action against the corporate trustee, defendant North Carolina National Bank (hereafter NCNB), alleging breach of fiduciary and contractual duties in administering and managing the trusts. NCNB moved for summary judgment on the ground that plaintiff's action was barred by the statute of limitations. From the granting of summary judgment for NCNB on 16 March 1982, plaintiff appeals.

Ted G. West and David S. Lackey; and Edward H. Blair, Jr., for plaintiff appellant.

Moore and Van Allen by George R. Hodges and John T. Allred; Todd, Vanderbloemen and Respess by Bruce W. Vanderbloemen for defendant appellee.

BRASWELL, Judge.

The issue presented by this appeal is whether plaintiff's action is barred by G.S. 1-52(1), the three-year statute of limitations governing actions "upon a contract, obligation or liability arising out of a contract."

The essential facts are not in dispute. In 1967 plaintiff's husband died leaving a will which established a marital trust for the benefit of plaintiff. NCNB was named trustee of this trust. The marital trust assets consisted primarily of stock in two closely-held furniture companies, which were merged in 1968 into U. S. Industries, Inc. (USI), a public company traded on the New York Stock Exchange.

In 1969 plaintiff, who also held USI stock in her own name, established an *inter vivos* trust funded entirely by USI stock. NCNB was named trustee of the *inter vivos* trust. Since both trusts were revocable by plaintiff and therefore under her control, NCNB treated them as one for investment purposes. There was a total of 200,007 shares of USI stock in the trusts by the end of 1973. By November 1974 NCNB had diversified out of the concentration in USI by trading 141,777 shares, 71% of all USI stock in the two trusts.

In November 1974 NCNB recommended to plaintiff that the remaining USI stock be sold. Plaintiff consented to this sale in writing but requested that 6,000 shares be retained in the marital trust. Pursuant to her request, in November and December 1974 NCNB sold all of the USI stock in the *inter vivos* trust and all but 6,000 shares of the USI stock in the marital trust.

Plaintiff terminated both trusts in February and March 1978. In January 1980 plaintiff instituted this action alleging that NCNB breached its fiduciary duties by failing to liquidate or diversify the poor quality USI stock.

Plaintiff argues in her brief that the statute of limitations began to run in 1978 when the trusts were terminated and that, therefore, the action was filed within the three-year statute of limitations, G.S. 1-52(1), for actions "upon a contract, obligation or liability arising out of a contract." Plaintiff also contends that since the *inter vivos* trust was under seal, the applicable statute of limitations for an action on that trust is ten years, pursuant to G.S. 1-47(2). We disagree and hold that the cause of action accrued when NCNB sold virtually all the stock in December 1974 and that therefore the Superior Court properly concluded that the action was barred by the three-year statute of limitations.

In her argument concerning the three-year statute of limitations, plaintiff relies on *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938), in which the court held that the three-year statute of limitations applied to actions based on breach of an express or implied trust based on a contract.

> "Where there is an express trust based on contract, express or implied, the statute of limitations has no application and no length of time is a bar unless and until there has been (1) a repudiation or disavowal of the trust, or (2) a demand and refusal, or (3) the trust has been terminated by death, or (4) has been closed. . . . The reason for the rule is that the possession of the trustee is presumed to be the possession of the *cestui que trust*. As long as the relation of trustee and *cestui que trust* is admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, no refusal on demand to comply with the terms of the trust, and no repudiation or disavowal of the trust, no cause of action rests in the *cestui que trust*. The cause of action arises when and

> only when there has been some assertion of adverse claim or ownership, or a refusal to comply upon demand, or a disavowal or repudiation of the trust." [Citations omitted.]

Id. at 293, 199 S.E. at 87.

Based on the above-quoted passage, plaintiff asserts that the cause of action in her case arose at the time the trusts were terminated, which was less than two years prior to institution of this action.

We agree, however, with defendant that the more recent case of *Tyson v. N.C.N.B.*, 305 N.C. 136, 286 S.E. 2d 561 (1982), is dispositive of this appeal. In *Tyson* the plaintiff sued the executor/trustee seeking damages for breach of fiduciary duty for its failure to exercise reasonable care in marshalling the assets of the estate. In his opinion, Justice Carlton, writing for the court, stated that "[o]ur research reveals that the issue of which statute of limitations applies to an action against an executor for breach of fiduciary duty has never been considered by this Court." *Id.* at 141, 286 S.E. 2d at 564. The court discussed the holding in *Teachey* that the three-year statute applies in actions for breach of an express trust, and concluded that the situation in *Tyson* should also be treated as one of express trust and that the court should apply the three-year statute as done in *Teachey.* The Supreme Court held that the action was barred by the three-year statute of limitations applicable to contract actions, G.S. 1-52(1), and that the cause of action accrued at the date of the alleged breach or, at the latest, on the date it was discovered.

Applying *Tyson* to the facts before us, we find that plaintiff's action, like the one in *Tyson*, is one of damages for the trustee's breach of fiduciary duty. The alleged breach is NCNB's holding a concentration of USI stock in the two trusts and its failure to diversify the trust portfolios. In her deposition, plaintiff describes her cause of action against NCNB as one arising from NCNB's failure to sell the poor quality USI stock. NCNB sold the trusts' USI stock (except for the 6,000 shares that plaintiff requested not be sold) in November and December 1974. Thus, at that time NCNB ceased to hold a concentration of USI stock. Since the alleged breach of fiduciary duty is NCNB's retention of and failure to diversify USI stock, the breach had to occur prior to December 1974 when the stock was sold. The date of the breach,

therefore, was five years prior to commencement of this action. Prior to liquidation of the USI holdings, NCNB's agents met with plaintiff and obtained her approval for the sale. She was advised when the sale was accomplished. She therefore knew of the facts that constituted the alleged breach at the time they occurred. She regularly received financial statements from NCNB and had been aware for some time of the decline in the value of the USI stock. In her deposition plaintiff admitted that she had considered filing a lawsuit for at least three years before she actually did so in 1980. She first felt that NCNB was breaching its fiduciary duty when it let the USI stock "go to rock bottom." In January 1976 plaintiff wrote NCNB complaining about the USI "fiasco." Therefore, whether measured by the date of breach or the date of discovery, plaintiff's cause of action was not timely filed and was barred by the three-year statute of limitations. *Tyson v. N.C.N.B., supra.*

We find no merit to plaintiff's argument that since the trust agreement was executed by the parties under seal, the ten-year statute of limitations applies to the *inter vivos trust.* G.S. 1-47(2), the ten-year statute, governs only actions based "[u]pon a sealed instrument." However, G.S. 1-52(1), the three-year statute, governs actions based "upon a contract . . . or liability arising out of a contract." The plaintiff's action here is based on breach of a fiduciary duty arising out of the contractual relationship created by the trust agreement and is not an action upon the instrument itself. As defendant points out in its brief, plaintiff's action is contrary to the terms of the trust instrument, in that the instrument gives the trustee absolute discretionary power to deal with trust property and provides that the trustee has no duty to diversify trust investments. We overrule this assignment of error.

For the foregoing reasons, we hold that plaintiff's action on both trusts was not timely instituted and is now barred, and that the entry of summary judgment for defendant was proper.

Affirmed.

Judges WEBB and WHICHARD concur.

IN THE MATTER OF: MARTHA G. MILLER v. GUILFORD COUNTY SCHOOLS AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8218SC864

(Filed 21 June 1983)

Master and Servant § 108.1— unemployment compensation—refusal to assume additional work assignment—no misconduct

An employee who was discharged because she refused to assume an additional permanent work assignment on the ground that she did not have time to perform the additional task was not discharged for misconduct connected with her work so as to disqualify her for unemployment compensation.

APPEAL by Guilford County Board of Education, Employer, and the Employment Security Commission of North Carolina from *Helms, Judge.* Judgment entered 7 June 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 June 1983.

Defendant employer and the Employment Security Commission of North Carolina appeal from a judgment of the Superior Court reversing a decision by the Employment Security Commission that plaintiff claimant is disqualified for unemployment compensation benefits. The Commission made the following findings of fact:

1. Claimant last worked for Guilford County Schools on January 12, 1981. From January 18, 1981 until January 24, 1981, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a).

2. Claimant was discharged from this job for refusing to assume the duties involved in publishing the newsletter, on a permanent or indefinite basis, in addition to her primary graphic arts responsibilities.

3. Claimant was initially employed as a part-time graphic artist in the fall of 1978. In July 1979, claimant became a full-time employee.

4. On January 12, 1981, claimant was questioned by Mr. Phill Tate, Director of Community Education, regarding her progress on the upcoming newsletter, tentatively scheduled

for February 1981 publication. At this time, claimant voiced her objection to having full responsibility for the newsletter and Tate informed claimant that she was to assume full responsibility for same. The only way claimant could continue her employment was to assume said responsibility.

5. Claimant refused to assume full responsibility for the newsletter due to time constraints. Claimant and Tate had different opinions regarding claimant's available time to perform newsletter related duties. Claimant had the skills to perform the newsletter related duties, but contended the newsletter duties would adversely affect her graphic arts performance.

6. Claimant assumed full responsibility for the November 1980 newsletter to parents and December 1980 newsletter to staff, at Tate's request. Prior thereto, Tate had full responsibility for the newsletters.

7. Claimant could have performed the newsletter duties in total. It was a division of labor decision made by employer.

The Commission concluded that claimant refused to perform the duties involved in publishing the newsletter, on a permanent of indefinite basis, in addition to her primary graphic arts responsibilities; therefore, claimant must be "disqualified for benefits for having been discharged from the job for misconduct connected with the work." The Superior Court found the Commission erred in concluding that the claimant was guilty of misconduct, and reversed the order of the Commission. From the judgment entered, defendant employer and the Employment Security Commission appealed.

Smith Moore Smith Schell & Hunter, by Richard W. Ellis for plaintiff, appellee.

Douglas, Ravenel, Hardy, Crihfield & Bullock, by John W. Hardy for defendant-appellant, Guilford County Board of Education.

V. Henry Gransee, Jr. for defendant-appellant, Employment Security Commission of North Carolina.

HEDRICK, Judge.

The question presented by this appeal is whether it is misconduct connected with work for an employee to refuse to assume an additional, permanent work assignment because she did not agree with her supervisor's decision that she had time to perform the additional task. The Employment Security Law of North Carolina, in part, provides: "An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work." N.C. Gen. Stat. Sec. 96-14(2).

"Misconduct," in the context of this statute, has been defined as "conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 359 (1982) (citations omitted). Although ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant. *Id.* at 376, 289 S.E. 2d at 359. In considering an appeal from a decision of the Employment Security Commission, the reviewing court must "(1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision." *Id.* (citation omitted). The findings of fact in the present case were not challenged, thus they are conclusive. In *re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 364, 291 S.E. 2d 308, 309 (1982).

While the evidence discloses the employer had the right to discharge the claimant for her refusal, in our opinion the claimant was not discharged for misconduct within the meaning of the statute so as to disqualify her for unemployment benefits. Claimant was employed as a graphic artist and had the right to refuse to assume additional job responsibilities if she wished, but the employer had the right to discharge her if she so refused. The issue here is not whether the employer had the right to assign this duty to claimant, or whether claimant had the right to refuse to do the task, but is whether claimant's behavior rises to the level of misconduct within the statute. It does not follow from the

right to discharge an employee for his or her refusal to assume additional job responsibilities that the employee by refusing was wilfully or wantonly disregarding the employer's interest. To extend the definition of misconduct in such an expansive fashion, as appellants would have it, would be to abandon questions of wrongful intent, willfulness, wantonness, or deliberate misbehavior. In our opinion, the employer failed to carry its burden of showing circumstances which disclose that the employee was discharged for misconduct within the meaning of the statute. The findings do not support the Commission's conclusions of law, thus the court was correct in reversing the order of the Commission. The judgment of the Superior Court will be affirmed and the proceeding will be remanded to that court for the entry of an order remanding the cause to the Employment Security Commission for the entry of an appropriate order consistent with this opinion.

Affirmed.

Judges WELLS and PHILLIPS concur.

MARGARET L. KNOX v. DAVID LEONARD SCOTT AND WIFE, BRENDA THOMAS SCOTT

No. 8226SC798

(Filed 21 June 1983)

Deeds § 20.4— restrictive covenants—boathouse excluded

The trial court erred in concluding that a second story of a building which was built to house a boat and the boat's paraphernalia was an impermissible "building" within the definition of a subdivision's restrictive covenants. Defendants' two story structure in its entirety was a "boathouse" which was specifically exempt from the restrictions imposed.

APPEAL by defendants from *Lewis, Judge.* Judgment entered 5 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 May 1983.

Plaintiff and defendants are adjoining residential landowners in a subdivision on Lake Norman in Mecklenburg County. Lots in

the subdivision are subject to the following pertinent restrictive covenant:

> 2. LAND USE AND BUILDING TYPE. The lots shall be used for residential purposes only. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family-dwelling not to exceed two and one-half stories in height, a private garage for not more than two cars, boathouses and piers, ...

Defendants constructed on their lot a permanent structure located approximately sixteen feet from the lake shoreline and consisting of two levels separated by a wooden floor and connected by an inside stairway. They used the first level to store a motorboat. They used the second level to store boating and other water recreational equipment.

Plaintiff prayed for an order requiring defendants to remove this structure. Based on the foregoing facts, the trial court concluded that the first level of the structure was a "boathouse" which was permitted by the restrictions; that the second level was a "building" which was not permitted thereby; and that plaintiff was entitled to the equitable relief of a mandatory injunction. It ordered that defendants remove the second floor under its supervision.

From this order, defendants appeal.

Curtis, Millsaps and Chesson, by Cecil M. Curtis, for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman, by F. Fincher Jarrell, for defendant appellants.

WHICHARD, Judge.

Defendants assign error to the conclusion that the second level of their structure was a building which was not permitted under the restrictions, contending that it is not supported by the findings of fact. For reasons which follow, we hold the conclusion erroneous.

The guiding principle in the construction of restrictive covenants is as follows:

> While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, *e.g.*, *Long v. Branham*, 271 N.C. 264, 156 S.E. 2d 235 (1967), *see generally*, J. Webster, Real Estate Law in North Carolina § 346 (1971), such covenants are not favor[e]d by the law, *e.g.*, *Cummings v. Dosam, Inc.*, 273 N.C. 28, 159 S.E. 2d 513 (1968), and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. *Stegall v. Housing Authority of the City of Charlotte*, 278 N.C. 95, 178 S.E. 2d 824 (1971); *Long v. Branham, supra.* The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925); *see generally* 7 J. Grimes, Thompson on Real Property § 3160 (1962).

Hobby & Son v. Family Homes, 302 N.C. 64, 70-71, 274 S.E. 2d 174, 179 (1981).

In construing restrictive covenants, the meaning of each provision must be gathered from a study and consideration of all the covenants contained in the instrument, *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E. 2d 619, 623-24 (1954), giving each part its effect according to the natural meaning of the words used, *Hobby & Son, supra*, 302 N.C. at 71, 274 S.E. 2d at 179. The rule of strict construction requires an interpretation which least restricts the free use of land. Thus, when the language of a covenant is capable of two constructions, one which limits the restriction, rather than one which extends it, should be embraced. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E. 2d 235, 239 (1967).

Plaintiff contends that the second story of defendants' structure is a "building," which is defined in *Webster's Seventh New Collegiate Dictionary* 110 (1967) as "a [usually] roofed and walled structure built for permanent use," and in *Black's Law Dictionary* 176 (5th ed. 1979) as "[a] structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof." She argues that, as such, that level, which housed boating paraphernalia, was prohibited by the restrictions and did not fall within any of the exceptions to their constraints.

The principles set forth above, however, dictate a more narrow construction. A single story in a multi-story structure would not ordinarily fall within the foregoing or any other definitions of "building." Further, paragraph 2 of the covenants specifically exempts boathouses from its restrictions. A "boathouse" is defined in *Webster's Third New International Dictionary* 244 (1971) as "a building [usually] built partly over water for the housing or storing of boats and *often provided with accommodations for gear or general storage* and often with rooms for social activity." (Emphasis supplied.) The first floor of defendants' structure is used to house boats, and the second floor to store boating paraphernalia. The structure thus clearly qualifies as a boathouse under the foregoing definition.

Plaintiff contends the intent of the restrictions is to prohibit construction of structures which obstruct the view of the lake from the dwellings of other lot owners. The photographs introduced as exhibits indicate that defendants' two story structure in fact obstructs the view from plaintiff's dwelling.

To be enforceable, the nature and extent of a restrictive covenant must be determinable with reasonable certainty from its language. *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E. 2d 513, 517 (1968). While preserving a view may be a legitimate, indeed desirable, objective in a lakeside development, restrictive covenants designed to achieve that objective must be clearly drawn to reflect it. *Hobby & Son, supra.*

The covenants here do not express that objective, nor can it be clearly inferred from their language. Even construing the two and one-half story limitation imposed on residences to apply to nonresidential structures, defendants' two story structure fell within that limitation.

The objective of protecting the view could have been achieved by an express height limitation on non-residential structures. It could also have been achieved by language specifically prohibiting construction or placement of non-residential structures which obstructed the lake view from residential structures. Neither an express height limitation on non-residential structures nor an express prohibition of view-blocking by such structures appears, however.

Pursuant to the principle of strict construction applicable to restrictive covenants, we hold that defendants' two story structure in its entirety is a "boathouse" which is specifically exempt from the restrictions imposed; and that the trial court thus erred in concluding that its second story was an impermissible "building" and in ordering its removal. The judgment is therefore reversed, and the cause is remanded for entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and EAGLES concur.

MARTIN-KAHILL FORD LINCOLN MERCURY, INC. v. RAY SKIDMORE AND RAY SKIDMORE FORD, INC.

No. 8225SC663

(Filed 21 June 1983)

1. **Appeal and Error § 9— moot issue**

The issue of whether the trial court erred in denying plaintiff's motion for summary judgment was rendered moot when plaintiff prevailed after a trial on the merits.

2. **Sales § 19— breach of warranty against encumbrances—nominal damages**

In an action for breach of warranty against encumbrances in the sale of the assets of an automobile dealership, the trial court did not err in instructing the jury that plaintiff was entitled to recover only nominal damages where plaintiff's evidence tended to show that the assets were subject to outstanding tax liens of a town and a county for personal property taxes for 1979 and 1980 and that the town taxes had been paid by a bank for plaintiff's account, but plaintiff's evidence failed to show that it had actually paid the tax liens, that it was indebted to the bank for the amount paid by the bank, or that it was deprived of possession because of the tax liens.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 16 March 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 10 May 1983.

This action involves a breach of warranty against encumbrances. On 26 September 1979 plaintiff, as assignee, agreed in writing to purchase the assets of an automobile dealership from

defendant. The agreement contained a provision warranting that the dealership assets would be transferred free and clear of encumbrances. After the closing of the transaction, plaintiff discovered that the assets were subject to outstanding tax liens to the Town of Hudson and Caldwell County for personal property taxes for 1979 and 1980, in the amount of $33,801.00.

On 24 April 1981 plaintiff filed complaint against defendant for breach of warranty, seeking recovery in the amount of $33,801.00, plus attorney fees. The matter was tried before a jury on 16 March 1982. At the conclusion of the trial, the court granted individual defendant Ray Skidmore's motion for a directed verdict. As to the corporate defendant, Judge Snepp removed from the jury the issue of actual damages and instructed only on nominal damages. Plaintiff appeals from a jury verdict against defendant in the amount of $1.00.

Cagle and Houck by Joe N. Cagle for plaintiff appellant.

Michael P. Mullins for defendant appellee.

BRASWELL, Judge.

[1] Plaintiff first argues that the court erred in denying its motion for summary judgment against defendant. It is well-settled that denial of a motion for summary judgment is interlocutory and therefore not appealable, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980). In this case, plaintiff appealed from the denial of its motion after a full trial had been held and jury verdict returned in its favor. The issue therefore is moot since plaintiff in fact prevailed after a trial on the merits. Even if summary judgment had been granted, plaintiff still would have had to prove the amount of damages it sought to recover since the only evidence of the encumbrances was the notices of attachment and garnishment from the Town of Hudson and Caldwell County. The ownership of the assets as of 1 January 1980 was in dispute, according to the conflicting allegations in the complaint and answer. Plaintiff failed to allege in its complaint that it had in fact paid the tax liens. We also note that plaintiff failed to preserve as error the denial of the motion by excepting at the time of the denial. Compare *Motyka v. Nappier*, 9 N.C.

App. 579, 176 S.E. 2d 858 (1970), with *Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E. 2d 882 (1977). We find no merit to this assignment of error.

[2] Plaintiff next argues that the court erred in removing from the jury the issue of actual damages and in instructing only on nominal damages.

There is little dispute over the facts. The evidence showed that in the agreement to purchase the assets of the automobile dealership dated 26 September 1979, defendant impliedly and expressly warranted that the assets would be delivered free from any security interest, lien or encumbrance. Testimony from the Caldwell County Tax Collector showed that the dealership's 1979 and 1980 personal property taxes had not been paid. The Town of Hudson Tax Collector testified that 1979 and 1980 taxes had been paid by North Carolina National Bank (NCNB) for plaintiff's account. There was some dispute concerning the effective date of the sale between plaintiff and defendant. Jerry Kahill, president of plaintiff, testified that the final bill of sale was signed on 30 December 1979, but that the date shown on the closing document was 3 January 1980. He and about 18 other employees began working at the dealership in December of 1979, opened an account with NCNB to finance the purchase of automobiles in December, received new automobiles in December from Lincoln-Mercury, and advertised using the new dealership name in December.

At the close of the evidence, the court conducted a hearing on defendant's motion for a directed verdict. The following conversation occurred:

> "THE COURT: The motion for directed verdict by the individual defendant is granted. I don't know whether there is any evidence that you [*sic*] client has paid any money or not. It says paid by the bank for the account of your client. The law is you can only recover what you have paid out in these cases.
>
> MR. CAGLE: [Plaintiff's counsel] I believe on January 1 the tax collector has a lien.
>
> THE COURT: It doesn't matter whether he has a lien. The law of a warranty or a guarantey [*sic*] against encumbrances is that you can only recover what you have paid. It doesn't

matter if there is a lien. What you are out of pocket if you haven't satisfied the lien, you can only get nominal damages. I don't know what else to do but instruct the jury they can give you nominal damages."

Judge Snepp was applying the established rule of law in this State, as enunciated in *Seymour v. Sales Co.*, 257 N.C. 603, 609, 127 S.E. 2d 265, 269 (1962). In *Seymour*, the Supreme Court stated that upon discovery of breach of warranty, a buyer can rescind the contract, return the goods, demand return of the sales price, and upon refusal by seller to comply, institute an action for the sales price. Alternatively, a buyer can waive the right to rescind and institute "an action for damages for breach of warranty against encumbrances. In such action, a buyer cannot recover anything more than nominal damages until he has paid the amount of the outstanding lien or has been deprived of possession by reason of the lien in question . . . ." *Id.* Although *Seymour* predates the adoption of the Uniform Commercial Code in 1967, our research has not disclosed any change since the adoption in the law on damages as set forth in *Seymour*. *See* G.S. 25-1-103.

We find from a review of the evidence presented that plaintiff failed to prove that it had paid the amount of the outstanding tax liens or that it had sustained any actual damages as a result of the liens. The Caldwell County Tax Collector testified that 1979 and 1980 personal property taxes had not been paid. The Tax Collector for the Town of Hudson testified that the 1979 and 1980 taxes had been paid by NCNB for plaintiff's account. Plaintiff, however, presented no evidence that it had actually paid the taxes, that it was indebted to NCNB for the amount paid by NCNB, or that it was deprived of possession because of the tax liens. Pursuant to *Seymour*, we hold that the court's instruction to the jury that plaintiff was entitled only to recover nominal damages was proper.

We do not discuss plaintiff's contentions concerning the trial judge's failure to conduct a jury instruction conference and concerning the lack of opportunity given to counsel to object to any portion of the charge. In violation of Rule 10(a), (b) and (c), N.C. Rules App. Proc., plaintiff failed to take exception in the record or to assign as error these omissions of the court.

In the judgment rendered below, we find

No error.

Judges WEBB and WHICHARD concur.

IN THE MATTER OF: DAN WEBBER, D/B/A DAN WEBBER HARDWOOD LUMBER COMPANY v. McCOY LUMBER COMPANY

No. 8218SC822

(Filed 21 June 1983)

Assignments § 1— assignment of contract—action to recover money due

The trial court properly found an assignment of a contract and properly entered judgment for plaintiff on plaintiff's claim for money due from defendant where the evidence tended to show that pursuant to an agreement between Eastern Forest Products, Inc. and the plaintiff, the defendant's purchase order made to Eastern Forest Products, Inc. was assigned to the plaintiff and the plaintiff purchased the lumber materials to fill this order and shipped them to defendant's facility. G.S. 25-2-210(2).

APPEAL by defendant from *Helms, Judge.* Judgment entered 22 March 1982 in GUILFORD County Superior Court. Heard in the Court of Appeals 19 May 1983.

Plaintiff brought this action to recover money due for lumber delivered to a customer of defendant. In his complaint, plaintiff alleged, *inter alia*, that he sold the lumber to defendant, that it was delivered to defendant's customer and that defendant agreed to pay for the lumber but had failed to do so. Defendant answered, admitting that plaintiff sold the lumber and that defendant's customer received delivery of the lumber but denying liability as alleged by plaintiff. Defendant's answer further asserted a counterclaim, seeking a setoff for amounts allegedly owed to defendant by plaintiff on a separate transaction.

The case was tried before Judge Helms, sitting without a jury. After hearing the evidence, the trial judge made the following pertinent findings of fact.

> 3. On February 5, 1980, the Defendant submitted its purchase order number G-5263 to Eastern Forest Products, Inc., a North Carolina Corporation with its office located in Wilkesboro, North Carolina, for a quantity of lumber prod-

ucts to be delivered to the Defendant's facility in Fort Belvoir, Virginia.

4. Pursuant to an agreement between Eastern Forest Products, Inc. and the Plaintiff, the Defendant's purchase order was assigned to the Plaintiff and the Plaintiff purchased the lumber material to fill this order and shipped them to the Defendant's facility in Fort Belvoir, Virginia.

5. The Defendant acknowledged the assignment of the contract for the sale of lumber material between the Defendant and Eastern Forest Products, Inc. to the Plaintiff by negotiating with the Plaintiff regarding a set off, and thereafter asserting a set off, against the amount due on the February 5, 1980 contract for amounts allegedly due to the Defendant from the Plaintiff on certain transactions occurring in May, June, July and August of 1979, which are more specifically described in Findings of Fact numbers 10 through 15.

6. The Defendant received the lumber material delivered by the Plaintiff at the Defendant's facility at Fort Belvoir, Virginia, and the Defendant obtained the use and benefit of such lumber materials thereafter.

7. On or about February 25, 1980, the Plaintiff sent its invoices numbered 1374 and 1375 and on or about March 28, 1980 the Plaintiff sent its invoice number 1439 to the Defendant requesting payment for the lumber materials delivered pursuant to Defendant's purchase order number G-5263.

8. The Plaintiff has received no payment for the lumber materials specified in Defendant's purchase order number G-5263 and the Plaintiff's invoices numbers 1374, 1375 and 1439.

9. The Defendant is indebted to the Plaintiff in the amount of $14,211.47 with interest at the rate of 8% per annum on $9,849.68 from March 26, 1982, and at the rate of 8% per annum on $4,361.79 from April 27, 1980, by reason of the Defendant's order and the Plaintiff's delivery of the lumber materials specified in the Defendant's purchase order G-5263 and Plaintiff's invoices numbered 1374, 1375 and 1439.

Based on his findings, the trial judge made the following pertinent conclusions of law:

> 1. The Defendant entered into a contract with Eastern Forest Products, Inc. for the purchase of certain lumber materials, which contract was assignable, and was assigned from Eastern Forest Products, Inc. to the Plaintiff for performance.
>
> 2. The Plaintiff performed the contract between the Defendant and Eastern Forest Products and is therefore entitled to the payment specified therein and evidenced by the Defendant's purchase order G-5263 and Plaintiff's invoices numbered 1374, 1375 and 1439 in the amount of $14,211.47, plus interest at a legal rate of 8% per annum on $9,849.68 from March 26, 1980, and interest at the legal rate of 8% per annum on $4,361.79 from April 27, 1980.

Thereupon, the trial judge entered judgment for plaintiff on plaintiff's claim. Defendant appealed.

Graham, Cooke, Miles & Bogan, by James W. Miles, Jr., for plaintiff-appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Thomas S. Thornton and Rayford K. Adams, III, for defendant-appellant.

WELLS, Judge.

We note at the outset that all of defendant's assignments of error relate to plaintiff's claim and no question is argued with regard to defendant's counterclaim.

In its brief, defendant contends that there was insufficient evidence to establish an assignment by Eastern Forest Products to plaintiff of its contract with defendant; that, therefore, it was incumbent upon plaintiff to plead and to establish by competent evidence that he was the "real party in interest;" and that plaintiff failed to establish this.

We have reviewed the evidence that was before Judge Helms and find it supports his findings and conclusion that there was a valid assignment of the disputed contract to plaintiff. We, therefore, do not reach the questions raised by defendant regard-

ing whether it was incumbent upon plaintiff to plead and prove that he was the "real party in interest," and we affirm the judgment of Judge Helms. *See generally* Shuford, North Carolina Practice and Procedure (2nd Ed.), Sections 17-3 and 17-5.

Findings of fact made by the trial judge in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

G.S. 25-2-210(2) applies to the present case and provides:

> Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract, or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

At trial, plaintiff testified to the existence of an agreement between Eastern Forest Products and himself by which he would handle certain orders. Plaintiff testified that, pursuant to this agreement he received and took over defendant's purchase order to Eastern. Plaintiff bought lumber from a mill and delivered it to defendant's customer. Plaintff's son, who was a manager in one of plaintiff's offices, testified that defendant's purchase order was assigned to plaintiff for fulfillment and invoicing. This evidence is sufficient to support findings number 4 and 9 in which the court found that defendant's purchase order was assigned to plaintiff and that defendant is indebted to plaintiff for the sale price. These findings, in turn, support the court's conclusion that there was an assignment and that defendant is indebted to plaintiff.

The judgment of the trial court must be and is

Affirmed.

Judges HEDRICK and PHILLIPS concur.

ROBERT E. DIXON, JR. v. ROSALIE PATRICK DIXON

No. 8210DC727

(Filed 21 June 1983)

Appeal and Error § 6.2; Injunctions § 3— mandatory injunction—preserving status quo—premature appeal

Defendant could not appeal from a mandatory injunction ordering defendant to return property to plaintiff's residence pending final disposition of plaintiff's action for divorce and equitable distribution of marital property since the injunction was intended to maintain the status quo and since defendant had not shown that her "substantial rights were affected." G.S. 50-20(i), G.S. 1-277, and G.S. 7A-27.

APPEAL by defendant from *Cashwell, Judge.* Order entered 29 March 1982 in WAKE County District Court. Heard in the Court of Appeals 12 May 1983.

Plaintiff's action is for divorce and equitable distribution of marital property. On plaintiff's motion for a preliminary injunction, the trial judge found that defendant had removed certain items of personal property owned by the parties individually or jointly from the home of plaintiff, the former marital home. Upon concluding that it was necessary to prevent irreparable loss or damage, the trial judge issued a mandatory injunction ordering defendant to return the property to plaintiff's residence pending final disposition of plaintiff's action. The trial judge further ordered that neither party damage, sell, move, mortgage or in any other way harm any personal property that is or may be involved in the lawsuit, and also ordered that plaintiff post a $500.00 security bond. From this order, defendant appealed.

Johnson, Gamble & Shearon, by George G. Hearn, for plaintiff-appellee.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for defendant-appellant.

WELLS, Judge.

For defendant to have a right of appeal from a mandatory preliminary injunction, "substantial rights" of the appellant must be adversely affected. G.S. 1-277 and G.S. 7A-27. Otherwise, an appeal from such an interlocutory order is subject to being dis-

missed. *State v. Fayetteville Street Christian School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E. 2d 135 (1982). Generally, a right is "substantial" only if it would be lost if the ruling or order is not reviewed before final judgment. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, --- S.E. 2d --- (filed 31 May 1983); *Smart v. Smart, supra*. G.S. 50-20(i) provides that a party to an equitable distribution action may seek an injunction pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37. The decision as to whether to grant such an injunction for the purpose of preserving the *status quo* pending trial is left to the discretion of the trial judge, *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975), and generally no appeal lies from the issuance of such an injunction, *Bridges v. Bridges*, 29 N.C. App. 209, 223 S.E. 2d 845 (1976).

The injunction issued in the present case was obviously intended to maintain the *status quo*. The order affects both plaintiff and defendant, and plaintiff, who received possession of the property, was ordered to post a bond to protect defendant. Defendant has not shown that her "substantial rights" are affected, that her recourse on the bond posted by plaintiff will be inadequate or that the trial judge abused his discretion in issuing his injunction. Piecemeal adjudication and unnecessary delay in proceedings like the present one serve to delay and frustrate the effective administration of justice. *See Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981). This appeal is

Dismissed.

Judges BECTON and EAGLES concur.

BRENDA MOORE, AS GUARDIAN FOR CLAUDIUS JIAMACHELLO MOORE, A MINOR v. LARRY G. WILSON

No. 8212DC869

(Filed 21 June 1983)

Constitutional Law § 24.7; Process § 9.1— nonresident defendant—personal jurisdiction—minimum contacts

Defendant's contacts with this State were sufficient to permit the courts of this State to assert personal jurisdiction over defendant in a child support action under G.S. 1-75.4 and due process standards where plaintiff fathered the child in North Carolina and signed an acknowledgment of paternity and voluntary support agreement in this State.

APPEAL by defendant from *Keever, Judge.* Order entered 21 May 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 7 June 1983.

This is a civil action brought by plaintiff for child support. Defendant moved to dismiss the complaint for lack of personal jurisdiction. From an order denying his motion, defendant appealed.

Cooper, Davis, Eaglin & DeSilva, by Paul B. Eaglin, for plaintiff-appellee.

McLeod and Senter, by Joe McLeod for defendant-appellant.

WELLS, Judge.

The sole issue raised by defendant is whether the trial court erred in ruling that it has personal jurisdiction over defendant. Defendant argues that there is insufficient evidence to support the Court's findings of fact and conclusion that he has had sufficient minimum contacts with North Carolina to establish jurisdiction. We disagree.

The question of personal jurisdiction is controlled by a two part test: (1) statutory prerequisite must be met and (2) elements of due process must be satisfied. The crucial inquiry in applying this test is whether the defendant has had enough minimum contact with the state to satisfy standards of due process and traditional notions of fair play and substantial justice. *See Johnston v. Gilley,* 50 N.C. App. 274, 273 S.E. 2d 513 (1981) and cases cited and discussed therein.

The trial judge made findings of fact which include the following:

> . . .
>
> (2) That Defendant signed an acknowledgement of paternity and voluntary support agreement for this child on November 22, 1974, in Forsyth County, North Carolina; that said document was filed in Cumberland County, North Carolina.
>
> (3) That in February 1975, Defendant was found guilty of criminal non-support of said Plaintiff minor child in Cumberland County.
>
> (4) That in 1976 Defendant was found to be in contempt of the criminal order of this court in Cumberland County, North Carolina.
>
> . . .
>
> (6) . . . That Defendant has complied with the criminal order of the Cumberland County Court for the last six years and has made payments for the support of this minor child through the Cumberland County Clerk of Court's office.
>
> . . .

Defendant argues that these findings have no factual basis because the only evidence considered by the trial judge in making these findings was plaintiff's complaint. However, defendant took no exception to any of the above findings of fact and excepted only to the judge's conclusion, "[t]hat these are more than adequate minimum contacts of the defendant with the State of North Carolina, and the traditional notions of fair play and substantial justice are not offended by hearing the case here," and to the judge's denial of the motion to dismiss. Findings of fact not excepted to by the defendant are presumed to be supported by the evidence and are binding on appeal. *Swygert v. Swygert,* 46 N.C. App. 173, 264 S.E. 2d 902 (1980).

In our opinion the trial court's findings of fact support the conclusion that defendant's contacts with North Carolina were substantial enough to meet both the statutory requirements of G.S. 1-75.4 and due process standards. Defendant's fathering of

the infant plaintiff in North Carolina and his signing of an acknowledgment of paternity and a voluntary support agreement indicate that defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. *Compare Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980).

The order denying defendant's motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

Judges HEDRICK and PHILLIPS concur.

FAYE R. JONES v. DONNIE RAY JONES

No. 825DC921

(Filed 21 June 1983)

Divorce and Alimony § 24.4— arrearage in child support—imprisonment until payment—insufficient findings

The trial court erred in ordering defendant imprisoned for civil contempt until he purged himself of such contempt by paying arrearages for support of his child where the evidence was insufficient to show that defendant actually possessed enough money to purge himself or that he had "the present ability to take reasonable measures that would enable him to comply with the order."

APPEAL by defendant from *Lambeth, Judge.* Order entered 22 January 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 9 June 1983.

This is an appeal by defendant from an order imprisoning him for civil contempt until he purges himself of such contempt by paying arrearages for the support of his child in the amount of $6,540.00.

Julia Talbutt for plaintiff, appellee.

W. G. Smith and Bruce H. Jackson, Jr. for defendant, appellant.

HEDRICK, Judge.

In *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E. 2d 786, 787 (1980), this Court, speaking through Martin, Judge (Harry C.), said:

> For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order. (Citation omitted.)

In the present case, the defendant excepted to the following finding of fact made by the trial judge: "That Defendant has had and now has the present means and ability to comply with the provisions of the Judgment of 3 February 1975. That Defendant's failure to comply with said Order is without just cause or excuse." The question thus presented is whether the evidence in the record supports the finding of fact that the defendant possesses the present means of paying the arrearage of $6,540.00. We hold it does not.

While the evidence tends to show that defendant was gainfully employed as a construction worker at an hourly wage of $5.75 and that he lives with his second wife who also is gainfully employed with an average take-home pay of approximately $406.00 per month and that the defendant and his wife reside in a trailer situated on some "land" given to defendant by his present father-in-law and that the trailer is heavily mortgaged and that monthly mortgage payments are $250.00 and that the mortgage will be paid in six years and that defendant owns an automobile which is "broken," there is no evidence in this record that defendant actually possesses $6,540.00 or that he has "the present ability to take reasonable measures that would enable him to comply, with the order." *Id.*

We are familiar with the popular conception among members of the bench and bar that a defendant can raise more money in jail in an hour than he can outside in a year, but we cannot substitute popular conception for evidence to support a critical finding of fact. The order must be reversed and the cause remanded for further proceedings.

Reversed and remanded.

Judges WELLS and PHILLIPS concur.

THOMAS F. MINOR v. VIRGINIA H. MINOR

No. 8212DC592

(Filed 21 June 1983)

Rules of Civil Procedure § 41.2— defiance of court's orders—dismissal of motion in cause

The trial judge did not err in refusing to consider plaintiff's motion in the cause and in dismissing the motion because of plaintiff's prolonged and continuing defiance of the court's previous orders. G.S. 1A-1, Rule 41(b).

APPEAL by plaintiff from *Hair, Judge.* Order entered 22 December 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 20 April 1983.

Upon the plaintiff suing for an absolute divorce, the defendant counterclaimed for permanent alimony, and since then various orders requiring support payments of the plaintiff have been entered. None of the orders have been complied with, however, and plaintiff has been adjudged in contempt several times, but with little effect, since he appeared at none of the hearings and has not been found by the sheriff. By order entered 11 December 1979 he was found to be in contempt of court for being $2,100 in arrears under the terms of the previous orders and was ordered to pay defendant $800 a month thereafter.

The plaintiff, a retired Army officer, receives a substantial monthly income from the U. S. Army Pay and Financial Center in Indianapolis, Indiana. As the alimony arrearage continued to grow, in January, 1981, pursuant to the provisions of G.S. 50-16.7, an order was entered directing plaintiff to execute an assignment of wages or income in favor of the defendant in the amount of $800 a month and ordering him to show cause why, pursuant to the provisions of Rule 70 of the Rules of Civil Procedure, the court should not appoint someone to execute the assignment for him if he did not do so himself by a certain time. When plaintiff

failed to make the assignment as directed, the judge appointed the Clerk of Court to execute it for him.

Upon the Army Pay and Financial Center receiving the income assignment and complying with it by reducing plaintiff's monthly payment in the amount of $800 and sending it to defendant, plaintiff filed a motion in the cause, requesting that the court direct the Center to disregard the assignment, which plaintiff contends is in effect a garnishment of his military pay contrary to law. In response thereto the defendant moved that the plaintiff's motion be dismissed because of plaintiff's continuing refusal to obey any of the several orders entered herein. At the hearing thereon, citing the plaintiff's repeated defiance of the court, the judge declined to consider plaintiff's motion on the merits and entered an order dismissing it, pursuant to the provisions of Rule 41(b) of the Rules of Civil Procedure. It is from this order that the plaintiff appealed.

Hutchens & Waple, by Mark L. Waple, for plaintiff appellant.

Beaver & Holt, by H. Gerald Beaver, for defendant appellee.

PHILLIPS, Judge.

The scope of this appeal is very narrow, indeed. It is not concerned with the propriety of any of the alimony or contempt orders, or of the order of income assignment, or even of the income assignment itself, none of which has been excepted to or appealed from. Nor is it concerned with the merits of the plaintiff's motion in the cause, which has not been considered and ruled on by the trial judge. The only question presented for decision is whether the judge erred in refusing to consider plaintiff's motion in the cause and dismissing it because of plaintiff's continuing and prolonged defiance of the court's orders. In our view, no error has been shown.

The part of Rule 41(b) pertinent hereto reads as follows:

> For failure of the plaintiff to prosecute or 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. [Emphasis supplied.]

Though motions are not mentioned therein, it necessarily follows that a rule which expressly authorizes the judge to dismiss a

recalcitrant and disobedient plaintiff's action also authorizes him to dismiss a mere motion made in support of the action. That the judge was abundantly justified in doing so is equally plain and requires no discussion.

In passing, we note, however, that the power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, did not originate with Rule 41(b). It is longstanding and inherent. 27 C.J.S. *Dismissal & Nonsuit* § 59. For courts to function properly, it could not be otherwise.

The order appealed from is

Affirmed.

Judges HILL and JOHNSON concur.

LOUIS E. RAINES v. BRUCE WARREN THOMPSON AND INGLES MARKETS, INCORPORATED v. NANTAHALA POWER AND LIGHT COMPANY

No. 8230SC814

(Filed 21 June 1983)

Appeal and Error § 6.2— appeal from motion to dismiss and motion to strike—premature

Defendant's appeal was premature since no appeal lies as a matter of right from the denial of a Rule 12(b)(6) motion or a motion to strike portions of pleadings pursuant to Rule 12(f). Further, the third party defendant had attempted to appeal from an order which did not involve plaintiff's claim against the original defendants, and to allow such an appeal would frustrate plaintiff's efforts to pursue his claim when he is not involved in the controversy between the original defendants and the third party defendant.

APPEAL by third party defendant from *Thornburg, Judge.* Order entered 13 July 1982 in Superior Court, JACKSON County. Heard in the Court of Appeals 19 May 1983.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries which allegedly resulted when he was struck by a motor vehicle driven by defendant Thompson and owned by defendant Ingles Markets, Inc. These defendants filed an answer denying any liability to plaintiff and, as third party

plaintiffs, filed a third party complaint against Nantahala Power and Light Co. (Nantahala) as third party defendant for "contribution." Nantahala, as third party defendant, filed an answer to the third party complaint praying that the third party complaint be dismissed and that the third party plaintiffs recover nothing of Nantahala. In its answer, Nantahala moved that the third party complaint be dismissed "[p]ursuant to Rule 12(b)" on the grounds that "this Court lacks jurisdiction over the person of this defendant and for failure of the third party complaint to state a claim upon which relief can be granted in favor of the third party plaintiffs, and on the grounds that the joinder of this third party defendant is improper and violates the provisions of G.S. 97-10.2 subsection (e)." As a second defense, Nantahala moved to strike certain portions of the third party complaint.

Judge Thornburg entered an order denying the third party defendant's motion to dismiss and motion to strike and *ex mero motu* entered an order severing the third party action from plaintiff's action against defendants Thompson and Ingles Markets, Inc. Third party defendant Nantahala appealed.

VanWinkle, Buck, Wall, Starnes and Davis, by Philip J. Smith, for third-party plaintiffs.

Morris, Golding and Phillips, by James Golding, for third-party defendant.

WELLS, Judge.

Apparently conscious of the fact that this appeal is subject to dismissal, third party defendant first argues in its brief that "[t]his appeal is brought pursuant to the provisions of G.S. 1-277(a) and G.S. 7A-27(d)(1), both of which statutes permit an appeal from an interlocutory order which affects a substantial right." No appeal lies as a matter of right from the denial of a Rule 12(b)(6) motion or a motion to strike portions of pleadings pursuant to Rule 12(f). *State v. Fayetteville Street Christian School,* 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed,* 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980); *O'Neill v. Southern National Bank,* 40 N.C. App. 227, 252 S.E. 2d 231 (1979); *Godley Auction Co. v. Myers,* 40 N.C. App. 570, 253 S.E. 2d 362 (1979). This is because no final judgment is involved in such a denial and the movant is not deprived of any substantial right that cannot be protected by a

timely appeal from a final judgment which resolves the controversy on its merits. *Id.*

Moreover, the third party defendant here has attempted to appeal not only from interlocutory orders, but from an order which does not involve plaintiff's claim against the original defendants. To allow such an appeal could and would successfully frustrate plaintiff's efforts to pursue his claim when he is not involved in the controversy between the original defendants and the third party defendant. *Compare Lamb v. Wedgewood South Corp.*, 308 N.C. 419, --- S.E. 2d --- (filed 31 May 1983).

This appeal is

Dismissed.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HERMAN NICKERSON

No. 829SC231

(Filed 21 June 1983)

Homicide § 27.1— instructions—unanimity of verdict—theory of voluntary manslaughter

In a prosecution for second degree murder, the trial court's instructions, including its instructions on unanimity of the verdict and the elements of voluntary manslaughter under the evidence in the case, correctly charged the jury that in order to convict defendant of second degree murder, it must unanimously agree that the killing included the element of malice, and that in order to convict defendant of the lesser offense of voluntary manslaughter, it must unanimously agree that the killing was intentional but without malice, and the court did not err in failing to instruct that the jury need not unanimously agree on the theory of manslaughter—heat of passion or imperfect self-defense—in order to return a verdict of guilty of manslaughter.

APPEAL by defendant from *Battle, Judge.* Judgment entered 23 April 1981 in FRANKLIN County Superior Court. Originally heard in the Court of Appeals 23 September 1982.

Initially, we dismissed this appeal for failure of defendant to comply with Appellate Rules 9(c)(1) and 28(b)(4). Our Supreme

Court, upon discretionary review, reversed our initial opinion and remanded for an opinion on the merits. *See State v. Nickerson*, 308 N.C. 376, 302 S.E. 2d 221 (1983).

Defendant was indicted for the murder of Percy Richardson, Jr. At trial, the State indicated that it was proceeding against defendant on the charge of second degree murder. At the close of the case, the trial court submitted to the jury alternative verdicts of guilty of second degree murder, guilty of voluntary manslaughter, and not guilty. From judgment entered upon a verdict of guilty of second degree murder, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant.

WELLS, Judge.

The sole question presented in this appeal is whether the trial court erred in not instructing the jury that they need not unanimously agree on the *theory* of manslaughter in order to return a verdict of guilty of manslaughter.

Defendant contends that there was evidence in this case of two kinds of voluntary manslaughter: one, a killing in the heat of passion upon adequate provocation; and two, "imperfect self-defense" manslaughter; i.e., a killing without malice because the defendant, while entitled to use force to defend himself, used excessive force. Defendant does not contend that the trial court failed to adequately instruct the jury on the elements of second degree murder and of voluntary manslaughter under the evidence in this case, but defendant contends that the unanimity instruction given could have prevented the jury from finding defendant guilty of voluntary manslaughter where the jury was in agreement that defendant was so guilty but was not in agreement as to under which theory he was guilty.

The only portion of the charge excepted to was as follows:

> I instruct you that a jury verdict is not a verdict until all twelve jurors agree unanimously as to what your verdict should be. You may not render a verdict by majority vote.

We hold that this instruction, considered together with the correct instructions as to the elements of voluntary manslaughter under the evidence in this case correctly instructed the jury that in order to convict for murder in the second degree, they must unanimously agree that the killing included the element of malice, and that for them to convict defendant of the lesser offense of voluntary manslaughter, they must unanimously agree that the killing was intentional but without malice. Since the jury found defendant guilty of second degree murder, it is clear that the jurors were in unanimous agreement that defendant acted with malice and that no juror believed that defendant acted in the heat of passion or in imperfect self-defense.

Defendant received a fair trial free of prejudicial error.

No error.

Chief Judge VAUGHN and Judge WEBB concur.

WILLIAM RALPH MILLER v. MARIE SPARROW MILLER

No. 8215DC819

(Filed 21 June 1983)

APPEAL by plaintiff from *Harris, Judge.* Judgment entered 16 February 1982 in District Court, ALAMANCE County. Heard in the Court of Appeals 19 May 1983.

David I. Smith for plaintiff-appellant.

Vernon, Vernon, Wooten, Brown and Andrews, P.A., by Wiley P. Wooten, for defendant-appellee.

WELLS, Judge.

Plaintiff brought this action for absolute divorce based on one year's separation. Defendant filed an answer and counterclaim for divorce from bed and board, permanent alimony and counsel fees. Plaintiff took a voluntary dismissal of the action for absolute divorce.

After a trial before the judge without a jury, the court entered a judgment on 16 February 1982 awarding defendant wife a divorce from bed and board, permanent alimony at the rate of $600.00 per month, and requiring plaintiff to transfer certain personal property to defendant. Plaintiff gave notice of appeal on 16 February 1982.

We have carefully examined the several exceptions and assignments of error defendant has attempted to bring forward and argue in his brief and find these assignments of error are meritless.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 JUNE 1983

ACREE v. MOSELEY No. 826SC906	Northampton (80CVS206)	Affirmed
BARNES v. O'BERRY CENTER No. 8210IC895	Industrial Commission (G-5186)	Affirmed
BATEMAN ROOFING v. TIMBERLAKE No. 823SC414	Pitt (81CVS816)	Affirmed
DOWLESS FARM SUPPLY v. DEVANE No. 8313DC128	Bladen (82CVD196)	Affirmed
HENSLEY v. McCALL No. 8224SC914	Madison (81CVS27)	Affirmed
IN RE ADCOCK No. 829SC1260	Granville (82SP170)	Affirmed
IN RE GIBBS v. BROWN & ROOT CONSTRUCTION No. 823SC805	Pamlico (82CVS34)	Affirmed
K & M MECHANICAL SERVICES v. LOCKHART No. 8221SC912	Forsyth (82CVS1351)	Affirmed
KUYKENDALL v. KUYKEN- DALL No. 8228DC901	Buncombe (81CVD994)	Affirmed
MASON v. RUMPLE No. 8219DC856	Rowan (81CVD1083)	Affirmed
NICHOLS v. NICHOLS No. 8218DC916	Guilford (82CVD2256)	Affirmed
PYLES v. CP&L CO. No. 829SC931	Person (79CVS509)	Affirmed
STATE v. CLARK No. 8212SC1250	Cumberland (82CRS5395)	No Error
STATE v. NICHOLSON No. 812SC1173	Martin (81CRS3400)	Affirmed
STATE v. WILSON No. 8221SC998	Forsyth (82CRS852) (82CRS853)	Affirmed in Part; Reversed in Part; and Re- manded in Part
TOWNSEND v. McNEILL No. 8225SC905	Caldwell (80CVS611)	Affirmed

APPENDIX

AMENDMENTS TO THE
CODE OF PROFESSIONAL
RESPONSIBILITY

AMENDMENTS TO THE CODE OF PROFESSIONAL RESPONSIBILITY

The following amendments to the Code of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 2 of the Canons of Ethics and Rules of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar as appear in 205 NC 865 and as amended in 283 NC 798, 293 NC 777, 299 NC 747 and 301 NC 735 be amended by deleting the current DR 2-101; DR 2-102; DR 2-103; DR 2-104; and DR 2-105 and rewriting the same to read as follows:

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available

DR 2-101 **Publicity and Advertising**

(A) A lawyer shall not, on behalf of himself or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading or deceptive statement or claim.

(B) A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. If such communication is disseminated to the public by use of electronic media, it shall be prerecorded, and the prerecorded communication shall be approved in advance by the lawyer before it is broadcast. A recording of the actual transmission shall be retained by the lawyer for a period of one year following the last broadcast date.

DR 2-102 **Firm Names and Letterheads**

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. The North Carolina State Bar may require that every trade name used by a law firm shall be

registered, and upon a determination by the Council that such name is false or potentially misleading, may require with its use a remedial disclaimer or an appropriate identification of the firm's composition or connection. For purposes of this section the use of the names of deceased former members of the firm shall not render the firm name a trade name.

(B) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of the members and associates in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

(C) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(D) A lawyer shall not hold himself out as practicing in a law firm unless the association is in fact a firm.

(E) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless a certificate of registration authorizing said professional relationship is first obtained from the Secretary of the North Carolina State Bar. (A new section adopted by the Council on July 16, 1982 and certified to the Supreme Court on July 26, 1982 as DR 2-102 (D).)

DR 2-103 **Recommendation or Solicitation of Professional Employment**

(A) A lawyer shall not, by personal communication, solicit employment for himself or any other lawyer affiliated with him or his firm from a non-lawyer who has not sought his advice regarding employment of a lawyer if

(1) The communication is false, fraudulent, misleading or deceptive, or

(2) The communication has a substantial potential for, or involves the use of, coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communications not prohibited by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communication of the service or plan does not violate DR 2-101.

(C) A lawyer shall not accept employment when he knows or reasonably should know that the person who seeks his services does so as a result of any conduct prohibited by DR 2-101 or DR 2-103.

DR 2-104 **Specialization**

Unless a lawyer is certified as a specialist by a body authorized to do so by the North Carolina State Bar, he may represent himself as a specialist in a public communication only if such communication is not misleading or deceptive and includes the following disclaimer or language which is substantively similar:

"REPRESENTATIONS OF SPECIALTY DO NOT INDICATE STATE CERTIFICATION OF EXPERTISE."

BE IT FURTHER RESOLVED that DR 2-106 be renumbered DR 2-105; DR 2-107 be renumbered DR 2-106; DR 2-108 be renumbered DR 2-107; DR 2-109 be renumbered DR 2-108 and DR 2-110 be renumbered DR 2-109.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1982.

B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of December, 1982.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of December, 1982.

MARTIN, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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VENDOR AND PURCHASER

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ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action; In General

The trial court did not err in denying defendant's motion to stay plaintiff's action for divorce filed prior to the effective date of the Equitable Distribution of Marital Property Act until the entry of final judgment in defendant's action for divorce and an equitable distribution of the marital property filed in another county after the effective date of the Act. *Myers v. Myers*, 291.

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

The trial court properly entered a directed verdict in favor of defendant at the close of plaintiff's evidence where plaintiff's evidence showed that plaintiff agreed to absolve defendant from further liability in exchange for additional cost-free repairs made to concrete which defendant installed. *State Distributing Corp. v. G. E. Bobbitt & Assoc., Inc.*, 530.

Plaintiff's cashing of a check tendered in full payment of a disputed claim established an accord and satisfaction as a matter of law. *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 564.

AGRICULTURE

§ 8. Governmental Regulations and Civil and Criminal Liabilities

Plaintiff established that its acts and conduct on a 19.6-acre tract of land were within the State's declared public policy of encouraging farming, farmers and farmlands. *Baucom's Nursery Co. v. Mecklenburg Co.*, 396.

ANIMALS

§ 1. Liability for Injury to Domestic Animals

The trial court improperly granted plaintiff's and third party defendant's motions for summary judgment on defendant's counterclaim alleging negligence on the part of plaintiff in changing cattle feed without informing defendant. *Elmore's Feed & Seed, Inc. v. Patrick*, 715.

APPEAL AND ERROR

§ 6. Right to Appeal Generally; Effect of Statutes

In a negligence action, where the trial judge separated the issues of negligence from the issues of damages, where the jury answered that one defendant was not negligent while being unable to reach a verdict on the issue of whether another defendant was negligent, and where the judge accepted the verdict and entered judgment on the issue which was determined while declaring a mistrial on the other issue, the judgment was immediately reviewable on appeal. *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.; Gulley v. Yancey Trucking Co.*, 602.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Defendant had no right of immediate appeal from an order directing him to submit to a blood grouping test. *Davie County Dept. of Social Services v. Jones*, 142.

A trial court's orders granting plaintiff's motion in limine and awarding a partial new trial on the issue of damages were interlocutory orders, and defendant had no immediate right to appeal from them. *Rudder v. Lawton*, 277.

APPEAL AND ERROR — Continued

Order allowing summary judgment for fewer than all defendants affected a substantial right and was immediately appealable. *Swindell v. Overton*, 160.

Defendant could not appeal from a mandatory injunction ordering defendant to return property to plaintiff's residence pending final disposition of plaintiff's action for divorce and equitable distribution of marital property. *Dixon v. Dixon*, 744.

Defendant's appeal was premature since no appeal lies as a matter of right from the denial of a Rule 12(b)(6) motion or a motion to strike portions of pleadings pursuant to Rule 12(f). *Raines v. Thompson*, 752.

§ 6.9. Appealability of Preliminary Matters and Mode of Trial

An appeal from a judge's order withdrawing the matter from arbitration and placing it on the trial calendar was not premature. *Sims v. Ritter Construction, Inc.*, 52.

A default judgment dismissing defendant's answer and counterclaim in a divorce action as a sanction for failure to appear for a deposition was immediately appealable. *Adair v. Adair*, 493.

§ 9. Moot and Academic Questions

The issue of whether the trial court erred in denying plaintiff's motion for summary judgment was rendered moot when plaintiff prevailed after a trial on the merits. *Martin-Kahill Ford v. Skidmore*, 736.

§ 14. Appeal and Appeal Entries

Defendant's appeal was timely perfected. *Henderson v. Provident Life and Accident Ins. Co.*, 476.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

Where defendants failed to except to the denial of their motion for a rehearing before the Industrial Commission, the assignments of error presented no question for review. *Church v. G. G. Parsons Trucking Co.*, 121.

§ 28.1. Exceptions and Assignments of Error Related to Findings of Fact; Necessity for Requests, Objections, and Exceptions

Where defendant failed to except to any of the trial court's findings of fact or conclusions of law, they were presumed to be supported by competent evidence and are binding on appeal. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 205.

In an appeal from orders denying plaintiff's motion for an order requiring the opening of an adoption record where plaintiff failed to except to the findings of fact and conclusions drawn to support the judgment, the judgment is affirmed. *In re Rumley v. Inman*, 324.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

In a civil action for assault, the trial court erred in failing to allow the defendant to offer testimony that plaintiff was intoxicated on the date of one of the assaults. *Gay v. Gay*, 288.

ARBITRATION AND AWARD

§ 2. Agreements to Arbitrate as Bar to Action

Where a contract between the parties contained an agreement to submit any contract controversy to arbitration, the trial court had no jurisdiction to hear the

ARBITRATION AND AWARD — Continued

action arising out of the contract and erred in withdrawing the matter from arbitration and placing it on the trial calendar. *Sims v. Ritter Construction, Inc.*, 52.

§ 4. Proceedings by Arbitrators

The trial court did not err in failing to vacate an arbitrator's award because the individual respondents were not parties to the arbitration agreement between claimant and the corporate respondent and the female respondent was not a party to claimant's agreement with the male respondent. *In re Boyte*, 682.

§ 6. Resubmission to Arbitrators

Upon remand for clarification of an arbitration award requiring respondents to pay claimant a certain amount for architect services on a house project and a warehouse project, the arbitrator did not err in revising the award so that the total amount was due only from the individual defendants for services on the house project. *In re Boyte*, 682.

ARSON AND OTHER BURNINGS

§ 4.1. Cases Where Evidence Was Sufficient

The State's evidence was sufficient for the jury in a prosecution for first degree arson. *S. v. Riggs*, 111.

§ 4.2. Cases Where Evidence Was Insufficient

The evidence was insufficient to convict defendants of burning a building used in trade in violation of G.S. 14-62. *S. v. Tew*, 190.

ASSAULT AND BATTERY

§ 3.1. Actions for Civil Assault; Trial

The trial court did not commit error in its findings and awarding damages based upon "numerous assaults and batteries" even though plaintiff alleged only two assaults in her complaint. *Gay v. Gay*, 288.

ASSIGNMENTS

§ 1. Rights and Interests Assignable and Transactions Constituting Assignments

The trial court properly found an assignment of a contract and properly entered judgment for plaintiff on plaintiff's claim for money due from defendant. *In re Webber v. McCoy Lumber Co.*, 740.

ATTORNEYS AT LAW

§ 11. Disbarment Proceedings; Procedure

The findings, conclusions and decisions of the State Bar Disciplinary Hearing Committee were supported by substantial competent evidence. *N.C. State Bar v. Frazier*, 172.

The State Bar Rules and not G.S. 84-30 address the question of discovery in disciplinary proceedings. *Ibid.*

The members of the Disciplinary Hearing Commission properly questioned defendant. *N.C. State Bar v. Talman*, 355.

ATTORNEYS AT LAW — Continued

§ 12. Disbarment Proceedings; Grounds

The findings and conclusions by the Disciplinary Hearing Commission of the State Bar were supported by substantial and competent evidence. *N.C. State Bar v. Talman*, 355.

AUTOMOBILES AND OTHER VEHICLES

§ 43.2. Plaintiff's Pleadings; Allegations as to Proximate Cause

In an action in which plaintiff sued defendant for injuries sustained in an automobile accident, the trial court did not err in allowing plaintiff's motion in limine in which plaintiff sought to have the court instruct defendant's counsel not to mention consumption of beer at trial. *Rudder v. Lawton*, 277.

§ 46. Opinion Testimony as to Speed

Testimony that defendant was driving "normal" and at a "reasonable speed" at the time of an accident was competent as a shorthand statement of fact. *Medford v. Davis*, 308.

§ 58.2. Turning; Collisions Between Vehicles Going Same Direction

In an action to recover for injuries sustained by plaintiffs when their motorcycle struck defendant's car as it made a left turn across plaintiffs' lane of travel as plaintiffs were passing a tractor-trailer, plaintiffs' evidence was sufficient for the jury on the issue of negligence by defendant in failing to see plaintiffs as they approached in the lane across which she was to turn. *Cunningham v. Brown*, 239.

§ 62.3. Striking Pedestrians; While Walking Along Streets or Highways

The evidence was insufficient to show negligence by defendant in striking a pedestrian who suddenly walked or jumped into the path of defendant's car. *Hughes v. Gragg*, 116.

§ 83.2. Contributory Negligence of Pedestrians; While Standing on or Walking Along Highways

Evidence that while decedent was walking on a highway late at night in a state of extreme intoxication, he walked or jumped directly into the path of defendant's moving vehicle established decedent's contributory negligence as a matter of law. *Hughes v. Gragg*, 116.

§ 86. Last Clear Chance

The evidence in a wrongful death action did not require the trial court to submit an issue of last clear chance. *Hughes v. Gragg*, 116.

§ 111. Proximate Cause, Contributory Negligence and Intervening Negligence in Homicides

The State presented sufficient evidence to show that defendant's actions were a proximate cause of the victim's death even though a doctor testified that the sole cause of the victim's death was the negligence of the attending doctor. *S. v. Mitchell*, 21.

The sole cause of death rule applies in involuntary manslaughter cases involving culpable negligence. *Ibid.*

§ 119.1. Reckless Driving; Sufficiency of Evidence

There was sufficient evidence of the identity of the driver of a vehicle involved in a prosecution for reckless driving and speeding while attempting to elude arrest

AUTOMOBILES AND OTHER VEHICLES — Continued

even though there was apparently a period of time when no one saw the car involved in the offenses. *S. v. Steelman,* 311.

§ 126.5. Competency and Relevancy of Evidence in DWI cases; Statements of Defendant

The Miranda rule did not apply to a statement made by petitioner at the scene of an accident. *Stalls v. Penny,* 511.

BILLS AND NOTES

§ 4. Consideration

Where a husband and wife executed a demand note for money loaned to the husband, the promisee's forbearance to levy on a bank account owned by both promisors constituted sufficient consideration for a new note and deed of trust signed by both promisors. *In re Foreclosure of Owen,* 506.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not err in allowing a State's witness to testify whose name had not been disclosed as a prospective witness prior to the jury voir dire. *S. v. Mitchell,* 21.

BOUNDARIES

§ 15. Effect of Verdict and Judgment Generally

A 1916 consent judgment entered in an action between the predecessors in title of plaintiffs and defendants was void and incapable of supporting a defense of res judicata as to ownership of disputed land. *Hardy v. Crawford,* 689.

BROKERS AND FACTORS

§ 6. Right to Commissions

Language in a realty agreement did not make the realtor's right to a commission contingent upon delivery of the deed and payment of a down payment. *Tryon Realty Co. v. Hardison,* 444.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Breaking and Entering and Larceny of Residential Premises

The evidence was sufficient to find defendant guilty of felonious breaking or entering and felonious larceny. *S. v. Callicutt,* 296.

§ 6.2. Instructions; Felonious Intent

The evidence was insufficient to support a verdict of felonious breaking or entering. *S. v. Moore,* 431.

§ 7. Instructions on Lesser Included Offenses

The trial court erred in failing to instruct on misdemeanor breaking and entering. *S. v. Moore,* 431.

CLERKS OF COURT

§ 3. Probate and Adoption Jurisdiction

When an order or judgment appealed from in a probate matter fails to show any specific exceptions, the role of the trial judge upon appeal to the superior court is to review the order of the clerk for errors of law only, and it is not proper to have a trial *de novo* or to hear any evidence in superior court. However, when the order of judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test, and if there is evidence to support the findings of the clerk, the judge must affirm. *In re Estate of Swinson,* 412.

CONSTITUTIONAL LAW

§ 5. Separation of Powers

There is no provision mandating the appointment of legislators to the State Bar Hearing Commission and the ability of government officials to make appointments is alone insufficient to show a violation of the separation of powers principle. *N.C. State Bar v. Frazier,* 172.

§ 18. Right of Free Press, Speech, and Assemblage

Plaintiff's First Amendment right against being compelled to speak was not violated by municipal and county organizations having a legislative reception to promote legislation. *North Carolina ex rel. Horne v. Chafin,* 95.

§ 24.7. Service of Process and Jurisdiction; Foreign Corporations; Nonresident Individuals

In an action to recover royalties due under a franchise agreement, defendant foreign corporation had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over it did not offend due process. *Harrelson Rubber Co. v. Dixie Tire and Fuels,* 450.

Defendant Virginia corporation had sufficient minimum contacts with North Carolina to permit courts of this State to assert personal jurisdiction over it in an action to recover for breach of fiduciary duty by the individual defendant in accepting kickbacks through the Virginia corporation for records and tapes bought for plaintiff while an employee of plaintiff. *Rose's Stores v. Padgett,* 404.

In an action to recover a deposit held by defendant foreign corporation pursuant to a contract for defendant to manufacture woodstoves for plaintiff North Carolina corporation, defendant had sufficient contacts with this State so that the exercise of personal jurisdiction over it did not offend due process. *Styleco, Inc. v. Stoutco, Inc.,* 525.

Defendant's contacts with this State were sufficient to permit the courts of this State to assert personal jurisdiction over defendant in a child support action. *Moore v. Wilson,* 746.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors or Businesses

Plaintiff contractor did not substantially comply with the requirements of the general contractor's licensing statute and was barred from recovering either on the basic contract or for "extras" in construction requested by defendants. *Brady v. Fulghum,* 99.

CONTRACTS — Continued

§ 27.1. Breach of Contract; Sufficiency of Evidence

In an action brought by plaintiff to recover unpaid rental payments for a copying machine leased to the defendant, the trial court erred in entering a directed verdict for defendant. *Copy Products, Inc. v. Randolph,* 553.

COURTS

§ 6.1. Jurisdiction on Appeals from Clerk; Probate

When an order or judgment appealed from in a probate matter fails to show any specific exceptions, the role of the trial judge upon appeal to the superior court is to review the order of the clerk for errors of law only, and it is not proper to have a trial *de novo* or to hear any evidence in superior court. However, when the order of judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test, and if there is evidence to support the findings of the clerk, the judge must affirm. *In re Estate of Swinson,* 412.

§ 9.4. Jurisdiction to Review Rulings of Another Superior Court Judge; Motions for Dismissal, Judgment on Pleadings or Summary Judgment

Where one superior court judge ruled on defendant's summary judgment motion only as to plaintiffs' contract claim, it was proper for a second judge thereafter to rule on defendant's motion for summary judgment as to plaintiffs' tort claim. *Asheville Contracting Co. v. City of Wilson,* 329.

CRIMINAL LAW

§ 18.3. Warrant or Indictment; Amendment

It was not error for a trial judge to allow the State to amend an arrest warrant. *S. v. Reeves,* 219.

§ 26.2. Attachment of Jeopardy

Where defendants were arrested on charges of rape and required to post bond, where on the day the preliminary hearing was scheduled in district court, the district attorney dismissed the charges, and where the defendants were later indicted on the same charges, arrested again, and required to post another bond, the former jeopardy defense was not available to defendants. *S. v. Shoffner and S. v. Summers,* 245.

§ 26.5. Plea of Former Jeopardy; Same Acts or Transactions Violating Different Statute

Defendant could properly be convicted in superior court of trespassing at a bus terminal after having been acquitted in district court of leaving a cab unattended while soliciting fares in violation of a city ordinance. *S. v. Churchill,* 81.

§ 42.6. Chain of Custody or Possession

The trial court did not abuse its discretion by admitting a pistol into evidence. *S. v. Gonzalez,* 146.

§ 50.2. Opinion of Nonexpert

The admission of an officer's testimony regarding the results of field tests conducted on substances purchased from defendant was harmless. *S. v. Proctor,* 233.

CRIMINAL LAW — Continued

§ 66.9. Suggestiveness of Photographic Lineup

The fact that defendant's photograph was the only one common to two different photographic lineups did not make the procedure impermissibly suggestive. *S. v. Carroll,* 623.

Two photographic identification procedures were not impermissibly suggestive where in the first lineup defendant was represented only by a side view while the others were depicted by both side and front views, and where in the second lineup, defendant's photograph was darker, showed more of his body, and had a different hairstyle than the other men in the other photographs. *Ibid.*

Where, between the time a prosecuting witness positively identified the defendant as her assailant from a side view photograph and the time that she identified her assailant from a front view photograph, a police officer told her that the man she had selected lived in the same apartment complex that she did, defendant failed to show that this fact made it substantially likely that either identification was mistaken. *Ibid.*

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

The evidence supported the trial court's finding that the prosecuting witness's in-court identification of defendant was based on her observation of him at the time of the incident for which he was being tried. *S. v. Carroll,* 623.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Other Pretrial Identification Procedures

The evidence supported the trial court's finding that an arson victim's in-court identification of defendant was of independent origin and not tainted by a pretrial showup identification. *S. v. Riggs,* 111.

§ 73.1. Admission of Hearsay Statement as Prejudicial or Harmless Error

Defendant was not prejudiced by the trial court's refusal to strike hearsay testimony in an embezzlement case where other witnesses presented competent testimony showing the same evidence. *S. v. Tedder,* 12.

§ 73.2. Statements Not Within Hearsay Rule

Where a witness testified that the company she worked for was owned by one industry and after voir dire stated that the store was a division of another industry, the statement after the voir dire was not inadmissible hearsay since she did not say that the other person said that the store was owned by the industry asserted. *S. v. Reeves,* 219.

§ 76.6. Confessions; Voir Dire Hearing; Sufficiency of Findings of Fact

In a prosecution for armed robbery, the trial court's findings of fact were insufficient to support the admission into evidence of defendant's statement. *S. v. Gonzalez,* 146.

§ 77. Admissions and Declarations of Persons Other than Defendant

The paraphrasing of a codefendant's statement sufficiently excluded all references to defendant in a manner that would not prejudice defendant. *S. v. Gonzalez,* 146.

§ 77.3. Admissions and Declarations of or Implicating Codefendants

The inadmissibility of a statement by one of the codefendants was waived by the other defendants' failure to make timely objection when they had an opportunity to learn that the evidence was objectionable. *S. v. Gonzalez,* 146.

CRIMINAL LAW — Continued

§ 86.4. Credibility of Defendant and Interested Parties; Prior Arrests, Indictments, and Accusations of Crime

It was error for the trial court to allow defendant to be cross-examined regarding two prior convictions for misdemeanor breaking and entering by questioning whether he had been indicted for two counts of first degree burglary. *S. v. Moore,* 431.

§ 86.5. Credibility; Particular Questions and Evidence as to Specific Acts

The trial court did not err in allowing the prosecutor to cross-examine a witness as to whether he and defendant had been in the drug business for a long time. *S. v. Sanderson,* 520.

§ 87. Direct Examination of Witnesses Generally

The trial court did not err in allowing a State's witness to testify whose name had not been disclosed as a prospective witness prior to the jury voir dire. *S. v. Mitchell,* 21.

§ 87.1. Leading Questions

Where defendant objected to the testimony of an officer in which the officer enumerated the items seized from defendant's residence on the specific ground that the testimony was in response to a leading question, the trial court did not abuse its discretion in overruling defendant's objection on the grounds stated. *S. v. Proctor,* 233.

§ 87.4. Redirect Examination

It is within the trial court's discretion to allow a witness to be recalled and to offer additional testimony. *S. v. Mitchell,* 21.

§ 89.3. Prior Statements of Witness; Generally; Consistent Statements

In a prosecution for involuntary manslaughter, the court properly admitted into evidence a prior written statement of a State's witness for the purpose of corroborating her testimony. *S. v. Housand,* 132.

§ 90. Rule that Party is Bound by and May Not Discredit Own Witness

In an armed robbery prosecution, the trial court erred in declaring the State's witness hostile and allowing the State to impeach him with a prior inconsistent statement. *S. v. Thomas,* 304.

§ 91. Nature and Time of Trial; Speedy Trial

Although 153 days elapsed from the time of defendant's arrest and his trial, the 120-day statutory speedy trial period was met when 45 days for two continuances and four days between defendant's request for the discharge of counsel and the court's order discharging counsel are excluded. *S. v. Morehead,* 226.

§ 91.2. Continuance on Ground of Pretrial Publicity

In a prosecution for involuntary manslaughter resulting from an automobile accident, the trial court did not err in denying defendant's motion for a continuance. *S. v. Mitchell,* 21.

§ 91.7. Continuance on Ground of Absence of Witness

The court did not err in denying defendant's motion for a continuance because of the unavailability of an unsubpoenaed out-of-state witness. *S. v. Thompson,* 38.

CRIMINAL LAW — Continued

§ 92. Consolidation and Severance of Counts; Consolidation of Charges Against Multiple Defendants

The trial court properly granted the State's motion to consolidate for trial the charges against three defendants. *S. v. Gonzalez,* 146.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by failure of the trial court to instruct the jury at the time of defendant's request that it should disregard certain soil samples which were shown to the jury but not introduced into evidence where the court gave the proper instruction after the close of all the evidence. *S. v. Riggs,* 111.

§ 99.6. Questions, Remarks, and Other Conduct of Court in Connection with Examination of Witnesses

The trial judge did not fail to act impartially when he raised an ownership problem in the arrest warrant by questioning a witness. *S. v. Reeves,* 219.

The trial judge did not express an opinion as to the credibility of a defense witness when he appointed an attorney to advise the witness of his Fifth Amendment rights and requested the attorney to sit next to the witness stand. *S. v. Sanderson,* 520.

§ 102.6. Particular Conduct and Comments in Argument to Jury

The trial court did not err in refusing to permit defense counsel to argue in his closing jury argument that the State had failed to prove that defendant was an employee on the date alleged in an embezzlement indictment where the court had earlier ruled that the date in the indictment was clerical error. *S. v. Tedder,* 12.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions; Charge to Jury

The trial judge did not express an opinion in his summary of the prosecuting witness's testimony as to whether or not she saw defendant's mustache. *S. v. Carroll,* 623.

§ 122. Additional Instructions after Initial Retirement of Jury

The trial judge did not err when he entered the jury room to answer questions and gave the jurors further instructions in the absence of the parties and their attorneys pursuant to an agreement by the parties and counsel. *Medford v. Davis,* 308.

§ 124. Sufficiency and Effect of Verdict in General

Although the element of "intent to sell and deliver" was not included in the verdict form with regard to three drug related offenses, the form sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately. *S. v. Sanderson,* 520.

§ 138. Severity of Sentence and Determination Thereof

Defendant's use of a deadly weapon to shoot his victim, and thereby accomplish the unlawful killing which constituted the offense of manslaughter, could not properly be considered as a factor in aggravation. *S. v. Green,* 1.

Where a homicide emanated from a game of cards involving defendant and the victim, evidence that defendant carried a concealed weapon was properly considered by the court as a factor in aggravation. *Ibid.*

Where the record was devoid of evidence that, at the time of prior convictions, the defendant either was indigent, was represented by counsel, or waived counsel,

CRIMINAL LAW — Continued

the court could not have found them by a preponderance of the evidence, and the prior convictions of defendant in a homicide case were improperly considered as factors in aggravation. *Ibid.*

In imposing a sentence for attempted first degree burglary, the trial court erred in finding as aggravating factors that the crime was especially heinous, atrocious or cruel, that defendant associated with members of a motorcycle gang who had dealt in drugs, and that defendant went to the apartment in question with a shotgun for the purpose of revenge. *S. v. Massey*, 66.

The trial court erred in finding as an aggravating factor that defendant had a prior conviction punishable by more than 60 days' confinement where there was no evidence as to whether defendant was indigent and was represented by counsel at the time of the prior conviction. *Ibid.*

The trial court erroneously consolidated for judgment the offenses of involuntary manslaughter and driving under the influence, second offense. *S. v. Mitchell*, 21.

In a prosecution for involuntary manslaughter among other crimes, the trial court properly considered as aggravating factors that defendant's sentence would deter others from committing the same offense and that a lesser sentence would unduly depreciate the seriousness of defendant's offense. *Ibid.*

In a prosecution for driving under the influence of intoxicating liquor, second offense and involuntary manslaughter, the trial court properly found as aggravating factors in imposing a sentence for involuntary manslaughter that defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement and that defendant had a long history of persistent disregard of the motor vehicle laws and rules. *Ibid.*

In a prosecution for involuntary manslaughter where defendant drove an automobile through a store window and hit a young girl, the trial court incorrectly considered the girl's age as an aggravating factor. *Ibid.*

In imposing a sentence for armed robbery, the court erred in finding as aggravating factors that the offense was committed for pecuniary gain and that a codefendant used a deadly weapon. *S. v. Thompson*, 38.

The trial court properly found as an aggravating factor that defendant had prior convictions punishable by more than 60 days' confinement where defendant's record of convictions was read into the record by the district attorney. *Ibid.*

The trial court properly found as an aggravating circumstance that defendant lied on the stand during trial and in his statement to the police. *Ibid.*

Where the trial court found as one of the aggravating factors in defendant's sentencing hearing that the defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement, but where there was no evidence to determine whether defendant was indigent at the time of this prior conviction and if so, whether he was represented by counsel, the aggravating factor could not be considered. *S. v. Callicutt*, 296.

In a prosecution for armed robbery, the evidence was sufficient for the trial court to find as the single aggravating factor that "the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." *S. v. Gonzalez*, 146.

In imposing a sentence for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as aggravating factors that the offense was especially heinous, atrocious or cruel and that the victim suffered very severe physical disability from the crime. *S. v. Medlin*, 251.

CRIMINAL LAW — Continued

In a prosecution for stealing an automobile, the trial court improperly considered as an aggravating factor that the offense was committed for pecuniary gain. *S. v. Huntley*, 577.

Pecuniary gain was inherent in the offense of uttering a forged check where defendant was not hired or paid for committing the offense and should not have been considered as an aggravating circumstance. *S. v. Thompson*, 585.

§ 142.3. Particular Conditions of Probation or Suspension; Conditions Held Proper

A condition of defendant's probation for the crime of trespassing at a bus terminal that she not go upon the terminal premises except for the purpose of traveling by bus did not amount to banishment and was reasonable. *S. v. Churchill*, 81.

§ 142.4. Particular Conditions of Probation or Suspension; Conditions Held Improper

The trial court in an embezzlement case erred in ordering defendant, as a condition of probation, to pay the employer restitution for the meals and travel expenses of two prosecution witnesses. *S. v. Tedder*, 12.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

Where a trial judge denied defendant's motion to suppress, and where the court found that plea negotiations were finalized before either the court or the prosecutor was made aware of defendant's intent to appeal, the court in its discretion decided to treat the purported appeal as a petition for certiorari. *S. v. Atwell*, 643.

§ 158.1. No Consideration of Matters Outside Record

Where defendant failed to include in the record what a witness would have testified concerning prior confrontations between defendant's family and the family of the victim, the court was unable to review on appeal the propriety of the trial judge's excluding the evidence at trial. *S. v. Pate*, 137.

§ 162. Necessity for Objection

The inadmissibility of a statement by one of the codefendants was waived by the other defendants' failure to make timely objection when they had an opportunity to learn that the evidence was objectionable. *S. v. Gonzalez*, 146.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of, and Time for Making, Exceptions and Objections

Defendant failed to properly preserve a challenge to the jury instructions where he failed to make an objection to the charge before the jury retired. *S. v. Housand*, 132.

The absence of a jury instruction conference, where one is not requested, will not excuse a defendant's failure to make a timely objection to the charge as required by App. Rule 10(b)(2). *S. v. Thompson*, 38.

§ 167.1. Miscellaneous Errors as Harmless or Prejudicial

The benefit of an objection to an officer's testimony as to statements made by defendant while in custody was lost when evidence of the same import was thereafter elicited by defense counsel on cross-examination. *S. v. Pate*, 137.

DEAD BODIES

§ 2. Contract to Inter and Interment

Plaintiffs' evidence was insufficient to be submitted to the jury on the issue of negligence by defendant embalmer and funeral director in embalming or interring the body of plaintiffs' mother, to support plaintiffs' claim for punitive damages against defendant funeral director and defendant vault supplier for failure to conduct a satisfactory reburial of their mother's body, or to be submitted to the jury on the question of whether one defendant breached its warranty of a leakproof casket. *Ransom v. Blair,* 71.

DEATH

§ 7.4. Competency and Relevancy of Evidence of Damages

In a wrongful death action, the trial court did not err in allowing an economist to testify concerning the present monetary value of the decedent to the plaintiff. *Powell v. Parker,* 465.

DECLARATORY JUDGMENT ACT

§ 4.1. Validity of Statutes and Ordinances

Plaintiff, owner of a 19.6-acre tract of land for farm and agricultural purposes, properly used the Declaratory Judgment Act to determine if his rights were affected by a zoning ordinance. *Baucom's Nursery Co. v. Mecklenburg Co.,* 396.

DEEDS

§ 20. Restrictive Covenants in Subdivisions

In an action brought by homeowners' association against defendants for unpaid monthly assessments which were required by the restrictive covenants, the trial court properly found that the covenants, conditions, and restrictions were enforceable as covenants running with the land. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson,* 205.

Where the deed from the first owner of defendants' lot clearly specified that the conveyance was subject to a recorded declaration of restrictions, the restrictions were within defendants' chain of title. *Ibid.*

Assessment covenants in a declaration of restrictive covenants recorded by a developer were sufficiently certain and definite to be enforceable. *Homeowners' Association v. Parker and Homeowners' Association v. Laing,* 367.

§ 20.3. Restrictions against Multiple Family Dwellings and Mobile Homes

There was sufficient evidence to support the trial judge's findings that defendants' structure was a trailer and a temporary structure within the meaning of a subdivision's restrictive covenants. *Barber v. Dixon,* 455.

§ 20.4. Architectural and Aesthetic Restrictions

The trial court erred in concluding that a second story of a building built to house a boat and the boat's paraphernalia was an impermissible "building" within the definition of a subdivision's restrictive covenants. *Knox v. Scott,* 732.

§ 20.6. Who May Enforce Restrictions

Plaintiffs did not waive their right to enforce restrictive covenants in a subdivision by failing to enforce the covenants against two other people. *Barber v. Dixon,* 455.

DEEDS — Continued

§ 20.7. Enforcement Proceedings

Where a restrictive covenant clearly provided for the collection of attorneys' fees, the trial court properly allowed attorneys' fees as part of the costs against defendant. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson,* 205.

Where defendants never tendered their witness as an expert, the trial court did not err in failing to allow the witness to answer certain questions. *Barber v. Dixon,* 455.

§ 28. Construction and Operation of Timber Deeds or Preservation of Timber

Plaintiffs offered sufficient evidence of a violation of a timber deed to support the trial judge's findings of fact, conclusions of law and award to plaintiff. *Matthews v. Brown,* 559.

DESCENT AND DISTRIBUTION

§ 6. Wrongful Act Causing Death as Precluding Inheritance

The trial court did not err in applying the anti-lapse statute in conjunction with the slayer statute and in finding that the children of the slayer, who are also the grandchildren of the decedent, take the father's share under the will by substitution. *Misenheimer v. Misenheimer,* 706.

DIVORCE AND ALIMONY

§ 2.4. Pleadings; Jury for Controverted Issues

The trial court erred in entering a judgment of absolute divorce without affording defendant a jury trial where defendant demanded a jury trial in her answer. *Pettus v. Pettus,* 141.

§ 13.1. Requirement that Parties Live Separate and Apart

In an action for divorce based on a year's separation, plaintiff did not have to prove that the separation occurred on the date alleged in the complaint but only that the parties had lived separate and apart for one year prior to the institution of the suit. *Myers v. Myers,* 291.

§ 13.5. Separation for Statutory Period; Competency and Sufficiency of Evidence

The plaintiff in a divorce action could properly testify that he had not resumed the marital relationship and had not formed an intent to resume the marital relationship. *Myers v. Myers,* 291.

§ 16.9. Alimony; Amount and Manner of Payment

The trial court's findings were sufficient to support its order directing defendant to pay permanent alimony to plaintiff in an amount of $200.00 per month. *Davis v. Davis,* 573.

Although a separation agreement did not define "gross income," the trial court did not err in including a gain on the sale of property as part of defendant's gross income. *Heater v. Heater,* 587.

§ 18.16. Attorney's Fees and Costs

The court's findings were insufficient to support its order requiring defendant to pay counsel fees for plaintiff's attorney in an alimony action. *Davis v. Davis,* 573.

DIVORCE AND ALIMONY — Continued

§ 24.2. Effect of Separation Agreements

The evidence supported the trial court's finding of a change in circumstances since the parties signed a separation agreement so as to justify an increase in child support from the amount required by the agreement. *Byrd v. Byrd,* 438.

§ 24.4. Enforcement of Support Orders; Contempt

The trial court did not err in failing to find whether defendant desired and was able to employ counsel in a civil contempt proceeding. *Daugherty v. Daugherty,* 318.

The trial court erred in ordering defendant imprisoned for civil contempt until he purged himself of such contempt by paying arrearages for support of his child. *Jones v. Jones,* 748.

§ 24.9. Support; Findings

A finding that "the needs of the minor children of the parties are set forth in the affidavit of" defendant mother was a sufficient finding upon which to base an award of child support. *Byrd v. Byrd,* 438.

§ 27. Attorney's Fees and Costs; Generally

Although defendant's answer and counterclaim in which she sought child support did not include the required allegations or prayer for an award of attorney's fees, the pleadings were deemed to conform to the evidence and the trial court's award of attorney's fees was proper. *Byrd v. Byrd,* 438.

DURESS

§ 1. Generally

The 3-year statute of limitations barred defendant wife from claiming that her deed to plaintiff husband was signed as a result of duress. *Biesecker v. Biesecker,* 282.

EASEMENTS

§ 5. Creation of Easements by Implication or Necessity

In an action in which an easement by implication was established, the evidence presented sufficiently identified the easement over plaintiff's land. *Cash v. Craver,* 257.

§ 5.2. Creation of Easements by Implication or Necessity; Reasonably Necessary Uses

The trial court properly found that defendants owned an easement by implication in a road. *Cash v. Craver,* 257.

§ 11. Termination of Easements

Defendant's evidence was insufficient to show that plaintiffs' easement across defendant's property was abandoned by their predecessor in title. *Skvarla v. Park,* 482.

ELECTRICITY

§ 2.3. Competition Between Suppliers

A municipal corporation cannot be an "electric supplier" within the meaning of G.S. 62-110.2(b)(5), and that statute confers no right upon a municipality to continue

ELECTRICITY — Continued

to supply electricity to a customer within an unassigned service area. *State ex rel. Utilities Comm. v. Virginia Elec. and Power Co.*, 262.

EMBEZZLEMENT

§ 5. Evidence in Prosecution for Embezzlement

Testimony by the employer's sales manager as to the authority of an employee to open the cash register did not constitute improper opinion testimony. *S. v. Tedder*, 12.

§ 6. Sufficiency of Evidence, Nonsuit, and Directed Verdict

The State's evidence was sufficient to support defendant's conviction of embezzlement from a department store by selling merchandise for less than the marked price. *S. v. Tedder*, 12.

There was no fatal variance between an indictment charging defendant with embezzlement on 5 November 1981 and evidence showing that the crime occurred on 5 October 1980. *Ibid.*

EMINENT DOMAIN

§ 6.5. Testimony of Witness as to Value

Plaintiff's appraisal witness could properly base his before and after estimates on the value of fill material required to restore the landowners' remaining property to its original relationship to the roadway after the grade of the roadway was changed by the construction project. *Dept. of Transportation v. McDarris*, 55.

§ 6.8. Testimony as to General and Special Benefits

The trial court properly excluded evidence offered by the condemnor concerning an agreement between the landowners and the highway contractor under which the landowners received free fill material for their remaining property. *Dept. of Transportation v. McDarris*, 55.

ESTOPPEL

§ 4.2. Equitable Estoppel; Conduct of Party Sought to be Estopped; Silence

Plaintiff failed to prove that his insurance company was estopped to deny that plaintiff was covered on the date of his injury. *Carter v. Frank Shelton, Inc.*, 378.

§ 4.6. Conduct of Party Asserting Estoppel; Reliance

A mistaken designation on plaintiff's application for workers' compensation insurance did not estop his insurance company from denying coverage. *Carter v. Frank Shelton, Inc.*, 378.

EVIDENCE

§ 11. Transactions or Communications with Decedent or Lunatic

Although the trial court improperly sustained an objection to certain testimony on grounds of the North Carolina dead man's statute, the error was not prejudicial since the testimony was inadmissible as hearsay and therefore properly excluded. *Cash v. Craver*, 257.

EVIDENCE — Continued

§ 22.1. Evidence at Former Trial or Proceeding of Another Case Arising from Same Subject Manner

The Disciplinary Hearing Commission of the North Carolina State Bar did not err in receiving into evidence the testimony of two witnesses given in a Florida lawsuit. *N.C. State Bar v. Talman*, 355.

The Disciplinary Hearing Commission of the State Bar properly considered final orders from previous court proceedings. *Ibid.*

§ 32. Parol or Extrinsic Evidence Affecting Writings; Nature of Rule

Where plaintiff entered into an agreement to purchase certain items of equipment from defendant and where the contract contained a sentence stating: "This instrument constitutes the entire agreement between the parties for the sale of goods, and no oral agreements or representations of any kind or nature shall be binding," parol testimony was properly excluded by the trial court and summary judgment was properly entered for defendant. *Cable TV, Inc. v. Theatre Supply Co.*, 61.

§ 42.1. Statements as to Speed and Stopping Difference

Testimony that defendant was driving "normal" and at a "reasonable speed" at the time of an accident was competent as a shorthand statement of fact. *Medford v. Davis*, 308.

§ 48. Competency and Qualification of Experts in General

A licensed professional engineer and a mechanical engineer engaged in the plumbing and heating business could properly testify as experts as to the cause of sewer line failures. *Hughes v. City of High Point*, 107.

The trial court did not err in failing to qualify defendant's witness as an expert in the field of real and personal property appraisals. *R-Anell Homes v. Alexander & Alexander*, 653.

§ 48.3. Failure to Object to Qualification of Expert; Absence of Specific Finding by Court

Testimony in a condemnation case by respondents' appraisal witness was not incompetent because the witness was never tendered as an expert nor expressly found to be an expert. *Dept. of Transportation v. McDarris*, 55.

§ 49.3. Form of Hypothetical Question

When hypothetical questions are used, it is not required that the witness be first asked the question of causation using "could" or "might" language before he is asked in the phraseology of "would." *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.; Gulley v. Yancey Trucking Co.*, 602.

§ 50. Testimony by Medical Experts

The trial court did not err in allowing a medical expert witness to testify concerning one defendant's diabetic condition even though his name, address, and the basis of his opinion had not been provided to appellants by answers to interrogatories. *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.; Gulley v. Yancey Trucking Co.*, 602.

FORGERY

§ 2.1. Sufficiency of Bill of Indictment

An indictment for uttering a forged check sufficiently alleged that defendant uttered the check with the intent to defraud. *S. v. Morehead,* 226.

FRAUDS, STATUTE OF

§ 2.1. Memorandum Held Sufficient to Take Contract Out of Statute of Frauds

A written agreement for decedent to sell plaintiff "my entire woodland. This begins where my road and the main road begin and goes according to the survey done by Keith Gibson" contained only a latently ambiguous description of the land. *Bradshaw v. McElroy,* 515.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions against Advertisements along Highways

Petitioner's outdoor advertising sign structures along a new segment of I-95 were a nonconforming use on the effective date for the enforcement of the Outdoor Advertising Control Act such that petitioner had a vested right to complete the signs. *Bracey Advertising Co. v. Dept. of Transportation,* 197.

HOMICIDE

§ 15.2. Defendant's Mental Condition; Malice

In a prosecution for second degree murder, the trial court properly admitted evidence of an argument between defendant and the victim which occurred several days prior to the homicide. *S. v. Green,* 1.

§ 19.1. Evidence of Character or Reputation

In a prosecution for second degree murder, the trial court properly excluded testimony regarding the general character and reputation of the victim in the community and his reputation as "a violent and dangerous man." *S. v. Green,* 1.

§ 27.1. Voluntary Manslaughter; Heat of Passion

The trial court did not err in failing to instruct that the jury need not unanimously agree on the theory of manslaughter—heat of passion or imperfect self-defense—in order to return a verdict of guilty of manslaughter. *S. v. Nickerson,* 754.

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

In a prosecution for second degree murder, the trial court did not err in failing to instruct the jury on self-defense where the undisputed evidence was that defendant shot an unarmed man in his own yard from a moving car. *State v. Pate,* 137.

HUSBAND AND WIFE

§ 4. Contracts and Conveyances Between Husband and Wife Generally; Gifts

A deed from the wife to the husband was not invalid because the wife was not represented by counsel and did not understand her legal rights when she signed the deed. *Biesecker v. Biesecker,* 282.

Natural love and affection constituted good consideration for the wife's conveyance to the husband. *Ibid.*

HUSBAND AND WIFE — *Continued*

§ 10.1. Requisites and Validity; Void and Voidable Agreements

The trial court properly dismissed plaintiff's cause of action to have certain provisions of a separation agreement between plaintiff and defendant declared void on the ground that defendant had cohabitated with a man. *Sethness v. Sethness*, 676.

§ 11.1. Operation and Effect of Separation Agreements

A separation agreement in which each spouse waived and renounced all rights under any previously executed will of the other constituted a valid renunciation which adeemed a devise and bequest to the wife. *Sedberry v. Johnson*, 425.

The husband's obligations under a separation agreement and consent judgment with respect to the sale of the home of the parties were not terminated by the wife's death. *Shutt v. Butner*, 701.

§ 12. Revocation and Rescission; Presumption of Marital Relationship; Divorce and Remarriage

Where the wife conveyed to the husband upon their separation her interest in entirety property, the fact that the wife and husband thereafter resumed the marital relationship was no basis for rescinding the deed or imposing a constructive trust on the property. *Biesecker v. Biesecker*, 282.

INDICTMENT AND WARRANT

§ 2. Return by a Duly Constituted Grand Jury

Where the State took a voluntary dismissal with leave because defendant could not be found, the prosecutor could properly reinstate the indictments without further action by the grand jury. *S. v. Morehead*, 226.

INFANTS

§ 6. Hearing for Award of Custody

The trial court's comment in a child custody proceeding that a witness was lying was not prejudicial. *Smithwick v. Frame*, 387.

§ 6.2. Modification of Order Awarding Custody

A finding or conclusion that the trial court retained jurisdiction in a child custody case was unnecessary since that fact is inherent in an order denying a change in visitation rights. *In re Jones*, 103.

§ 6.5. Misconduct of Claimant for Custody

Evidence of plaintiff's criminal record and past conduct did not preclude the trial court from finding that the best interest of a child would be served by placing him in the custody of the plaintiff. *Smithwick v. Frame*, 387.

§ 6.7. Award of Visitation Rights

Petitioner failed to carry her burden of showing that circumstances had changed since an order was made which set visitation rights of the maternal grandparents, and the trial court properly upheld the grandparents' visitation rights. *In re Jones*, 103.

INJUNCTIONS

§ 3. Mandatory Injunctions

Defendant could not appeal from a mandatory injunction ordering defendant to return property to plaintiff's residence pending final disposition of plaintiff's action for divorce and equitable distribution of marital property. *Dixon v. Dixon,* 744.

INSURANCE

§ 2.2. Liability of Broker or Agent to Insured for Failure to Procure Insurance

The evidence was sufficient to go to the jury on the question of whether an insurance company was negligent by its own actions in failing to effect insurance coverage. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.,* 419.

The trial court improvidently entered a directed verdict for the insurance company on the issue of whether the insurance company was liable for negligence on the part of its agent. *Ibid.*

Plaintiff's evidence was sufficient for the jury in an action to recover damages for negligent advice given by defendant insurance agency. *R-Anell Homes v. Alexander & Alexander,* 653.

§ 4. Coverage During Pendency of Application; Binders

Plaintiff was not covered by a valid binder at the time of a fire which destroyed his property. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.,* 419.

§ 14. Provisions Excluding Liability if Death Results from Stipulated Causes

The trial court erred in granting defendant's motion to dismiss plaintiff's complaint where plaintiff's now-deceased husband bought a life insurance policy which provided for double coverage in the event of accidental death but which created certain exceptions for military planes. *Pearce v. American Defender Life Ins. Co.,* 661.

§ 16. Payment and Avoidance of Life Insurance Policies for Nonpayment under Group Policies

The trial court properly overruled defendant's motion for summary judgment on the question of whether or not plaintiff's dependent was covered under a group life insurance policy. *Henderson v. Provident Life and Accident Ins. Co.,* 476.

The trial court properly denied defendant's motion for a directed verdict and judgment n.o.v. since there was a question as to when coverage under a group life insurance policy began and ended. *Ibid.*

§ 18.1. Misrepresentations as to Health and Physical Condition

A genuine issue of material fact was presented as to whether insured made a material misrepresentation in his life insurance application that he had never had high blood pressure. *Sauls v. Charlotte Liberty Mut. Ins. Co.,* 533.

§ 75.2. Subrogation and Actions against Tort-feasors

Defendant wife's counterclaim for child support under a separation agreement was a compulsory counterclaim in the husband's action to determine rights under the agreement, and defendant was precluded by res judicata from asserting the child support claim as a counterclaim in plaintiff insurer's action against defendant to recover an amount it had paid the husband under an automobile insurance policy for damages which defendant had intentionally inflicted upon the husband's vehicle. *Farm Bureau Mut. Ins. Co. v. Balfour,* 580.

INSURANCE — Continued

§ 90. Limitations on Use of Vehicle

An injury caused by the discharge of a weapon from inside an automobile by an occupant thereof does not arise out of such ownership, maintenance or use so as to afford coverage under the "ownership, maintenance or use" provision of a standard automobile liability insurance policy. *Wall v. Nationwide Mutual Ins. Co.*, 127.

§ 130. Notice and Proof of Loss

Plaintiffs complied with requirements that a fire insurance proof of loss "be signed and sworn to by the insured" when they signed a proof of loss before a notary public who recited that it was "sworn to" before her even though plaintiffs were not administered oaths by the notary. *Thompson v. Home Insurance Co.*, 562.

§ 149. Liability Insurance

Where insured shot into a car occupied by his wife and killed the driver thereof, and the insured pled guilty to second degree murder of the driver, the insured's shooting of the driver was excluded from coverage under a homeowner's policy by a provision that the policy did not apply "to bodily injury or property damage which is either expected or intended from the standpoint of the insured." *Commercial Union Ins. Co. v. Mauldin*, 461.

INTEREST

§ 1. Items Drawing Interest in General

The trial court did not err in denying plaintiff prejudgment interest where defendant defended the suit on its own because the amount involved was less than the deductible amount of its liability insurance policy. *R-Anell Homes v. Alexander & Alexander*, 653.

JUDGMENTS

§ 55. Right to Interest

The trial court did not err in denying plaintiff prejudgment interest where defendant defended the suit on its own because the amount involved was less than the deductible amount of its liability insurance policy. *R-Anell Homes v. Alexander & Alexander*, 653.

JURY

§ 7.14 Manner, Order and Time of Exercising Challenge

Where a prospective juror indicated during examination by defendant that she thought police officers would lie, the trial court did not err in allowing the State to re-examine and challenge the juror after the juror had been accepted by the State. *S. v. Mitchell*, 21.

LARCENY

§ 7. Weight and Sufficiency of Evidence Generally; Circumstantial Evidence

The evidence was sufficient to establish that defendant took a jacket from a store without the owner's consent. *S. v. Reeves*, 219.

LARCENY – Continued

§ 7.7 Larceny of Automobile

In a prosecution for stealing an automobile, the trial court erred in failing to allow a man to testify that he saw a drunk give defendant a car key and $10.00; however, the error was harmless. *S. v. Huntley,* 577.

LIBEL AND SLANDER

§ 18. Damages and Verdict

A genuine issue of material fact was presented as to whether defendants were guilty of "actual malice" in publishing a certain newspaper photograph of plaintiff and were thus liable for punitive damages. *Cochran v. Piedmont Publishing Co.,* 548.

LIMITATION OF ACTIONS

§ 4.6 Accrual of Cause of Action for Breach of Contract; Particular Contracts

Plaintiff's action alleging a breach in fiduciary duty of a trustee was barred by the three-year statute of limitations. *Bruce v. N.C.N.B.,* 724.

MARRIAGE

§ 6. Presumptions Applicable to Multiple Marriages

The trial court properly concluded that petitioner was the widow of deceased and thus entitled to dissent from his will upon the basis of the unrebutted presumption of the validity of a second marriage. *In re Estate of Swinson,* 412.

MASTER AND SERVANT

§ 10. Duration and Termination

Where the personnel policies of defendant municipal housing authority were not expressly incorporated in plaintiff's contract of employment at will, defendant was not obligated to follow its personnel policies in dismissing plaintiff. *Griffin v. Housing Authority,* 556.

If plaintiff was dismissed from his employment with a municipal housing authority for reasons that would damage his reputation, plaintiff was given sufficient notice and an opportunity at a hearing to refute charges against him so as to comply with due process requirements. *Ibid.*

§ 49. "Employees" within the Meaning of the Workmen's Compensation Act

The Industrial Commission should have made proper findings to determine whether defendant employer was estopped to deny workers' compensation coverage for plaintiff painter. *Moore v. Upchurch Realty Co.,* 314.

§ 49.1. Status of Particular Persons

In a workers' compensation proceeding, the evidence was sufficient to find an employer-employee relationship between plaintiff and defendant. *Carter v. Frank Shelton, Inc.,* 378.

§ 55.4. Relation of Injury to Employment

Where plaintiff truck driver had not completed his trip because of failing brakes on both the tractor and trailer, and where plaintiff interrupted his trip to have repairs made to the brakes, the accidental injuries sustained by the plaintiff

MASTER AND SERVANT — Continued

while he was traveling from one town to another for the purpose of having repairs made to the brakes to enable him to continue the trip to his original destination arose out of and in the course of his employment. *Church v. G. G. Parsons Trucking Co.*, 121.

Where decedent worked as a bulldozer operator at a county landfill and fell off a dragpan and was killed when the machine ran over him while leaving for lunch, the Industrial Commission properly concluded that decedent's injury did arise out of and in the course of his employment. *Patterson v. Gaston Co.*, 544.

§ 60.2. Injuries Sustained while Acting in Interest of Self; Particular Injuries

Injuries sustained by an animal hospital worker when he was struck by a hit and run driver while crossing the street in front of defendant employer's place of business after having purchased a newspaper during his working hours did not arise out of and in the course of his employment. *White v. Battleground Veterinary Hosp.*, 720.

§ 69. Amount of Recovery Generally

The evidence did not establish that the death of an employee who fell from a pallet which was on the forks of a forklift was caused by the willful failure of defendant employer to comply with OSHA safety regulations so as to require a 10% increase in compensation for the death of the employee. *Prevette v. Clark Equipment Co.*, 272.

§ 71.1. Computation of Average Weekly Wage Under Exceptional Circumstances

The evidence supported a finding by the Industrial Commission that a fair and just calculation of decedent's average weekly wage was reached by the use of the 5-week wage record of decedent. *Prevette v. Clark Equipment Co.*, 272.

§ 72. Partial Disability

In a workers' compensation proceeding in which the Hearing Commissioner awarded plaintiff compensation for permanent partial disability to her back, plaintiff's exceptions provided a sufficient basis to permit the Full Commission to hear expert evidence concerning disability to plaintiff's knees and to award plaintiff additional compensation for permanent partial disability to her knees. *Nash v. Conrad Industries*, 612.

§ 81. Construction of Policy as to Coverage; Insurer's Liability Generally

Defendant insurance carrier was not estopped to deny workers' compensation coverage for plaintiff painter. *Moore v. Upchurch Realty Co.*, 314.

Plaintiff could not recover from the insurer of his sole proprietorship under G.S. 97-2(a) since he failed to notify his insurer of his election to be included within the workers' compensation coverage. *Carter v. Frank Shelton, Inc.*, 378.

A mistaken designation on plaintiff's application for workers' compensation insurance did not estop his insurance company from denying coverage. *Ibid.*

Plaintiff failed to prove that his insurance company was estopped to deny that plaintiff was covered on the date of his injury. *Ibid.*

There was insufficient evidence to show that plaintiff's accountant and the insurance agency through which he procured insurance were agents of the insurance company in that plaintiff failed to show they acted on the insurance company's behalf or subject to its control. *Ibid.*

MASTER AND SERVANT — Continued

§ 94.1. Specific Instances where Findings of Fact are Incomplete

A workers' compensation case must be remanded to the Commission since the Commission did not determine whether plaintiff's earning capacity has or has not been diminished, since the statutory basis for compensation was not specified, since the Commission was mistaken in stating, as a stipulation, the amount of plaintiff's average weekly wage, and since the Commission failed to rule on plaintiff's motion for attorneys' fees. *West v. Bladenboro Cotton Mills,* 267.

A workers' compensation proceeding is remanded for findings as to whether plaintiff was temporarily totally disabled for any employment between certain dates. *Nash v. Conrad Industries,* 612.

§ 95. Right to Appeal or Review; Mode of Review

In a workers' compensation proceeding in which the Industrial Commission ordered defendants to pay a certain amount to plaintiff prior to the time defendants appealed the award and subsequent to the time plaintiffs appealed the Industrial Commission decision, neither party's right to be heard before the appellate court was lost. *West v. Bladenboro Cotton Mills,* 267.

§ 108.1 Right to Unemployment Compensation; Effect of Misconduct

An employee who was discharged because she refused to assume an additional work assignment was not discharged for misconduct connected with her work so as to disqualify her for unemployment compensation. *In re Miller v. Guilford County Schools,* 729.

MORTGAGES AND DEEDS OF TRUST

§ 4.1. Consideration

Where a husband and wife executed a demand note for money loaned to the husband, the promisee's forbearance to levy on a bank account owned by both promisors constituted sufficient consideration for a new note and deed of trust signed by both promisors. *In re Foreclosure of Owen,* 506.

§ 9. Release of Part of Land from Mortgage Lien

The trial court properly entered summary judgment for defendant in plaintiff's action for breach of contract to execute release deeds pursuant to a settlement agreement. *Justus v. Deutsch,* 711.

§ 13.2. Ownership of Property; Rents and Profits; Waste

Where plaintiff beneficiary of a purchase money deed of trust purchased the secured property at a foreclosure sale by bidding the amount of the obligation owed to it plus the costs of the sale, plaintiff could not recover damages for alleged waste by defendant debtor and others. *Monte Enterprises v. Kavanaugh,* 541.

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

The beneficiaries of a deed of trust were not holders of the note secured by the deed of trust and thus were not entitled to foreclose the deed of trust where the note had been assigned to a bank as security for a loan. *In re Foreclosure of Connolly v. Potts,* 300.

§ 27. Conduct of Sale

Defendant trustee breached his fiduciary duty to plaintiff debtors in selling together in one foreclosure sale two tracts of land encumbered by two separate deeds of trust, and the evidence on motion for summary judgment presented a gen-

MORTGAGES AND DEEDS OF TRUST — Continued

uine issue as to whether plaintiffs were damaged by such breach of fiduciary duty. *Swindell v. Overton*, 160.

§ 31. Report of Sale and Confirmation

In order for jurisdiction to vest in the superior court to consider injunctive relief in a foreclosure proceeding, the action seeking injunctive relief must be commenced prior to any order of confirmation entered by the clerk. *Swindell v. Overton*, 160.

§ 42. Rights to Products

The purchaser at a foreclosure sale is entitled to crops unsevered at the time of delivery of the deed. *Swindell v. Overton*, 160.

MUNICIPAL CORPORATIONS

§ 2.3. Territorial Extent and Annexation; Compliance with Statutory Requirements

The metes and bounds description in a notice of hearing and an annexation ordinance was sufficient when considered with maps included in the report for extending services to the annexed area. *In re Annexation Ordinance*, 588.

§ 2.4. Remedies to Attack Annexation or Annexation Proceedings

Service of a petition for review of an annexation ordinance on respondent city by certified mail, return receipt requested, sufficiently complied with statutory requirements. *In re Annexation Ordinance*, 588.

§ 2.5. Effect of Annexation

Where a judgment upholding the validity of a local act annexing plaintiffs' land to a town was stayed pending appeal, affirmation of the judgment by the appellate court dissolved the stay order, and the town could collect ad valorem taxes from plaintiffs for the period during which the appeal was pending. *Abbott v. Town of Highlands*, 130.

§ 2.6. Extension of Utilities to Annexed Territory

A city was not required to include public transportation and recreation facilities in its plans for extension of services to an annexed area. *In re Annexation Ordinance*, 588.

§ 21. Injuries in Connection with Sewers and Sewage Disposal; Construction of Sewage System

Plaintiffs' evidence on motion for summary judgment was sufficient to support a finding that defendant city's operation of its sewer system in its existing condition after notifying plaintiffs that it would no longer attempt to correct a sewage overflow problem constituted a nuisance entitling plaintiffs to compensation for permanent damages. *Hughes v. City of High Point*, 107.

§ 30.6. Special Permits and Zoning Variances

A city council's denial of a special use permit for an antique shop in a historic district on the ground that such use of the property would materially endanger the public health and safety was supported by competent, material and substantial evidence. *Jennewein v. City Council of Wilmington*, 89.

MUNICIPAL CORPORATIONS — Continued

§ 30.8. Construction and Interpretation of Zoning Regulations

The evidence of the size and use of plaintiff's 19.6-acre tract of land fitted within the definition of "farm" contained in a city ordinance. *Baucom's Nursery Co. v. Mecklenburg Co.*, 396.

§ 30.13. Billboards and Outdoor Advertising Signs

Outdoor advertising sign structures consisting of vertical poles with horizontal slats were lawful "structures" under a 1965 zoning ordinance and should have been allowed to continue as a nonconforming use under a 1980 zoning ordinance. *City of Sanford v. Dandy Signs, Inc.*, 568.

§ 42. Claims and Actions against Municipality for Personal Injury; Notice

Effective notice of a minor's tort claim against a city could be furnished by the minor's parent, close relative, lawyer or other representative. *Plemmons v. City of Gastonia*, 470.

NEGLIGENCE

§ 2. Negligence Arising from the Performance of a Contract

An alleged breach of duty by defendant city to keep plaintiff contractor's work site free of flooding during plaintiff's performance of a grading contract did not give rise to an action in tort. *Asheville Contracting Co. v. City of Wilson*, 329.

§ 29.1. Particular Cases where Evidence of Negligence is Sufficient

In an action to recover for injuries received by plaintiff when defendant's dump truck fell while he was repairing it, the evidence on motion for summary judgment presented an issue of fact as to defendant's negligence and did not establish contributory negligence as a matter of law. *Rippy v. Blackwell*, 135.

The trial court improperly granted plaintiff's and third party defendant's motion for summary judgment on defendant's counterclaim alleging negligence on the part of plaintiff in changing cattle feed without informing defendant. *Elmore's Feed & Seed, Inc. v. Patrick*, 715.

NOTICE

§ 1. Generally; Necessity of Notice

A country club membership agreement did not require the club to give members 30 days' notice of its intention to raise the amount of the yearly membership dues. *Raintree Homeowners Assoc. v. Raintree Corp.*, 668.

NUISANCE

§ 7. Damages and Abatement

Plaintiffs' evidence on motion for summary judgment was sufficient to support a finding that defendant city's operation of its sewer system in its existing condition after notifying plaintiffs that it would no longer attempt to correct a sewage overflow problem constituted a nuisance entitling plaintiffs to compensation for permanent damages. *Hughes v. City of High Point*, 107.

PARENT AND CHILD

§ 1. The Relationship Generally; Creation and Termination of Relationship

In a proceeding to terminate parental rights, the trial court erred in terminating parental rights where the evidence failed to show that the physical and economic needs of the children were not adequately met and it failed to show that the intangible non-economic needs of the children were not met. *In re Montgomery,* 343.

The trial judge erred in finding that respondent failed to pay a reasonable portion of the amount of child care and that he had the ability to pay that amount. *Ibid.*

§ 6.1. Factors to be Considered in Determining Custody

An order determining child custody could not be affirmed where the trial judge failed to give a clear indication that his decision rested on a determination of what would be in the child's best interest. *In re DiMatteo,* 571.

§ 7. Parental Duty to Support Child

A voluntary child support agreement could not be modified or vacated on the basis of relitigation of the paternity issue in a proceeding related solely to the support agreement. *Beaufort County v. Hopkins,* 321.

§ 7.1. Effect of Parent's Death on Duty to Support

Where a separation agreement and consent judgment required defendant husband to pay child support to the wife, the court could properly require defendant to continue the child support payments to the grandmother who had custody after the death of the wife without making new findings as to the needs of the child and the ability of defendant to pay. *Shutt v. Butner,* 701.

PARTIES

§ 1.1. Persons who are Necessary Parties

The trial judge's judgment exceeded the court's jurisdiction where, although the defendants' son and his wife were not parties named in the pleadings, the judgment purported to enjoin them from putting a mobile home or trailer on the defendants' lot. *Barber v. Dixon,* 455.

PARTITION

§ 6. Whether the Property Should be Sold for Partition or Actually Partitioned

A trial judge did not abuse his discretion by holding that property should be partitioned rather than sold. *Bridgers v. Bridgers,* 583.

PLEADINGS

§ 32. Right to Amend; Discretion of Court to Allow Amendment

The trial court did not err in failing to allow defendant to amend his answer where the denial stemmed from defendant's undue delay in making the motion. *Rudder v. Lawton,* 277.

PRINCIPAL AND AGENT

§ 1. Creation and Existence of Relationship

There was insufficient evidence to show that plaintiff's accountant and the insurance agency through which he procured insurance were agents of the insurance

PRINCIPAL AND AGENT – Continued

company in that plaintiff failed to show they acted on the insurance company's behalf or subject to its control. *Carter v. Frank Shelton, Inc.*, 378.

§ 7. Undisclosed Agency

A sign contractor could recover from a motel owner individually for signs constructed for a motel corporation where the contractor had no actual notice of the corporate principal. *MAS Corp. v. Thompson*, 31.

PROCESS

§ 9.1. Minimum Contacts Test

Defendant's contacts with this State were sufficient to permit the courts of this State to assert personal jurisdiction over defendant in a child support action. *Moore v. Wilson*, 746.

§ 14.3. Service of Process on Foreign Corporation; Minimum Contacts Test; Sufficiency of Evidence; Contacts within State

In an action to recover royalties due under a franchise agreement, defendant foreign corporation had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over it did not offend due process. *Harrelson Rubber Co. v. Dixie Tire and Fuels*, 450.

Defendant Virginia corporation had sufficient minimum contacts with North Carolina to permit courts of this State to assert personal jurisdiction over it in an action to recover for breach of fiduciary duty by the individual defendant in accepting kickbacks through the Virginia corporation for records and tapes bought for plaintiff while an employee of plaintiff. *Rose's Stores v. Padgett*, 404.

In an action to recover a deposit held by defendant foreign corporation pursuant to a contract for defendant to manufacture woodstoves for plaintiff North Carolina corporation, defendant had sufficient contacts with this State so that the exercise of personal jurisdiction over it did not offend due process. *Styleco, Inc. v. Stoutco, Inc.*, 525.

QUASI CONTRACTS AND RESTITUTION

§ 2.1. Actions to Recover on Implied Contracts; Sufficiency of Evidence

Defendant wife stated a claim for unjust enrichment where she alleged that she conveyed her interest in the marital home to defendant husband upon their separation, and that she made mortgage payments upon the home after the parties reconciled. *Biesecker v. Biesecker*, 282.

RAILROADS

§ 2. Location; Relocation; and Maintenance of Tracks and Overpasses and Underpasses

The Utilities Commission had jurisdiction to consider a petition seeking to require a railroad to repair drainage ditches along a portion of its tracks insofar as the condition of the drainage ditches related to the safe and proper maintenance of the railroad's track factilities. *State ex rel. Utilities Comm. v. Seaboard Coast Line Railroad*, 631.

The Utilities Commission acted within its authority under G.S. 62-15(g) in permitting the Public Staff to participate in a proceeding to require a railroad to repair and improve its track facilities. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4.1. Relevancy and Competency of Improper Acts, Solicitations, and Threats; Proof of Other Acts and Crimes

Defendant was not denied equal protection and due process by the trial court's decision to allow cross examination of defendants about prior acts of misconduct while denying defendants the opportunity to cross examine the prosecuting witness concerning her prior bad acts. *S. v. Shoffner and S. v. Summers,* 245.

§ 4.3. Character or Reputation of Prosecutrix

In a prosecution for second degree rape, the trial court erred in excluding testimony concerning the prosecuting witness's prior sexual conduct which tended to suggest a prosecuting witness's modus operandi. *S. v. Shoffner and S. v. Summers,* 245.

ROBBERY

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

The evidence in an armed robbery case was sufficient to go to the jury. *S. v. Gonzalez,* 146.

RULES OF CIVIL PROCEDURE

§ 8.1. General Rules of Pleading; Complaint

Where defendant did not move for a more definite statement pursuant to G.S. 1A-1, Rule 12(e), and where plaintiff's complaint complied with the G.S. 1A-1, Rule 8(a)(1) requirements, the trial court did not err in failing to grant defendant's motion to require plaintiff to replead since defendant's remedy for additional facts was to use discovery pursuant to Article 5, G.S. 1A-1, Rule 26 et seq. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson,* 205.

§ 9. Pleading Special Matters

The trial court properly entered summary judgment for defendants where defendants specifically put into issue plaintiff's capacity to sue and where plaintiff failed to present a forecast of evidence showing that there was a triable issue on this question. *Highlands Township Taxpayers Assoc. v. Highlands Township Taxpayers Assoc., Inc.,* 537.

§ 12.1. Defenses and Objections; When and How Presented

Defendant waived his defense of failure to join a necessary party pursuant to G.S. 1A-1, Rule 12(b)(7) by failing to raise the issue prior to appeal. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson,* 205.

§ 13. Counterclaim and Crossclaim

Defendant wife's counterclaim for child support under a separation agreement was a compulsory counterclaim in the husband's action to determine rights under the agreement, and defendant was precluded by res judicata from asserting the child support claim as a counterclaim in plaintiff insurer's action against defendant to recover an amount it had paid the husband under an automobile insurance policy for damages which defendant had intentionally inflicted upon the husband's vehicle. *Farm Bureau Mut. Ins. Co. v. Balfour,* 580.

§ 15.1. Discretion of Court to Grant Amendment

The trial court did not abuse its discretion in permitting plaintiffs to amend their complaint after defendants had filed answer. *Swindell v. Overton,* 160.

RULES OF CIVIL PROCEDURE — Continued

§ 30. Depositions of Witnesses Upon Written Interrogatories

The trial court did not err in imposing sanctions on defendant for failure to appear for the taking of a deposition before specifically ruling on her motion for a protective order. *Adair v. Adair*, 493.

§ 37. Failure to Make Discovery; Consequences

Defendant was not prejudiced by the fact that she received less than five days' notice, excluding Saturday and Sunday, of a motion to impose sanctions for defendant's failure to appear for a deposition. *Adair v. Adair*, 493.

The trial court did not abuse its discretion in entering a default judgment dismissing defendant's answer and counterclaim in a divorce action as a sanction for defendant's failure to appear for a deposition. *Ibid.*

§ 40. Assignment of Cases for Trial

The trial judge did not abuse his discretion by denying defendant's motion for a continuance made at the beginning of trial and seventy-seven days after plaintiff's complaint was filed. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 205.

§ 41.2. Dismissal of Action in Particular Cases

The trial judge did not err in dismissing plaintiff's motion in the cause because of plaintiff's prolonged and continuing defiance of the court's previous orders. *Minor v. Minor*, 750.

§ 56. Summary Judgment

Where one superior court judge ruled on defendant's summary judgment motion only as to plaintiffs' contract claim, it was proper for a second judge thereafter to rule on defendant's motion for summary judgment as to plaintiffs' tort claim. *Asheville Contracting Co. v. City of Wilson*, 329.

It was not error for the trial judge to rule on summary judgment motions even though a motion to compel discovery was pending. *Elmore's Feed & Seed, Inc. v. Patrick*, 715.

§ 56.1. Timeliness of Summary Judgment Motion; Notice

Where defendant filed a Rule 56 motion for summary judgment and a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief, and the Rule 12(b)(6) motion to dismiss was converted into one for summary judgment by the court's consideration of matters outside the pleadings, the trial court did not err in considering affidavits filed by defendant after the summary judgment motion was filed. *Raintree Homeowners Assoc. v. Raintree Corp.*, 668.

§ 56.7. Appeal of Summary Judgment Motion

Denial of a motion for summary judgment should not be reviewable on appeal from a final judgment rendered in a trial on the merits. *MAS Corp. v. Thompson*, 31.

§ 59. New Trials; Amendment of Judgments

The trial court did not abuse its discretion in granting plaintiff's motion for a partial new trial on the issue of damages. *Rudder v. Lawton*, 277.

§ 60.2. Grounds for Relief from Judgment or Order

A default judgment entered after constructive service was obtained on defendant through the Commissioner of Motor Vehicles could not be set aside under Rule

RULES OF CIVIL PROCEDURE — Continued

60(b)(1) on the ground of mistake, inadvertence, surprise, or excusable neglect, and the trial court did not abuse its discretion in refusing to set it aside under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment." *Kennedy v. Starr,* 182.

SALES

§ 19. Actions or Counterclaims for Breach of Warranty; Measure of Damages

The trial court properly instructed the jury that plaintiff was entitled to recover only nominal damages in an action for breach of warranty against encumbrances in the sale of the assets of an automobile dealership. *Martin-Kahill Ford v. Skidmore,* 736.

SCHOOLS

§ 11. Liability for Torts

Where a minor was injured in a school gymnasium while the gymnasium was leased to a city, defendant school board was immune from liability for damages sustained by the minor and his parents. *Plemmons v. City of Gastonia,* 470.

§ 13.2. Dismissal of Principals and Teachers

There was substantial evidence to support the judgment of the trial judge and an order of a local board of education which dismissed petitioner from her position as a career teacher. *Davidson v. Winston-Salem/Forsyth Co. Bd. of Education,* 489.

SEARCHES AND SEIZURES

§ 24. Application for Warrant; Cases where Evidence is Sufficient; Information from Informers

An officer's affidavit based on information received from a confidential informant was sufficient to establish probable cause for issuance of a warrant to search defendant's residence for narcotics. *S. v. Rutledge,* 124.

A search warrant based on information from informants met the requirements of the appropriate statute. *S. v. Atwell,* 643.

§ 28. Issuance of Warrant

Where defendant's residence was more than a mile outside the city, the officer who executed the warrant exceeded his extraterritorial jurisdiction as limited by the provisions of G.S. 160A-286. *S. v. Proctor,* 233.

§ 40. Execution of Search Warrant; Items which May be Seized

Although a typewriter was not listed as an item to be seized in a warrant to search for stolen goods, it could properly be seized under the plain view doctrine during a search pursuant to the warrant where it was evidence of another crime. *S. v. Morehead,* 226.

TAXATION

§ 7. Public Purpose

Plaintiff's First Amendment right against being compelled to speak was not violated by municipal and county organizations having a legislative reception to promote legislation. *North Carolina ex rel. Horne v. Chafin,* 95.

TAXATION — Continued

§ 7.2. Particular Purposes as Public

Several municipal and county boards and entities did not violate the North Carolina Constitution by using public funds to pay for a reception honoring the North Carolina General Assembly and the State Senate President Pro Tem. *North Carolina ex rel. Horne v. Chafin,* 95.

§ 22.1. Particular Properties and Uses as Religious, Charitable and Educational

A 15.56 acre portion of petitioner's 20.56 acre tract of land was used for religious purposes, was reasonably necessary for the convenient use of petitioner's church buildings located on the remaining 5 acres, and was exempt from ad valorem taxes. *In re Southview Presbyterian Church,* 45.

§ 25. Assessment and Levy of Ad Valorem Taxes; Persons and Property Assessable

Where a judgment upholding the validity of a local act annexing plaintiffs' land to a town was stayed pending appeal, affirmation of the judgment by the appellate court dissolved the stay order, and the town could collect ad valorem taxes from plaintiffs for the period during which the appeal was pending. *Abbott v. Town of Highlands,* 130.

TAXICABS

§ 1. Generally

Defendant could properly be convicted in superior court of trespassing at a bus terminal after having been acquitted in district court of leaving a cab unattended while soliciting fares in violation of a city ordinance. *S. v. Churchill,* 81.

TRADEMARKS AND TRADENAMES

§ 1. Generally

The evidence was sufficient to support a verdict finding that defendant sign installer was not liable for infringement of the Holiday Inns, Inc. trademark by two motel signs constructed for plaintiff motel corporation but that the parties intended that plaintiff would be liable for any infringement. *MAS Corp. v. Thompson,* 31.

TRESPASS

§ 3. Continuing and Recurring Trespass and Limitation of Actions

The ponding of water on plaintiff's land during periods of rainfall caused by an oil refinery constructed on defendant's land in 1972 which blocks the natural drainage of water from plaintiff's land constituted an intermittent rather than a continuing trespass, and plaintiff's action, commenced on 29 March 1978, was not barred by the three-year statute of limitations. *Galloway v. Pace Oil Co.,* 213.

§ 8.2. Damages for Injuries to Property Attached to or Forming Part of Realty

The trial judge erred in awarding double damages to plaintiffs pursuant to G.S. 1-539.1(a) where plaintiffs proved a violation of a timber deed. *Matthews v. Brown,* 559.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence and Nonsuit

A 1916 consent judgment entered in an action between the predecessors in title of plaintiffs and defendants was void and incapable of supporting a defense of res judicata as to ownership of disputed land. *Hardy v. Crawford*, 689.

TRIAL

§ 11.1. Argument and Conduct of Counsel; Matters Outside Evidence

An argument of plaintiff's attorney was not sufficiently prejudicial to require a new trial. *Henderson v. Provident Life and Accident Ins. Co.*, 476.

§ 42. Form and Sufficiency of Verdict

It was proper for the trial judge to receive and accept a verdict on one issue and to render judgment accordingly and to grant a new trial on another issue concerning negligence when the jury was unable to agree upon an answer. *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.; Gulley v. Yancey Trucking Co.*, 602.

TRUSTS

§ 7. Income and Persons Entitled Thereto

Plaintiff's action alleging a breach in fiduciary duty of a trustee was barred by the three-year statute of limitations. *Bruce v. N.C.N.B.*, 724.

UNFAIR COMPETITION

§ 2. Deceptive Use of Another's Tradename, Trademark, or Insignia

Plaintiff's evidence was insufficient for the jury on the issue of unfair trade practices by defendant in the construction of two motel signs which infringed upon a motel chain's trademark. *MAS Corp. v. Thompson*, 31.

UNIFORM COMMERCIAL CODE

§ 10. Warranties in General

Provisions of G.S. 25-2-312(3) did not require defendant seller to deliver to plaintiff buyer motel signs free from any claim of trademark infringement. *MAS Corp. v. Thompson*, 31.

UTILITIES COMMISSION

§ 7. Carriers

The Utilities Commission had jurisdiction to consider a petition seeking to require a railroad to repair drainage ditches along a portion of its tracks insofar as the condition of the drainage ditches related to the safe and proper maintenance of the railroad's track facilities. *State ex rel. Utilities Comm. v. Seaboard Coast Line Railroad*, 631.

§ 12. Operation and Maintenance of Facilities; Discontinuance of Service

The Utilities Commission acted within its authority under G.S. 62-15(g) in permitting the Public Staff to participate in a proceeding to require a railroad to repair and improve its track facilities. *State ex rel. Utilities Comm. v. Seaboard Coast Line Railroad*, 631.

VENDOR AND PURCHASER

§ 3.1. Sufficiency of Particular Land Descriptions

The evidence on motion for summary judgment presented a genuine issue of material fact as to whether a 10.38 acre portion shown on a prior survey of decedent's property constituted the "entire woodland" which decedent owned and contracted to convey to plaintiff. *Bradshaw v. McElroy,* 515.

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

The trial court properly granted defendants' motion for directed verdict and dismissed plaintiffs' action based on fraud, negligent representation, breach of express warranty and unfair and deceptive trade practices where the evidence tended to show that plaintiff purchased commercial real estate from defendant and built a restaurant on land which had previously been used as a trash dump. *Libby Hill Seafood Restaurants, Inc. v. Owens,* 695.

WATERS AND WATERCOURSES

§ 1.1 Surface Waters; Drainage and Interference with Natural Flow; General Rules

The ponding of water on plaintiff's land during periods of rainfall caused by an oil refinery constructed on defendant's land in 1972 which blocks the natural drainage of water from plaintiff's land constituted an intermittent rather than a continuing trespass, and plaintiff's action, commenced on 29 March 1978, was not barred by the three-year statute of limitations. *Galloway v. Pace Oil Co.,* 213.

WILLS

§ 9.4. Judgment as Precluding Later Probate of Other Will

An attempt to have a paper writing admitted to probate in solemn form as a second codicil to a previously probated will constituted an impermissible collateral attack on the validity of the probated will. *In re Will of Jones,* 325.

§ 32.1. Gifts by Implication

Where testator stated that his wife's death in a common accident, or within 30 days after his death, would have the same effect as if she had predeceased him, and where his wife predeceased him, it was "consistent with sound reasoning" to assume that he intended to provide for the disposition of his estate in the event that his wife predeceased him as well as in the event that his wife's death occurred in a common accident or within 30 days after his death. *Welch v. Schmidt,* 85.

§ 61.2. Dissent of Spouse and Effect Thereof; Status of Marriage

The trial court properly concluded that petitioner was the widow of deceased and thus entitled to dissent from his will upon the basis of the unrebutted presumption of the validity of a second marriage. *In re Estate of Swinson,* 412.

§ 61.6. Dissent by Husband

Where a trial judge was required only to determine if the allocations of decedent's property made by the Commissioners were reasonable, fair and just, the trial judge erred in ordering a sale of all the real and personal property of the estate of decedent. *Etheridge v. Etheridge,* 499.

§ 66. Lapsed Legacies

Where testator's will devised his real property to his mother for her lifetime and after her death to his wife in fee simple, where the will provided for certain

WILLS — Continued

contingencies should his wife or mother predecease him, and where testator's wife predeceased him without issue, the remainder interest in testator's real property passed to testator's mother by intestate succession. *Betts v. Parrish,* 77.

§ 67. Ademption

A separation agreement in which each spouse waived and renounced all rights under any previously executed will of the other constituted a valid renunciation which adeemed a devise and bequest to the wife. *Sedberry v. Johnson,* 425.

WITNESSES

§ 8.2. Cross-examination as to Conviction, Accusation, or Prosecution

Where a witness denied three times in the presence of the jury a conviction for misdemeanor assault on a female, the judge sufficiently allowed counsel to "sift" the witness. *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.; Gulley v. Yancey Trucking Co.,* 602.

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